



50 State* Survey of Legal Excusability

Force Majeure, Commercial Impracticability, and Frustration of Purpose



* Plus the District of Columbia, Puerto Rico, and the US Virgin Islands

Foreword

The outbreak of COVID-19 has been one of the most disruptive events to the global economy in recent memory. Businesses across every sector of the economy are scrambling to determine the legal repercussions of government travel restrictions, labor shortages, supply chain interruptions, financing impacts, and market price fluctuations triggered by the pandemic. How can I possibly be expected to perform my maintenance contract if the government orders me to stay home? Am I still liable for liquidated damages if I don't meet the contractual milestones in my construction schedule? Do I still have to pay my purchase orders for kitchen supplies and foodstuffs if the government has shut down all restaurants indefinitely? These, and other questions like it, loom large in the wake of the current pandemic.

With this survey, we attempt to shed some light on the answers to these questions and educate readers about the history and status of what we call "legal excusability" in the United States, the District of Columbia, and the US Territories. When we say "legal excusability," we specifically refer to situations where intervening events delay or outright prevent one party from performing its obligations under a contract. In American jurisprudence, the law of excusability is derived from three authorities—the language of contracts, the common law, and legislative provisions excusing performance. Attorneys from Seyfarth Shaw's commercial litigation, construction, and government contracts practice groups have undertaken a comprehensive review of these concepts in every American jurisdiction, analyzed what we found, and summarized our findings in the pages below. While we certainly don't claim to have all the answers to the difficult questions that businesses face during these trying times, our goal is to provide the legal building blocks to aid contractors that may have a viable claim of legal excusability. We hope you find it informative.¹

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Executive Summary

Contractual *Force Majeure*

In French and Latin, the term *force majeure* translates respectively to “superior force” and “chance occurrence.” In English, *force majeure* has become synonymous with “unavoidable” or “inevitable.” In any language, the idiom is true to its literal meaning and a credit to the humbling truth that humankind cannot control every facet of its environment or predict the future with exactitude. American law has capitulated to this truth, as evidenced by decades of cases interpreting and enforcing contracts that disclaim the risks of non-performance due to events outside of either party’s reasonable control.

Businesses negotiate *force majeure* clauses in anticipation of intervening events that interfere with their ability to fulfill contractual obligations, whether those obligations involve the delivery of goods or land, completion of construction, performance of services, or payment of money. The typical *force majeure* clause enumerates specific grounds excusing *either* party’s breach of contract, including “acts of God” (i.e., hurricanes, tsunamis, and the like); government regulations; labor strikes; fires; floods; wars; terrorist attacks; and, in some cases, epidemics. Standard *force majeure* language includes a catch-all provision disclaiming a breach for “any other contingency outside of either party’s reasonable control.” Upon surveying the American case law of contractual *force majeure*, we uncovered three important legal themes we have attempted to capture throughout our state summaries.

First, *unforeseeability*. *Force majeure* clauses are, at bottom, an exercise in allocation of reasonably foreseeable business risks that the parties anticipated during contract negotiations. Accordingly, the vast majority of American courts will not excuse breach of contract based on a *force majeure* clause unless the intervening event was *unforeseeable* to both parties. Notably, unforeseeability must be viewed through an objective lens. Evidence of what the parties actually contemplated at the time of contract is largely irrelevant; all that matters is what an objectively reasonable person *could* have foreseen during contract formation.

While a determination of unforeseeability requires a degree of judicial discretion, courts are prone to scrutinize entire contracts for language indicating that a specific risk was foreseeable. In many states, judges will not excuse performance if there is even a slight suggestion in the contract that the parties could have anticipated the event alleged to excuse non-performance. In these states, a showing of unforeseeability is required regardless of whether the *force majeure* clause references “foreseeability” or a similar term. As such, contractors should ask themselves at the outset: Could I have reasonably anticipated that this supervening event would happen when I signed the contract?

Second, *strict interpretation*. In a nod to the freedom of contract characteristic of the common law, American courts tend to enforce *force majeure* clauses as they are written, absent some latent ambiguity in the *force majeure* language. Strict interpretation of contracts, the theory goes, prevents judges from re-allocating business risks and ensures the parties only get the relief for which they bargained (or could have bargained) in the contract. For instance, strict interpretation means that, where the contract disclaims liability for “acts of God, fires, earthquakes, and floods,” a disruptive labor strike will not excuse a party’s failure to fulfill its obligations. To hold otherwise would introduce a term in the contract that the

parties could have expressly stated but chose not to. In other words, American judges don't rescind contracts lightly. As discussed throughout this survey, the common law concepts of "commercial impracticability" and "frustration of purpose" evolved to address the situations where—in the absence of contractual language covering a *force majeure* event—performance may be excused to prevent extreme inequity to one side.

Third, *limitations on scope*. After the terrorist attacks of September 11, 2001, Clear Channel, LLC filed a lawsuit in federal court, seeking relief from its obligations under its agreement to hold a company event at a resort in Hawaii. The 9/11 attacks, it argued, rendered it inadvisable to travel and, therefore, excused it from paying the substantial sum of liquidated damages called for in the agreement. While sympathetic to the heightened burden on travel, the court rejected Clear Channel's *force majeure* argument. The problem, the court found, was that the company event was not scheduled to take place until March 2002—five months after the terrorists struck. The court noted the untenable repercussions on American business if it deemed terrorist attacks an indefinite threat. "To excuse a party's performance under a *force majeure* clause ad infinitum when an act of terrorism affects the American populace would render contracts meaningless in the present age, where terrorism could conceivably threaten our nation for the foreseeable future."

The holding of *OWBR LLC v. Clear Channel Communications, Inc.*, speaks to the problem of scope in the application of *force majeure* clauses. 266 F. Supp. 2d 1214, 1222 (D. Haw. 2003). Taken to extremes, *force majeure* events impact every aspect of business operations, to an unknown degree, and for an unknown duration. To address the problem of attenuation, American judges have fairly broad discretion to decide the scope of relief that they provide (at least where the contract omits specific remedies in the *force majeure* context). Whereas the *OWBR* court outright denied that a *force majeure* event excused performance of obligations that were not due for several months, other cases may provide intermediate relief, such as partial relief from delay damages or substitution of commercially practicable alternate goods.

Common Law Defenses to Breach of Contract

As a counterpart (or in some states, a complement) to contractually negotiated *force majeure* clauses, many states recognize common law defenses to a breach of contract claim, based on an intervening event outside the control of either party. Judicially created doctrines excusing performance of a contractual obligation go by many names: most notably, "commercial impracticability," "impossibility," "commercial frustration," and "frustration of purpose." These concepts generally espouse the equitable notion that, even where the parties have omitted any *force majeure* language from their agreement, a party should be excused from fulfilling its obligations where unforeseeable and uncontrollable events prevent or substantially hinder it from delivering the goods, services, or construction called for in the contract.

While the defendant invariably carries the burden of proving common law defenses excusing performance, the elements of each defense, available remedies, and application to real-world fact patterns vary from state to state. Moreover, our research revealed a disparate application of common law defenses in cases where contracting parties contemplated specific *force majeure* events in their contract. Certain states, such as Alabama, outright refuse to allow common law defenses concerning intervening

events, at least where the parties have negotiated a *force majeure* clause in their contract. Others, such as Idaho, view such defenses with disfavor, to be applied only in the most extreme of cases. As one might expect, more liberal states such as California and New York have a comparatively robust body of law articulating the parameters of commercial impracticability, impossibility, and frustration of purpose.

In most states, the essential elements of what we call the common-law excusability defenses are derived from the Second Restatement of Contracts. Courts of the various states have added to or modified the requirements of each defense, as reflected in the state-specific case law discussed in this survey. And moreover, the fact-specific application of the doctrines discussed below is contingent on the nature of commerce in the jurisdiction. For instance, one searching for common law arguments concerning excusable non-performance under oil and gas leases would be well-served to start with the Alaska cases addressing this scenario. Looking for cases concerning hurricanes and other “acts of God?”—Florida or Louisiana would be a better place to start.

Impossibility / Frustration of Purpose

For all intents and purposes, the terms “impossibility” and “frustration of purpose” are interchangeable. Contractual duties become legally impossible (and therefore excused) when an intervening event renders performance no longer feasible, i.e., when the fundamental purpose of the bargain is frustrated by some unforeseeable occurrence. The Restatement of Contracts articulates the concept of impossibility/frustration of purpose, as follows:

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.

Restat. (2d) of Contracts § 265 (1981).

The key language above is the phrase “substantially frustrated.” As discussed throughout this survey, some judges are more willing than others to determine that performance is “substantially frustrated,” as opposed to simply more difficult or expensive. For the most part, mere disadvantage or increased burden is unlikely to win the day. Judges in virtually every state have shown little sympathy for defendants who face a tougher road to performing their contracts, but who can still perform in some respect. In extreme cases, the court may interpret the impossibility defense literally, to mean that a breach occurred unless the defendant can show it was absolutely barred from performing the work by forces outside of its control. In contrast to this literal interpretation of the impossibility defense, the commercial impracticability defense establishes a lower (though still relatively high) burden for excusability.

Commercial Impracticability

At the outset, readers should note that many states draw no distinction between the concepts of frustration of purpose and commercial impracticability. Alaska, for example, appears to recognize a unified common law defense to contract performance based on the test expounded in Section 261 of the Second Restatement of Contracts. This test is the basis for most of the precedent framing the issue of

commercial impracticability. Section 261 of the Second Restatement—titled “Discharge by Intervening Impracticability”—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.” Restat. (2d) of Contracts § 261.

Whether a contract is “impracticable” is a matter of degree that varies from one jurisdiction to the next. The notion that an intervening event was “a basic assumption on which the contract was made” depends on case-specific evidence of what the parties contemplated during the time of contract formation. In addition, determining whether a party caused or contributed to the intervening event (a common ground for denying commercial impracticability) requires judges to apply discretion concerning proximate causation. These judgments become particularly difficult where contractual language implies that the parties may have considered the intervening event claimed to excuse performance. Because these sub-issues are often fact-intensive, it can be difficult to obtain a judicial ruling on excusability at the summary judgment stage, which may substantially delay an ultimate judgment as to liability.

Statutory Defenses

Every state has adopted legislation codifying principles of commercial impracticability with respect to contracts for the sale of movable goods. These provisions, which are modeled after Article 2 of the Uniform Commercial Code (UCC), afford two avenues of relief for parties in breach of a sales contract. Where delivery of goods is rendered commercially impracticable because the agreed-upon type of carrier or delivery service becomes unavailable, the seller may tender a commercially reasonable substitute if one is available. See UCC § 2-404. Under a related provision, delay or failure to perform a sales contract is excused outright where “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 the regulation or order later proves to be invalid.” See UCC § 2-405. In addition to the two aforementioned UCC provisions, most states have adopted clauses excusing, or permitting substitution of, performance of lease agreements. In short, we have searched the legislative codes of every American state and territory and identified the statutory citations and relief provided by each statute.

Alabama

Contractual *Force Majeure*

The few Alabama cases interpreting *force majeure* clauses primarily involve loss limitations in bailment and carrier contracts. These cases suggest that *force majeure* clauses will be strictly enforced according to their terms, and that a party will be bound to perform or answer in damages, despite an act of God, unexpected difficulty, or hardship, because these contingencies *could* have been addressed in the contract. *Cove Creek Dev. Corp. v. APAC–Ala., Inc.*, 588 So. 2d 42 (Ala. 1991) (impossibility/difficulty of performance and resulting delay was not excusable and liquidated damages clause was enforceable); *Poughkeepsie Sav. Bank v. Highland Terrace Apartments*, 352 So. 2d 1108 (Ala. 1977). In other words, if the parties included a *force majeure* clause in their agreement, an Alabama court will probably enforce the clause as written. But if the parties fail to include a *force majeure* clause, the court will turn to other tools to determine which party assumed the risk at issue.

Impossibility / Commercial Impracticability

The defenses of impossibility and commercial impracticability generally do not excuse contract performance in Alabama, with only a few exceptions. In *Silverman v. Charmac, Inc.*, the court applied the Second Restatement of Contracts concept of impracticability, but cautioned that the Restatement is not the law in Alabama, stating: “This Court has not recognized the defense of impossibility or impracticability.” 14 So. 2d 892, 894 (Ala. 1982); *see also Madison Cty. v. Evanston Ins. Co.*, 340 F. Supp. 3d 1232, 1277 (N.D. Ala. 2018) (Alabama forestalls the defense of impossibility or impracticability); *Peppertree Apartments, Ltd. v. Peppertree Apartments*, 631 So. 2d 873, 879 (Ala. 1993) (illegality and governmental action are exceptions to general rule that impossibility does not excuse performance).

Statutory Defenses

Alabama Code § 7-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. The statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Alabama Code § 7-2-615 (Excuse by Failure of Presupposed Conditions)

This provision of the Alabama Code applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance where such performance “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 invalid.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer.

**Alabama Code §§ 7-2A-404/405
(Substituted Performance/Excused Performance on Lease Contracts)**

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Alabama Cases

- *Madison Cty. v. Evanston Ins. Co.*, 340 F. Supp. 3d 1232 (N.D. Ala. 2018) - Stating that Alabama has “not recognized the defense of impossibility or impracticability” and that the parties “could have contracted against the contingency regarding the supposed unavailability of additional named insurance,” but failed to do so.
- *Peppertree Apartments, Ltd. v. Peppertree Apartments*, 631 So. 2d 873 (Ala. 1993) - Defendants did not present substantial evidence of impossibility in opposition to the summary judgment motion where they failed to establish that financing was unavailable due to Housing and Urban Development debarment action.
- *Cove Creek Dev. Corp. v. APAC–Ala., Inc.*, 588 So. 2d 458 (Ala. 1991) - Subcontractor delays in completing construction were not excused by difficulty in obtain certain materials.
- *Silverman v. Charmac, Inc.*, 14 So. 2d 892 (Ala. 1982) - Stating that the Restatement is not the law in Alabama and that “[t]his Court has not recognized the defense of impossibility or impracticability.”
- *Poughkeepsie Sav. Bank v. Highland Terrace Apartments*, 352 So. 2d 1108 (Ala. 1977) - Re-payment of promissory note was not excused by the doctrine of impossibility where rainfall delayed completion of construction.

Alaska

Contractual *Force Majeure*

In Alaska, contractual *force majeure* cases most commonly arise in the context of oil and gas leases. For example, in *Alaskan Crude Corp. v. State*, the court addressed whether a government order to prepare an oil spill contingency plan excused a lessor's obligations under a lease for an oil and gas unit that expressly excused performance based on issues "beyond the unit operator's reasonable ability to foresee or control." 261 P.3d 412, 420 (Alaska 2011). The court held that the governmental order was foreseeable and, therefore, did not qualify as an excusable *force majeure*. *Id.* ("The requirement that a force majeure event be unforeseeable is a common characteristic of force majeure clauses in oil and gas leases."). The court further went on to note that government orders *pre-dating* the contract cannot be *force majeure* events because they are foreseeable. *Id.*

Commercial Impracticability / Frustration of Purpose

Alaska courts do not draw any meaningful distinction between commercial impracticability, on the one hand, and frustration of purpose/impossibility, on the other. *Murray E. Gildersleeve Logging Co. v. N. Timber Corp.*, 670 P.2d 372, 375 (Alaska 1983) ("Impossibility of performance is recognized as a valid defense to an action for breach of contract when the promisor's performance becomes commercially impracticable as a result of the frustration of a mutual expectation of the contracting parties."). Citing to the Second Restatement of Contracts, the *Murray* court stated that: "Commercial impracticability is demonstrated when performance "can only be done at an excessive and unreasonable cost. . . . While an explicit agreement is not necessary to establish a mutual expectation, there must be an assumption on both sides that an event will occur for its non-occurrence to excuse a breach." *Id.* (internal quotation marks and citations omitted).

The holding of *Mat-Su/Blackard/Stephan & Sons v. State* highlights how Alaska applies the defense of frustration of purpose/commercial impracticability. 647 P.2d 1101 (Alaska 1982). That case involved vocal community opposition to a state contract to pave roads. Under the contract, the builder had a duty to obtain gravel fill material, which it planned to extract from a gravel pit adjacent to the project site. Residents of the neighboring community later petitioned the State with concerns about the contractor using the gravel pit. The State nevertheless rejected the residents' complaints, after which the contractor removed 46,000 tons of gravel from the pit. However, shortly thereafter, the Zoning Board reversed course and denied the contractor the right to remove gravel from the pit. In court, the contractor argued that the zoning ordinance gave rise to a defense of both frustration of purpose and commercial impracticability. *Id.* at 1105.

The court rejected the argument that the contractor was excused from performance based on the impossibility / frustration of purpose defense. The court held that "the object of the contract was to build a road, and this purpose was not frustrated." *Id.* Importantly, the Court noted that "the ban on removal of the Spendlove gravel was not the result of an enactment after the time of contracting, but rather was the

application of pre-existing law to the activity.” *Id.* at 1106. Finally, the court rejected that third-party interference with fill operations rendered performance impossible. *Id.*

Statutory Defenses

Alaska Stat. Ann. § 45.02.614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Alaska Stat. Ann. § 45.02.615 (Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

Alaska Stat. Ann. §§ 45.12.404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Alaska Cases

- *Alaskan Crude Corp. v. State, Dep’t of Nat. Res., Div. of Oil & Gas*, 261 P.3d 412 (Alaska 2011) - Performance of operator of oil and gas unit was not excused by dispute with Alaska Oil and Gas Conservation where contract stated that force majeure was limited to events that were “beyond the unit operator’s reasonable ability to foresee or control.” Contractor was not excused because the government order to prepare a contingency plan pre-dated the execution of its lease—a fact of which the contractor was fully aware.

- *Wien Air Alaska v. Bubble*, 723 P.2d 627 (Alaska 1986) - Doctrine of commercial impracticability did not relieve airline of its contractual duties to pay temporary airline pilot where government advisory board merely advised, but did not order, airline to settle a labor strike.
- *Murray E. Gildersleeve Logging Co. v. N. Timber Corp.*, 670 P.2d 372 (Alaska 1983) - Timber company was not excused from its contractual obligations to deliver wood to logging company where United States Forest Service failed to approve logging on a parcel of land on which the parties intended to log.
- *Christianson Constr. Co. v. Isaacson Structural Steel Co.*, 648 P.2d 601 (Alaska 1982) - Remanding to trial court for determination whether force majeure clause, which disclaimed performance in the event of a labor strikes and events “beyond the reasonable control of the seller,” was incorporated into the parties’ agreement for delivery of steel.
- *Mat-Su/Blackard/Stephan & Sons v. State*, 647 P.2d 1101 (Alaska 1982) - Contract to pave state roads was not rendered impracticable by community opposition to use of fill pit and subsequent zoning ordinance precluding extraction of fill from specific pit.

Arizona

Contractual *Force Majeure*

The limited case law addressing *force majeure* clauses in Arizona mostly concerns loss limitations in bailment and carrier contracts. In the few cases that exist, the courts have indicated they will enforce the language of *force majeure* clauses as written. For example, in *New Pueblo Constructors, Inc. v. State*, the court assumed, for purposes of its discussion, that flooding and heavy rainfall from Hurricane Heather, which damaged work being performed under a road and bridge contract, was an act of God triggering the notice provisions and an adjustment of the contract price. 696 P.2d 185, 190 (Ariz. 1985). And in *Peters v. Macchiaroli*, the court found that a buyer was relieved of an obligation to pay for fruit that was totally destroyed by frost, where the contract provided that it was null and void in the event of frost, wind, or any other damage caused by an act of God. 243 P.2d 777, 780 (Ariz. 1952).

Commercial Impracticability

Arizona has defined commercial impracticability according to the Second Restatement of Contracts § 261 (1981). See *7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Machinery, Inc.*, 909 P.2d 408, 412 (Ariz. Ct. App. 1995). Under the Restatement, “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,” and “his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.” Traditionally, the doctrine has been applied to three categories of supervening events: death or incapacity of a person necessary for performance, destruction of a specific thing necessary for performance, and prohibition or prevention by law. *7200 Scottsdale*, 909 P.2d at 413. This doctrine is inapplicable, however, where the contract references or contemplates the event or scenario which may affect performance. *Butterfield Plaza Benson, L.L.C. v. Johnson*, No. 2 CA–CV 2010–0042, 2010 WL 4705181, at *4 (Ariz. Ct. App. 2019).

Impossibility / Frustration of Purpose

The doctrine of frustration of purpose deals with “the problem that arises when a change in circumstances makes one party’s performance virtually worthless to the other.” *7200 Scottsdale*, 909 P.2d at 412 (citing Restatement § 265 cmt. a). Courts in Arizona extend limited relief under this theory.

The question in cases involving frustration is whether the equities of the case, considered in the light of sound public policy, require placing the risk on defendant or plaintiff under the facts of the given case. The answer depends on whether an unanticipated circumstances have made performance vitally different from what was reasonably to be expected. See *Mohave Cty. v. Mohave–Kingman Estates, Inc.*, 120 Ariz. 417, 422–23 (1978); *Mobile Home Estates, Inc. v. Levitt Mobile Home Sys., Inc.*, 118 Ariz. 219, 222 (1978); *Matheny v. Gila Cty.*, 147 Ariz. 359, 360 (App. 1985). Frustration of purpose must be so severe that it could not be regarded as a risk assumed under the contract. *7200 Scottsdale*, 909 P.2d at 415. Whether a party to a contract is entitled to relief under the doctrine of frustration of purpose is generally treated as a question of law. *Butterfield Plaza*, 2010 WL 4705181, at*4.

Statutory Defenses

Arizona Code § 47-2614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Arizona Code § 47-2615 (Excuse by Failure of Presupposed Conditions)

This provision of the Arizona Code applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance where such performance “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 invalid.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer.

Arizona Code §§ 47-2A404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Arizona Cases

- *7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc.*, 909 P.2d 408 (Ariz. Ct. App. 1995) - Neither frustration of purpose nor commercial impracticability excused organizer’s performance of its obligations to hold a convention at a resort facility based on outbreak of the Gulf War and Saddam Hussein’s general threats of global terrorism. Court emphasized that the actual objective risk of threats to air travel was only slight.

- *New Pueblo Constructors, Inc. v. State*, 696 P.2d 185 (Ariz. 1985) - Finding that unusually severe storms and flooding excused delays to highway project, but remanding for determination whether contractor complied with contractual notice requirements.
- *Matheny v. Gila Cty.*, 147 Ariz. 359 (App. 1985) - Municipality was excused and ambulance service contract was rescinded under the doctrine of commercial frustration where there were no available persons who could comply with new Arizona legislation regulating profession.
- *Mohave Cty. v. Mohave–Kingman Estates, Inc.*, 120 Ariz. 417 (1978) - Holding that changes to existing ordinances did not render purpose of land purchase agreement frustrated under the doctrine of impossibility.
- *Mobile Home Estates, Inc. v. Levitt Mobile Home Sys., Inc.*, 118 Ariz. 219 (1978) - Holding that the doctrine of commercial frustration is not justification for rescission of a contract that has already been fully performed.
- *Peters v. Machiaroli*, 243 P.2d 777 (Ariz. 1952) - Excusing buyer's obligation to pay for fruit damaged by frost where contract expressly stated that it was null and void to the extent goods were damaged by weather.

Arkansas

Contractual *Force Majeure*

Under Arkansas law, performance may or may not be excused under conditions covered by a *force majeure* clause. See *United States v. City of Fort Smith*, 760 F.2d 231, 233 (8th Cir. 1985) (applying Arkansas law) (where *force majeure* clause expressly rules out as a basis for change the kind of problems alleged, no error in denial of relief); *Gordon v Crown Cent. Petroleum Co.*, 679 S.W. 2d 192 (Ark. 1984) (*force majeure* clause provided that covenants in lease were subject to all state and federal laws and regulations, which included Arkansas Oil and Gas Commission regulations).

Parties in Arkansas are relatively free to include *force majeure* terms as they see fit. For instance, the language of the *force majeure* clause may require application of a reasonableness standard under the fact and circumstances of a particular case. *Wilson v. Talbert*, 535 S.W. 2d 807 (Ark. 1976). In *Wilson*, a lessee waited six months to repair a rupture in an oil tank, even though another storage tank stood adjacent to the damaged one and could have been utilized by simply opening or closing valves. *Id.* The time involved in making the necessary repairs and restoring production was not reasonable under the facts and circumstances and the lease was terminated. *Id.*

Commercial Impracticability/ Impossibility

In Arkansas, the law of impossibility has evolved into a broader and more equitable rule of impracticability. *Smith v. Decatur Sch. Dist.*, 2011 Ark. App. 126 (2011). Impracticability of performance may excuse a party from performing contractual obligations under the well-known Second Restatement Test:

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, 266 Ark. 296, 302 (1979) (citations omitted); see also *Smith*, 2011 Ark. App. at 5. Impossibility of performance of a contract sufficient to excuse the nonperformance on the part of either party means an impossibility consisting in the nature of the thing to be done, and not in the inability of the party to do it, and it must be shown that the thing required under the contract cannot be accomplished. *Serio v. Copeland Holdings, LLC*, 2017 Ark. App. 280 (2017) (citing *Whipple v. Driver*, 140 Ark. 393 (1919)). Prevention of performance by a government order or regulation may qualify as an impracticability of performance defense. *Smith*, 2011 Ark. App. at 5 (citing *Mathews v. Garner*, 25 Ark. App. 27 (1988)).

Statutory Defenses

Ark. Code § 4-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Ark. Code § 4-2-615 (Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

Ark. Code § 4-2A-404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Arkansas Cases

- *Serio v. Copeland Holdings, LLC*, 2017 Ark. App. 280 (2017) - Impossibility of performance of a contract means “an impossibility consisting in the nature of the thing to be done, and not in the inability of the party to do it, and it *must be shown that the thing required under the contract cannot be accomplished.*”
- *Smith v. Decatur Sch. Dist.*, 2011 Ark. App. 126 (2011) - Stating that prevention of performance by a government order or regulation may qualify as an impracticability of performance defense.
- *United States v. City of Fort Smith*, 760 F.2d 231 (8th Cir. 1985) (applying Arkansas law) - Holding that where *force majeure* clause expressly ruled out as a basis for change the kind of problems alleged, trial court did not err in denying excusability defense.

- *Gordon v. Crown Cent. Petroleum Co.*, 679 S.W. 2d 192 (Ark. 1984) - Where *force majeure* clause provided that covenants in lease were subject to all state and federal laws and regulations, Arkansas Oil and Gas Commission regulations were within the scope of the clause.
- *Wilson v. Talbert*, 535 S.W. 2d 807 (Ark. 1976) - The language of the *force majeure* clause may require application of a reasonableness standard under the fact and circumstances of a particular case.

California

Contractual *Force Majeure*

In California, a *force majeure* provision will not excuse a party's contractual obligations "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." *Oosten v. Hay Haulers Dairy Emps. & Helpers Union*, 45 Cal. 2d 784 (1955).

Where contracting parties have negotiated specific contingencies in the *force majeure* clause, the court must construe the excusability defense only in the context of the contingencies identified in the contract. However, where the *force majeure* clause contains boilerplate language, California courts may be more inclined to apply the common law test for commercial impracticability. *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001) (stating that courts may read in the common law elements of *force majeure* where the contract includes a "standard, boilerplate, catch-all force majeure provision"); *Sun Pac. Mktg. Co-op., Inc. v. DiMare Fresh, Inc.*, No. CIV-F-06-1404 AWI, 2010 WL 3220301, at *10 (E.D. Cal. 2010) ("Where the terms were specifically bargained for by both parties . . . the doctrine of force majeure should not supersede the specific terms bargained for in the contract.").

Regardless of whether the contractual *force majeure* language is general or specific, the party claiming excusable non-performance may "only escape liability if [the *force majeure* event] was beyond the reasonable control of either party." *Id.* Moreover, the party claiming *force majeure* must also be able to demonstrate that the alleged *force majeure* event was the proximate cause of nonperformance of the contract. *Id.*

Commercial Impracticability / Frustration of Purpose

California courts apply the doctrine of commercial impracticability set forth in the Restatement of Contracts, which provides: "Where . . . 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 to the contrary." *Maudlin v. Pac. Dev. Scis. Corp.*, 137 Cal. App. 4th 1001, 1017 (2006) (citing Restat. (2d) of Contracts § 261 (1981)).

Temporary impossibility or suspension does not excuse or discharge contractual obligations unless the temporary impossibility becomes permanent. Frustration of purpose "that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration." *Id.*

A mere increase in the cost of performing contractual obligations does not alone render the contract impracticable or the purpose of the contract frustrated, except where there is an “extreme and unreasonable difficulty, expense, injury, or loss involved.” *Butler v. Nepple*, 54 Cal. 2d 589, 599 (1960) (“The fact that compliance with his contract would involve greater expense than he anticipated would not excuse defendant. Parties sui juris cannot escape performance of their undertakings because of unforeseen hardship. . . . Even in the case of a force majeure provision in a contract, mere increase in expense does not excuse the performance unless there exists ‘extreme and unreasonable difficulty, expense, injury, or loss involved.’”) (internal quotation marks and citations omitted); cf. *Pac. Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal. 2d 228, 238 (1946) (en banc) (force majeure 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”).

Statutory Defenses

California Commercial Code § 2614

(Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

California Commercial Code § 2615

(Excuse By Failure of Presupposed Conditions)

This provision of the California Commercial Code applies only to contracts for the sale of “goods” and excuses non-performance where such performance has been rendered impracticable under the test set forth in Section 265 of the Second Restatement of Contracts. Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer.

California Commercial Code § 10404/10405

(Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In

application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable California Cases

- *Sun Pac. Mktg. Co-op., Inc. v. DiMare Fresh, Inc.*, No. CIV-F-06-1404 AWI, 2010 WL 3220301 (E.D. Cal. 2010) - Material dispute of fact existed as to whether extreme heat wave in the San Joaquin Valley qualified as an “act of God” or “natural disaster” excusing performance of a contract to supply tomatoes.
- *Rio Props. v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 Fed. App’x 519 (9th Cir. 2004) - Material dispute of fact existed as to whether Rod Stewart was permitted to re-schedule a concert due to illness where contract generally excused performance based on “any cause beyond such party’s reasonable control.”
- *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099 (C.D. Cal. 2001) - *Force majeure* clause disclaiming risk for “regulatory, governmental, or military action” was deemed vague and unenforceable and did not include an FDA shut-down of subsidiary manufacturer’s pharmaceutical plant.
- *H.K. Islands Line Am., S.A. v. Distrib. Servs. Ltd.*, 795 F. Supp. 983 (C.D. Cal. 1991) - *Force majeure* clause did not excuse non-performance of contract for transportation of cargo where defendant failed to meet the contractual requirement to demonstrate that its performance was rendered “impossible” or “unprofitable” by labor strikes and riots.
- *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985) - Contractor was entitled to recover cost of relocating employees under *force majeure* clause of operations support contract, where Iran Hostage Crisis prevented it from completing contract and forced demobilization.

Colorado

Contractual *Force Majeure*

Colorado courts generally construe *force majeure* clauses based on the specific language negotiated by the parties, as long as the intervening event could “neither be anticipated nor controlled.” Although Colorado cases evaluating the *force majeure* defense are sparse, one case suggests that *force majeure* clauses are typically intended to cover “acts of god, terrorist attacks, inclement weather, union strikes, riots, and wars.” *Church Comm’n Net., Inc. v. Echostar Satellite L.L.C.*, No. 04-CV-02206-EWN-PAC, 2006 WL 8454330, at *15 (D. Colo. 2006).

Commercial Impracticability

Although it generally applies the Second Restatement test to claims of commercial impracticability, Colorado has substantially narrowed this defense, relative to other jurisdictions. In Colorado, to avoid its contractual obligations under the doctrine of commercial impracticability, the defendant must prove “total, or near total, destruction of the essential purpose of the transaction.” *Beals v. Tri-B Assocs.*, 644 P.2d 78, 81 (Colo. App. 1982); see also *Trs. of Col. Statewide Iron Workers (ERECTOR) Joint Apprenticeship & Training Trust Fund v. A & P Steel, Inc.*, 812 F.2d 1518, 1523 (10th Cir. 1987) (“The doctrine deals with situations where supervening events destroy or alter the foundation of the contract.”).

Frustration of Purpose

Colorado courts have also emphasized that the cause of an alleged interference with contractual performance must not be foreseeable at the time of contract formation, or else the alleged disruption to performance will be deemed within the risks assumed under the contract. *Id.*; *N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co.*, 799 F.2d 265, 276–78 (7th Cir. 1986) (holding that a “[f]ailure to predict market patterns will not provide a basis for relief under” the doctrine of commercial impracticability). Additionally, “the frustration of purpose doctrine is not available to a party whose own fault caused the event defeating the purpose of the contract.” *Strategis Asset Valuation & Mgmt., Inc. v. Pac. Mut. Life Ins. Co.*, 805 F. Supp. 1544, 1551 (D. Colo. 1992).

Statutory Defenses

Colo. Rev. Stat. Ann. § 4-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a

commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

**Colo. Rev. Stat. Ann. § 4-2-615
(Excuse By Failure of Presupposed Conditions)**

Excuses non-performance where such performance has been rendered impracticable under the test set forth in Section 265 in the Second Restatement of Contracts. Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer.

**Colo. Rev. Stat. Ann. §§ 4-2.5-404/405
(Substituted Performance/Excused Performance on Lease Contracts)**

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Colorado Cases

- *Strategis Asset Value & Mgmt., Inc. v. Pac. Mut. Life Ins. Co.*, 805 F. Supp. 1544 (D. Colo. 1992) - Defendant could not rely on frustration of purpose doctrine to excuse non-payment to tax consultant who had stake in building that foreclosed due to defendant’s failure to pay mortgage because: “The frustration of purpose doctrine is not available to a party whose own fault caused the event defeating the purpose of the contract.”
- *Res. Inv. Corp. v. Enron Corp.*, 669 F. Supp. 1038 (D. Colo. 1987) - Although contract contemplated likelihood of changes in economic conditions, including alterations in fuel price levels, force majeure defense could not relieve defendant of its contractual duty to pay where defendant failed to comply with contractual requirement to notify the other party of a force majeure event.
- *Beals v. Tri-B Assocs.*, 644 P.2d 78 (Colo. App. 1982) - Rescission of contract was not warranted by alleged frustration of purpose based solely on change in economic conditions and governmental restrictions that merely impair the profitability of a real estate development.

Connecticut

Contractual *Force Majeure*

Under Connecticut law, a contracts is interpreted “according to the intent expressed in [their] language and not by an intent the court may believe existed in the minds of the parties.” *Levine v. Massey*, 232 Conn. 272, 278 (1992). “When the intention conveyed by the terms of an agreement is clear and unambiguous, there is no room for construction. . . . [A] court cannot import into [an] agreement a different provision nor can the construction of the agreement be changed to vary the express limitations of its terms. . . . It is axiomatic that a party is entitled to rely upon its written contact as the final integration of its rights and duties.” *Id.* at 27-79 (internal quotation marks and citations omitted).

In evaluating *force majeure* clauses, Connecticut courts construe the contract as a whole and all relevant provisions will be considered together.” *HLO Land Ownership Assocs. Ltd. P’ship v. City of Hartford*, 248 Conn. 350, 356 (1999) (quoting *Barnard v. Barnard*, 214 Conn. 99 (1990)).

Before a duty arises on the part of the non-impacted party to provide relief as set forth under the “force majeure” provisions of a contract, the impacted party must comply with conditions precedent, including timely notice. *Milford Power Co., LLC v. Alstom Power, Inc.*, No. X04CV000121672S, 2001 WL 822488, at *3 (Conn. Super. Ct. 2001) (unpublished decision). “A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance . . . Whether the performance of a certain act by a party to a contract is a condition precedent to the duty of the other party to act depends on the intent of the parties as expressed in the contract and read in light of the circumstances surrounding the execution of the instrument.” *Id.* at *2 (citing *Christophersen v. Blount*, 216 Conn. 509, 512 (1990)) (internal quotation marks omitted).

Disproportionate Forfeiture

Section 229 of the Second Restatement of Contracts provides:

Excuse of a Condition to Avoid Forfeiture. To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the nonoccurrence of that condition unless its occurrence was a material part of the agreed exchange.

The comments to Section 229 note: “It is intended to deal with a term that does not appear to be unconscionable at the time the contract is made but that would, because of ensuing events, cause forfeiture” (Comment a) and that “[t]he rule stated in the present Section is, of necessity, a flexible one, and its application is within the sound discretion of the court” (Comment b). The subject notice provision is unconscionable neither as originally drafted nor as applied; it does not become unconscionable because the defendants neglected to comply with it at the time of the incident. Moreover, for the reasons previously mentioned, it was a material part of the agreed exchange. The court cannot exercise its discretion to vary the express terms of this contract. *Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 506 (2000) (courts will not engage in judicial revisionism where there is no evidence of fraud or duress in commercial contract between sophisticated parties even if the result of the

fair and logical enforcement of those unambiguous agreements seems unduly to burden one of the parties).

Impossibility / Frustration of Purpose

In Connecticut, a “party claiming that a supervening event or contingency has prevented, and thus excused, a promised performance must demonstrate that: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes.” *Dills v. Enfield*, 210 Conn. 705, 717 (1989) (citation omitted).

Similarly, under the doctrine of frustration of purpose, the event upon which the obligor relies to excuse his performance cannot be an event that the parties foresaw at the time of the contract. *Id.* Under Connecticut law, “frustration of purpose” excuses a promisor in certain situations when the objectives of contract have been utterly defeated by circumstances arising after formation of agreement, and performance is excused under this rule even though there is no impediment to actual performance. *Hess v. Dumouchel Paper Co.*, 154 Conn. 343 (1966).

Statutory Defenses

C.G.S.A. § 42a-2-614 (Substituted Performance)

Section 42a-2-614 of the Connecticut Uniform Commercial Code applies only to contracts for the sale of “goods” (as opposed to services or construction). Subsection 42a-2-614(1) permits a party to provide substituted performance if, “without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.” This subsection requires the tender of a commercially reasonable substituted performance where agreed to facilities have failed or become commercially impracticable. Under this Article of the Code, in the absence of specific agreement, the normal or usual facilities enter into the agreement either through the circumstances, usage of trade, or prior course of dealing. There must be a true commercial impracticability to excuse the agreed performance and justify a substituted performance. When such circumstances exist, a reasonable substituted performance tendered by either party should excuse it from strict compliance with contract terms which do not go to the essence of the agreement.

Subsection 42a-2-614(2) provides that the seller may withhold or stop delivery if “the agreed means or manner of payment fails because of domestic or foreign governmental regulation” unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. In the event that delivery has already been made, “payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.”

C.G.L.A. 106 § 2-615**(Excuse by Failure of Presupposed Conditions)**

This section of the Connecticut Uniform Commercial Code applies only to contracts for the sale of “goods” (as opposed to services or construction). Section 2-615 excuses a seller from timely delivery of goods contracted for, where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting. Except where seller has assumed a greater obligation, and subject to Section 42a-2-614, non-performance is excused “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.”

Under this Connecticut statute, a seller is not excused from all performance if seller’s capacity to perform is not wholesale. Rather, where possible, seller “must allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” Finally, the seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required among seller’s customers (including buyer), of the estimated quota thus made available for the buyer.

The comments to this section provide that increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Similarly, a rise or a collapse in the market is not, in itself, a justification since that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. That said, a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section.

Notable Connecticut Cases

- *Howard-Arnold, Inc. v. T.N.T. Realty, Inc.*, 315 Conn. 596 (2015) - Frustration of purpose did not apply to commercial tenant’s failure to exercise its option to purchase property under the terms of the lease, even if commercial landlord failed to fulfill its obligations to complete environmental remediation, where the purpose of the lease was to lease the premises to the tenant, and the lack of environmental remediation did not interfere with that purpose, tenant leased the premises for the entire ten years that the contract had anticipated and continued to occupy the premises, and option clause merely served as an offer by landlord for tenant to purchase the property.
- *Milford Power Co., LLC v. Alstom Power, Inc.*, No. X04CV000121672S, 2001 WL 822488 (Conn. Super. Ct. 2001) (unpublished decision) - Compliance with strict notice and claim provisions of contract is condition precedent to right to recovery for a *force majeure* event where terms of agreement are clear and unambiguous.
- *O’Hara v. State*, 218 Conn. 628 (1991) - The party claiming that supervening event or contingency has prevented performance must demonstrate that event made performance impracticable;

nonoccurrence of event was basic assumption on which contract was made; impracticability resulted without fault of party seeking to be excused; and party has not assumed greater obligation than law imposes.

- *Dills v. Enfield*, 210 Conn. 705 (1989) - Developer's duty to provide construction plans to a vendor was not discharged by the fact that the developer was unable to obtain mortgage financing.
- *Hanford v. Conn. Fair Ass'n*, 92 Conn. 621 (1918) - Affirming ruling in favor of a state fair association that was excused from holding a baby pageant due to an infantile paralysis epidemic.

Delaware

Contractual *Force Majeure*

Under Delaware law, *force majeure* clauses may excuse or defer performance in the event of circumstances beyond the parties' control, such as fire, flood, war, or acts of God. *Stroud v. Forest Gate Dev. Corp.*, No. Civ. A 20063-NC, 2004 WL 1087373, at *4 (Del. Ch. 2004) ("Application of a force majeure provision, as with any other contractual provision, starts with the words chosen by the drafters[.]"). The parties can broaden *force majeure* clauses through specific language. *Id.* at *5. Moreover, to prevail on a contractual *force majeure* defense, a party's performance must be rendered impossible by an act of God, law or the other party," and the party must demonstrate that the contract cannot be performed "by any means." *Bell Atl. Dir. Servs., Inc. v. Del. Law Ctr., Inc.*, No. CRIM.A.1997-07-083, 2000 WL 33654061, at *1 (Del. Ct. Com. Pl. 2000) (citing *Martin v. Star Pub. Co.*, 126 A.2d 238 (Del. Super. Ct. 1956)).

Commercial Frustration

Under the "commercial frustration doctrine," if a party's principal purpose is substantially frustrated after the contract is made, without its fault, by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, then the party's remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary. *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 620 (Del. Ch. 2005).

The doctrine of commercial frustration is generally limited to cases where "a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." *McReynolds v. Trilantic Capital Partners IV L.P.*, No. C.A. 5025-VCL, 2010 WL 3721865, at *4 (Del. Ch. 2010) (citing *Wal-Mart Stores*, 872 A.2d at 620 n.35). "The doctrine does not apply if the supervening events were 'reasonably foreseeable, and could (and should) have been anticipated by the parties' at the time of contracting." *Id.* (citing *Wal-Mart Stores*, 872 A.2d at 621). "By parity of reasoning, the doctrine cannot apply if the events in question were actually foreseen, anticipated by the parties, and explicitly provided for at the time of contracting." *Id.*; see 17B C.J.S. Contracts § 524 (2010) ("The parties may not invoke the doctrine of frustration where they have contracted with reference to contemplated risks, and thereby assumed the risk of the intervening event.").

Although Delaware has adopted the doctrine of commercial frustration, the courts have not precisely defined its contours, although they make several broad generalizations. *Wal-Mart Stores*, 872 A.2d at 620–21 (citing *Martin v. Star Publ'g Co.*, 126 A.2d 238, 242 (Del. 1956)):

First, the Courts note that the defense of commercial frustration is very difficult to invoke, as courts have been extremely reluctant to allow parties to disavow obligations that they have agreed to. Second, commercial frustration is a question of law that is to be determined by the court. Third, the party's main purpose must be completely, or nearly completely, frustrated. Fourth, the doctrine of commercial frustration operates to excuse the performance of a contract, not to compel performance by another party; i.e. the doctrine can only be used as a shield, and not as a sword. Fifth, the doctrine

of commercial frustration does not apply if at the time of contracting the supervening event was reasonably foreseeable, and could (and should) have been anticipated by the parties and provided for in the contract.

Id. (internal citations omitted).

Statutory Defenses

6 Del. C. § 2-614

(Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

6 Del. C § 2-615

(Excuse By Failure of Presupposed Conditions)

Excuses non-performance where such performance has been rendered impracticable under the test set forth in Section 265 of the Second Restatement of Contracts. Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer.

6 Del. C §§ 2A-404/405

(Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Delaware Cases

- *VICI Racing, LLC v. T-Mobile USA, Inc.*, 921 F. Supp. 2d 317 (D. Del. 2013) - Racecar owner’s failure to participate in four sports car races was not a breach of sponsorship contract, since owner had adhered to force majeure procedures outlined in agreement.

- *McReynolds v. Trilantic Capital Partners IV L.P.*, No. C.A. 5025-VCL, 2010 WL 3721865 (Del. Ch. 2010) - Limited partners in an investment fund failed to state supervening frustration claim against the fund arising out of the bankruptcy of the fund's general partner. The doctrine of supervening frustration did not apply to the partner's limited partnership agreement with the fund because the agreement addressed the possibility that the general partner would disassociate from the fund. The agreement provided that if the general partner declared bankruptcy, a majority of the limited partners could opt to continue the fund with a successor general partner.
- *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611 (Del. Ch. 2005) - Wal-Mart failed to state a claim under the doctrine of commercial frustration which excuses future performance under a contract only as follows: "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 circumstances indicate to the contrary."
- *Stroud v. Forest Gate Dev. Corp.*, No. Civ.A 20063-NC, 2004 WL 1087373 (Del. Ch. 2004) - Holding that *force majeure* clause, which included the catch-all phrase "any reason whatsoever beyond the control of [defendant]," included "delays" even though only "fire, strikes, and acts God" were listed. However, the court held that these delays did not excuse defendant's performance because they were foreseeable.
- *Williams Nat. Gas Co. v. Amoco Prod. Co.*, No. CIV. A. 11040, 1991 WL 58387 (Del. Ch. 1991) - Refusing to apply commercial frustration defense because (i) there was no evidence that the contract's principal purpose had, in fact, been frustrated, and (ii) the post-contract developments cited by defendant were not "event[s] the nonoccurrence of which was a basic assumption on which the contract was made."
- *City of Newark v. NVF Co.*, No. 5176, 1980 WL 6367 (Del. Ch. 1980) - County's attempt to rely upon its own voluntary act occurring between its negotiations with NVF and NVF's 1951 letter of intent, and its 1952 agreement with NVF, as excusing it from its performance of what it promised NVF, fails as a matter of law.
- *Martin v. Star Publ'g Co.*, 50 Del. 181 (1956) - Finding that a corporation is not excused from performance of an agreement to pay money because it voluntarily dissolves or discontinues its business. Because defendant voluntarily chose to discontinue its business, presumably for financial reasons, impossibility originating in financial incapacity is no excuse.

District of Columbia

Contractual *Force Majeure*

District of Columbia courts recognize *force majeure* as a defense excusing contract performance. Much of the case law in the District of Columbia focuses on the “act of God” language found in the typical *force majeure* clause. In order for an event to qualify as an “act of God,” the event must be “the result of the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention, and is of such character that it could not have been prevented or avoided by foresight or prudence.” *Watts v. Smith*, 226 A.2d 160, 162 (D.C. 1967). This means that “human interference or influence on what could otherwise be considered an act of God ... precludes an ‘Act of God’ legal defense.” *Am. Nat’l Red Cross v. Vinton Roofing Co.*, 629 F. Supp. 2d, 5, 9 (D.D.C. 2009). If the purported *force majeure* event is the result of human interference or influence (or could have been prevented through intervention), the defense is not available. *Id.*

Commercial Impracticability

D.C. courts also recognize the common law doctrine of commercial impracticability, which excuses a contractual party from performance because of a supervening event that changes the nature of the party’s performance so that it becomes commercially impracticable. See *Island Dev. Corp. v. District of Columbia*, 933 A.2d 340, 349 (D.C. 2007). Under an impracticability analysis, D.C. courts are more concerned with the nature of an event and its effect on performance. *Id.*

For a contract to be excused based on commercial impracticability, three elements must be satisfied. “First, a contingency—something unexpected—must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable. Unless the court finds these three requirements satisfied, the plea of impossibility must fail.” *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315–16 (D.C. Cir. 1966); see *Nat’l Ass’n of Postmasters of the U.S. v. Hyatt Regency Wash.*, 894 A.2d 471, 477 n. 5 (D.C. 2006); *Duffy v. Duffy*, 881 A.2d 630, 639 (D.C. 2005) (recognizing the doctrine of commercial impracticability). As suggested by one court, commercial impracticability will only be applied in extreme circumstances and the party asserting the defense must show “a real impossibility and not a mere inconvenience or unexpected difficulty.” *E. Capitol View Cmty. Dev. Corp. v. Robinson*, 941 A.2d 1036, 1040 (D.C. 2008).

Statutory Defenses

D.C. Code Ann. § 28:2.614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party

the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

D.C. Code Ann. § 28:2.615

(Excuse by Failure of Presupposed Conditions)

This provision applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance where such performance has been rendered impracticable under the test set forth in Section 265 of the Second Restatement of Contracts. Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer.

D.C. Code Ann. §§ 28:2A-404, -405

(Substituted Performance; Excused Performance)

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 28:2A-102, -103(a)(10). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable District of Columbia Cases

- *Whole Foods Mkt. Grp., Inc. v. Wical Ltd. P’ship*, No. 1:17-cv-01079-RCL, 2019 WL 5395739 (D.D.C. 2019) - Where a rodent infestation caused a grocery store to close for more than 60 days and the landlord issued a notice of default of the lease agreement to tenant store due to the closing, the court denied summary judgment, finding that the rodent infestation could be considered an “act of God” under the force majeure clause, provided the tenant store could not have prevented it.
- *Am. Nat’l Red Cross v. Vinton Roofing Co.*, 629 F. Supp. 2d 5 (D.D.C. 2009) - Where building owner brought suit against roofing contractor alleging that the contractor failed to leave the building’s roof watertight during construction, the court held that the *force majeure* defense was not available to the contractor because the contractor was on notice of the weather forecasting rain and the contractor left the work site prior to establishing that roof was watertight.
- *Nat’l Ass’n of Postmasters of the U.S. v. Hyatt Regency Wash.*, 894 A.2d 471 (D.C. 2006) - Doctrine of commercial impracticability did not excuse performance of agreement to hold conference where alleged intervening event was not akin to force majeure events identified in contract.

- *Watts v. Smith*, 226 A.2d 160 (D.C. 1967) - Defining an “act of God” as “the result of the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention, and is of such character that it could not have been prevented or avoided by foresight or prudence.”

Florida

Contractual *Force Majeure*

In Florida, whether a party can be excused from a contract on account of *force majeure* clause is a fact-specific determination that will depend on the nature of the party's obligations and the specific provisions of the contract. *Tonfi v. Prime Homes at Villa*, No. 07-22952-CIV-JORDAN, 2008 WL 11333242, at *4 (S.D. Fla. 2008). Florida courts tend to narrowly construe *force majeure* provisions and will strictly enforce the specific language in the contract. Consequently, where the contract does not specify an "act of God" as a qualifying event, the court may not infer one.

Under Florida law, a catch-all *force majeure* (i.e. a clause disclaiming "events outside the reasonable control of either party") is enforceable using the same analysis as courts use with respect to commercial impracticability. See *St. Joe Paper Co. v. State Dep't of Env'tl. Regulation*, 371 So. 2d 178, 180 (Fla. 1st Dist. Ct. App. 1979) (design error was *force majeure* event within clause that excused delays for "any cause ... not within the reasonable control of the company" and triggered contract extension); *Devco Dev. Corp. v. Hooker Homes, Inc.*, 518 So. 2d 922, 923 (Fla. 2d Dist. Ct. App. 1987) (excessive rainfalls within "any other condition" and excused performance of contractual obligations); *Camacho Enters., Inc. v. Better Constr., Inc.*, 343 So. 2d 1296, 1297 (Fla. 3d Dist. Ct. App. 1977) (interpreting the contract's *force majeure* clause as excusing delay where its president's heart attack was a circumstance "beyond the control" of the development company).

Force majeure clauses often encompass "acts of God." The Supreme Court of Florida defines an act of God as an act or occurrence:

So extraordinary and unprecedented that human foresight could not foresee or guard against it, and the effect of which could not be prevented or avoided by the exercise of reasonable prudence, diligence, and care or by the use of those means which the situation of the party renders it reasonable that he should employ. It must be the sole proximate cause of the nonperformance, without the participation of man, whether by active intervention or negligence or failure to act.

Fla. Power Corp v. City of Tallahassee, 18 So. 2d 671, 675 (Fla. 1944) (hurricane was an act of God which provided legal justification for non-delivery of electricity). See also *In re Magnolia Beach, LLC*, No. 07-79221-CRM, 2010 WL 3397412, at *2 (Bankr. N.D. Ga. 2010) (collecting cases) (contract included clause for extending performance due to delays caused by acts of God). Notably, Florida limits the application of this defense to those events that are the sole cause of the delay. *Id.* (holding that delay caused labor and material shortages caused by hurricane was not excusable).

Commercial Impracticability / Frustration of Purpose

In Florida, commercial impracticability / frustration of purpose are well-recognized common law defenses to nonperformance of a contract. *Fla. Power*, 18 So. 2d at 675. Specifically, Florida has adopted the test

articulated in Section 265 of the Second Restatement of Contracts, which states: “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.” Restat. (2d) of Contracts § 265.

“Acts of God” and governmental action are among several types of business risks that may implicate the impossibility defense. Ultimately the issue is whether the change was foreseeable. *Cook v Deltona Corp.*, 753 F.2d 1552, 1558 (11th Cir. 1985) (rejecting defense where “winds of change were blowing” when parties entered into contract and increase in governmental regulation was not beyond the contemplation of the parties). In addition, the question is not the relative difficulty caused by the event, but whether the event “so radically altered the world in which the parties were expected to fulfill their promises that it is unwise to hold them to the bargain.” *Harvey v. Lake Buena Vista Resort LLC*, 568 F. Supp. 2d 1354, 1368 (M.D. Fla. 2008). If the event could have been the subject of an express provision (it was foreseeable), an inference arises that the party who naturally bears the risk chose to assume it. *Id.*

Statutory Defenses

Florida Code § 672.614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Florida Code § 672.615 (Excuse By Failure of Presupposed Conditions)

This provision applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance where such performance has been rendered impracticable under the test set forth in Section 265 of the Second Restatement of Contracts. Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer.

Florida Code §§ 680.404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Florida Cases

- *Tonfi v. Prime Homes at Villa*, No. 07-22952-CIV-JORDAN, 2008 WL 11333242 (S.D. Fla. 2008) - “Florida law generally recognizes two doctrines excusing performance after the execution of the contract. The doctrine of impossibility excuses performance where it is totally impossible to do what was agreed. ... The doctrine of frustration of purpose applies where the value of performance has been frustrated.”
- *Leon Cty. v. Gluesenkamp*, 873 So. 2d 460 (Fla. Dist. Ct. App. 2004) - Governmental action excused performance because: “It is a basic assumption on which the contract was made that the law will not directly intervene to make performance impracticable when it is due.”
- *Arbid v. G.L. Homes of Lake Charleston Assoc., Ltd.*, No. 94-17778-RL, (Fla. Cty. Ct. 1995) - Stating that, generally, the “unavailability of materials, strikes, and labor problems” does not excuse performance.
- *Marshall Constr., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So. 2d 845 (Fla. Cir. Ct. 1990) - Although impossibility of performance can include extreme impracticability of performance, courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless, and expensive to the lessor. A mere “unexpected difficulty, expense, or hardship” does not excuse performance.
- *Devco Dev. Corp. v. Hooker Homes, Inc.*, 518 So. 2d 922 (Fla. 2d Dist. Ct. App. 1987) - Excessive rainfalls were within “any other condition” and excused performance of contractual obligations.
- *St. Joe Paper Co. v. State Dep’t of Env’tl. Regulation*, 371 So. 2d 178 (Fla. 1st Dist. Ct. App. 1979) - Design error was force majeure event within clause that excused delays for “any cause ... not within the reasonable control of the company” and triggered contract extension.
- *Camacho Enterprises, Inc. v. Better Constr., Inc.*, 343 So. 2d 1296 (Fla. 3d Dist. Ct. App. 1977) - Interpreting the contract’s force majeure clause as excusing delay because its president’s heart attack was a circumstance “beyond the control” of the development company.
- *Holly Hill Fruit Prods. Co., Inc. v. Bob Staton, Inc.*, 275 So. 2d 583 (Fla. 2d Dist. Ct. App. 1973) - Finding that performance was legally impossible where freezing weather conditions prevented grower from delivering oranges from various groves specified in contract.

Georgia

Contractual *Force Majeure*; Acts of God

In Georgia, *force majeure* clauses are also known as “act of God” provisions. *Force majeure* clauses establish conditions that, if triggered, permit a party to suspend performance, excuse a breach, or terminate the contract. The scope of any relief provided under such clauses is dictated by the terms of the contract. With the exception of “acts of God,” the items typically included in a *force majeure* clause are human-caused, for example, strikes, war, government or state action. Most *force majeure* clauses do not contemplate “epidemics” or “pandemics.” Without inclusion of an item akin to “pandemic,” contracting parties seeking to suspend or avoid performance of their contractual obligations might look to an “act of God” as a savior. But the Georgia case law on what constitutes an “act of God” is silent with respect to whether a pandemic counts as one. And not all “act of God” provisions are equal; some by their terms expressly or contextually limit qualifying acts of God.

The determination of whether or not an event qualifies as a *force majeure* is a mixed question of law and fact. See *Uniroyal, Inc. v. Hood*, 588 F.2d 454, 460 (5th Cir. 1979) (“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 RR Co.*, 187 Ga. 243, 251 (1938)).

Georgia case law provides that an act of God must not be human caused, and it must not be reasonably predictable or avoidable. For example, many Georgia cases describe an “act of God” as “[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado.” *Elavon, Inc. v. Wachovia Bank, Nat’l Ass’n*, 841 F. Supp. 2d 1298, 1306 (N.D. Ga. 2011) (quoting Black’s Law Dictionary (9th ed. 2009)); see also *W. & Atl. R.R. v. Hassler*, 92 Ga. App. 278, 280–81 (1955) (holding it was error not to provide jury instruction for “act of God” when rainfall was claimed to have been unprecedented); *Sampson v. Gen. Elec. Supply Corp.*, 78 Ga. App. 2, 8 (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.”) (citation omitted).

Human intervention or negligence cannot contribute to the disruption in performance or the acts of God defense will fail. *Cent. Ga. Elec. Membership Corp. v. Heath*, 60 Ga. App. 649, 649 (1939) (holding that lightning strike was an act of God, but the failure to properly ground the house was intervening human negligence and so the accident was not an “act of God”); see also *Sampson*, 78 Ga. App. at 8 (“[A]n ‘act of God,’ in order to constitute a defense, must exclude the idea of human agency.”); *S. Ry. Co. v. Standard Growers’ Exch.*, 34 Ga. App. 534, 534 (1925) (“[A]n act of God . . . refers to a natural cause, and not only excludes the idea of human agency, but the act must be of such a character that its effect could not be prevented by the exercise of due diligence on the part of the carrier.”). These decisions informed the conclusion by the U.S. District Court for the Northern District of Georgia that the 2008 financial crisis—even though outside of the contracting parties’ control—was not an act of God. See *Elavon, Inc.*, 841 F. Supp. 2d at 1306.

The Georgia Code defines the term “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.” O.C.G.A. § 1-3-3; see also *Royal Indem. Co. v. McClatchey*, 101 Ga. App. 507, 510 (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.”).

Commercial Impossibility / Temporary Impossibility

In practice, Georgia courts recognize a common law defense of impossibility under limited circumstances as well. For example, impossibility of performance will occur where, after the making of the contract, the performance is made illegal. *Fowler v. White*, 249 Ga. 853, 854 (1982). Where performance is conditioned upon the discretionary act of a third person who refuses or is unable to act, performance will be excused by reason of impossibility. *Roane v. Sophisticated Data Research, Inc.*, 259 Ga. 410 (1989).

The doctrine of temporary impracticability has been recognized by Georgia courts, generally in the context of insurance policies, which usually impose a requirement of notice as a condition precedent to coverage. For example, “[i]f it is impossible to give the required notice, failure to do so will not bar recovery, if notice is given within a reasonable time after the impossibility has passed.” *Wolverine Ins. Co. v. Sorrough*, 122 Ga. App. 556, 561 (1970); see also *N. Am. Accident Ins. Co. v. Watson*, 6 Ga. App. 193 (1909) (where compliance with the notice provisions of an insurance contract “has been prevented and rendered impossible by an act of God, this would furnish a sufficient legal excuse for the delay in giving the stipulated notice”).

Statutory Defenses

O.G.C.A. § 13-4-21

(Impossibility of Performance; Act of God)

Georgia has actually codified the impossibility 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.” Notably, this statutory defense requires that the act of God render performance “impossible,” while a contractual “act of God” provision may relieve performance for difficulty that is something less than impossibility.

O.G.C.A. § 11-2-614

(Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes

unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

O.G.C.A. § 11-2-615

(Excuse by Failure of Presupposed Conditions)

This provision applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance where such performance has been rendered impracticable under the test set forth in Section 265 of the Second Restatement of Contracts. Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer.

O.G.C.A. §§ 11-2A-404/405

(Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Georgia Cases

- *Elavon, Inc. v. Wachovia Bank, NA*, 841 F. Supp. 2d 1298 (N.D. Ga. 2011) - Economic downturn was not an “act of God” rendering bank’s performance impossible under alliance agreement because banks could still comply with merchant referral requirements of the agreement.
- *Uniroyal, Inc. v. Hood*, 588 F.2d 454 (5th Cir. 1979) - Dispute of material fact existed as to whether storm and consequent flooding of warehouse constituted an “act of God” excusing performance.
- *Royal Indem. Co. v. McClatchey*, 101 Ga. App. 507 (1960) - While lightning strike was an “act of God,” damage caused by lightning was still covered by insurance policy.
- *Cent. Ga. Elec. Membership Corp. v. Heath*, 60 Ga. App. 649 (1939) - “Act of God means 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 ideas of human agency.”

Hawaii

Contractual *Force Majeure*

Very few Hawaii courts have been asked to determine whether a contracting party's performance is excused under a *force majeure* clause. In the absence of statute or case law on the subject, Hawaii courts look to the Second Restatement of Contracts. *OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F. Supp. 2d 1214, 1222 (D. Haw. 2003).

In one case, a resort hotel sued a patron for contractual liquidated damages under a reservation agreement. The patron argued that liquidated damages were unenforceable under a contractual *force majeure* clause that excused performance for, among other things, "terrorism . . . or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement." *Id.* at 1220. The defendant argued that the terrorist attacks of September 11, 2001 rendered it "inadvisable" to travel to, or hold events in, Hawaii, although the event in question was not scheduled to happen until March 2002.

The court rejected the excusability defense, based on the plain language of the *force majeure* clause. Although the court observed that it may have been economically inadvisable or unwise to travel to Hawaii in the aftermath of the September 11 attacks, "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. The parties' *force majeure* clause did "not contain language that excuses performance on the basis of poor economic conditions, lower than expected attendance, or withdrawal of commitments from sponsors and participants." *Id.* at 1224. The court noted the widespread damaging impact a finding of *force majeure* could impose on the future commercial agreements in Hawaii:

Even if economics were not a significant factor in SFX cancelling the Agreement, the Court would still find that SFX could not properly invoke the Force Majeure clause based on the events of September 11. To excuse a party's performance under a force majeure clause ad infinitum when an act of terrorism affects the American populace would render contracts meaningless in the present age, where terrorism could conceivably threaten our nation for the foreseeable future. Certainly had the Power Jam 2002 event been scheduled for the weeks immediately following September 11, Defendants' argument that holding the convention was "inadvisable" would be much stronger. However, five months following September 11, when there was no specific terrorist threat to air travel to Maui or to Maui itself, Defendants cannot escape performance under the Agreement.

Id. at 1224.

Commercial Impracticability / Frustration of Purpose

Hawaii distinguishes between commercial impracticability and frustration of purpose, more so than other states. In Hawaii, contractual performance is excused under the doctrine of frustration if: (1)

the purpose that was frustrated was a principal purpose of the contracting party; (2) the frustration was substantial or severe; and (3) the event causing the frustration was not foreseeable to the parties when they entered the contract. *Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1154, 1161 (D. Haw. 2007).

In contrast, Hawaiian courts have held that performance of a contract becomes commercially impracticable when “its performance becomes excessively and unreasonably difficult or expensive.” *OWBR*, 266 F. Supp. 2d at 1223. Moreover, “the unforeseen cost increase that would excuse performance must be more than merely onerous or expensive. It must be positively unjust to hold the parties bound.” *Id.*

Statutory Defenses

Haw. Rev. Stat. Ann. § 490:2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Haw. Rev. Stat. Ann. § 490:2-615 (Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

Haw. Rev. Stat. Ann. §§ 490:2A-404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Hawaii Cases

- *Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1154 (D. Haw. 2007) - Under Hawaii's frustration of purpose doctrine, tenant's obligation to comply with environmental standards was foreseeable to the parties at the time that they entered into lease, and thus, compliance with those standards did not excuse tenant's obligation under the lease, which explicitly required tenant to comply with all present and future laws.
- *OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F. Supp. 2d 1214 (D. Haw. 2003) - Fulfillment of obligations to hold group gathering at hotel resort was not excused by September 11 terrorist attacks, which did not render travel to the event (to be held 5 months later) inadvisable.

Idaho

Contractual *Force Majeure*

As elucidated by the United States District Court for the District of Idaho, a *force majeure* clause is “[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.” *Roost Project, LLC v. Andersen Constr. Co.*, No. 1:18-CV-00238-CWD, 2020 WL 560574, at *8 (D. Idaho 2020). Idaho courts will interpret *force majeure* clauses using the same rules of contract interpretation as they would for any other agreement. *Id.*

In Idaho, a “force majeure excusing event, by its very nature, must be unforeseeable to some extent at the time of contracting.” *Id.* at *8. The *Roost Project* court explained that the foreseeability requirement for *force majeure* applies regardless of whether or not the contractual language at issue references or requires foreseeability. *Id.* Idaho courts will not recognize an excusable *force majeure* where the breaching party was not prevented from performing its obligations, but simply chose not to. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 748 (2000).

Even if a *force majeure* clause enumerates specific events that excuse performance, the court will construe a catch-all provision contemplating “any other force majeure event” or “any other event beyond the reasonable control of either party” to expand excusable events beyond those enumerated. *Burns Concrete, Inc. v. Teton Cty.*, 161 Idaho 117, 120 (2016) (“The wording of the force majeure clause does not limit the clause’s application to the types of events mentioned.”).

Commercial Impracticability / Impossibility / Frustration of Purpose

Idaho recognizes the defense of commercial impracticability, as codified in the Idaho Code with respect to contracts for the sale of goods. However, no Idaho case has considered these common law defenses outside the UCC context. In other words, absent a contractual *force majeure* clause, commercial impracticability does not appear to be an available common law defense for service and construction contracts.

In *Lawrance v. Elmore Bean Warehouse, Inc.*, the Idaho Court of Appeals applied Section 28-2-615 of the Idaho Code to hold that a buyer may rescind a sales contract upon proof that performance was rendered impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made. 108 Idaho 892, 894 (Ct. App. 1985). There, the court rejected the buyer’s argument that major decreases in the price of pinto beans could excuse its obligation to pay an agreed-upon fixed price under a contract with supplier. *Id.* In its opinion, the Court placed a great deal of emphasis on the concept of foreseeability:

In the case before us, testimony showed that the market for the pinto bean seed was very favorable at planting time. However, for a variety of reasons, the market price decreased forty percent by the

following January. A representative of Elmore admitted the reason he had contracted out for the production of the pinto beans was because “there was a chance of making a profit. . . .” Furthermore, the contract contained no provision to protect him from such a drop in the market price. It appears Elmore risked a change in the market price by signing to buy the beans at a fixed price. The language of comment 4 makes it incumbent upon Elmore to show it can operate only at a loss and that loss will be so severe and unreasonable that failure to excuse performance would result in a grave injustice. . . . Elmore asserted that if it were required to pay \$30 per hundredweight it would be driven into bankruptcy. However, it has failed to furnish specific facts to support that assertion. Therefore, as a matter of law, Elmore was unable to show the decline in the price of pinto bean seed was not reasonably foreseeable.

Id. at 894–95 (internal citations omitted).

Although commercial impracticability is limited to contracts for the sale of goods, frustration of purpose may be available where “some supervening event has destroyed the value of the counterperformance bargained for by the promisor, even though the counterperformance is still literally possible.” *Twin Harbors Lumber Co. v. Carrico*, 92 Idaho 343 (1968). The *Twin Harbors* court further required a finding that the “parties must have contracted, expressly or in necessary contemplation, with reference to continued existence of the specific thing as a condition essential to performance.” *Id.* at 349. The *Twin Harbors* decision highlights how Idaho courts look unfavorably on common law defenses based on *force majeure* events. The court stated that the “specific doctrine [of frustration of purpose] has never been considered in an opinion by this Court.” *Id.* at 349. Since *Twin Harbors* was decided, no reported Idaho case has addressed the frustration of purpose defense.

Statutory Defenses

Idaho Stat. Ann. § 28-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Idaho Stat. Ann. § 28-2-615 (Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

**Idaho Stat. Ann. § 28-12-404
(Substituted Performance on Lease Contracts)**

This provision applies to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.”

Specifically, this provision states:

If without fault of the lessee, the lessor, and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

**Idaho Stat. Ann. § 28-12-405
(Excused Performance)**

This provision excuses the performance of lease contracts “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.”

Notable Idaho Cases

- *Roost Project, LLC v. Andersen Constr. Co.*, No. 1:18-CV-00238-CWD, 2020 WL 560574 (D. Idaho 2020) - Dispute of material fact existed as to whether winter weather conditions and concomitant labor shortages excused delays in performance of construction contract under *force majeure* provision.
- *Burns Concrete, Inc. v. Teton Cty.*, 161 Idaho 117 (2016) - Holding that a developer’s inability to obtain a zoning approval to construct a cement plant excused performance of its contract under the catch-all language in *force majeure* clause, which did not limit excusable causes to those enumerated.
- *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738 (2000) - Developer of hydroelectric facility’s failure to post security required by development agreement was not excusable *force majeure* where public utility allegedly revoked the project’s certificate from Idaho Department of Environmental Quality because the “obligation to pay the security was not directly affected by the revocation and suspension of the required permits and certificates since Cogeneration and its financial partner Calpine could have posted the security but chose not to.”

- *Lawrance v. Elmore Bean Warehouse, Inc.*, 108 Idaho 892 (Ct. App. 1985) - Extreme fluctuations in the market price of pinto beans did not render payment of fixed-price under supply contract commercially impracticable such as to excuse performance.
- *Twin Harbors Lumber Co. v. Carrico*, 92 Idaho 343 (1968) - Affirming district court holding that mortgage contract was not nullified by the doctrine of frustration of purpose because mortgage agreement did not evidence any fundamental assumption upon which they predicated performance.

Illinois

Contractual *Force Majeure*

A *force majeure* clause is a contractual provision which excuses one or both parties' obligations when circumstances arise which are beyond the parties' control and make performance of the contract impractical or impossible. See generally *N. Ill. Gas Co. v. Energy Co-op., Inc.*, 461 N.E.2d 1049 (Ill. App. Ct. 3d Dist. 1984). Under Illinois law, there is an implied duty on the party claiming *force majeure* to "make a bona fide effort to dissolve the restraint" causing delay or inability to perform under the contract before invoking a *force majeure* clause. This duty is "related to the duty of good faith [and] is read into all express contracts unless waived." *Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850, 859 (N.D. Ill. 1990). If the parties include a *force majeure* clause in the contract, the clause supersedes the common law doctrine of impossibility. *Id.* at 855.

Commercial Impracticability

Courts in Illinois have applied the doctrine of commercial impracticability in certain cases. See *N. Ill. Gas Co.*, 461 N.E. 2d at 1061 (holding that a party is expected to use reasonable efforts to surmount obstacles to performance and performance is impracticable only if it is so in spite of such efforts) (citing Restat. (2d) of Contracts § 261(d)). A party seeking to excuse its performance must show that it 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. *Id.*

Impossibility / Frustration of Purpose

Under Illinois law, "[t]he doctrine of legal impossibility, or impossible performance, 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.*, 965 N.E.2d 414, 421–22 (Ill. 2012); see also *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 933 N.E.2d 860, 864–65 (Ill. App. Ct. 1st Dist. 2010). A party raising an impossibility defense must show: (1) an unanticipated circumstance; (2) that was not foreseeable; (3) to which the other party did not contribute; and (4) to which the party raising the defense has tried all practical alternatives. *Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc.*, 732 F. Supp. 2d 809, 827 (N.D. Ill. 2010). Moreover, the doctrine 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. *YPI*, 933 N.E.2d at 865.

The distinction between objective impossibility and subjective impossibility has been described as follows:

"It is generally well settled that subjective impossibility, that is, impossibility which is personal to the promisor and does not inhere in the nature of the act to be performed, does not excuse nonperformance of the contractual obligation. Subjective impossibility or personal inability to perform one's contractual promise ordinarily is to be distinguished from objective impossibility of performance.

The distinction, as explained by Williston, is between ‘the thing cannot be done’ (this being called objective impossibility) and ‘I cannot do it,’ called subjective impossibility.” 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, 29–30 (1962) (quoting Williston, Contracts (Rev. ed.) § 1932).

Ury v. Di Bari, No. 1-15-0277, 2016 WL 2610167, at *4–5 (Ill. App. Ct. 2016) (unpublished decision).

The doctrine of commercial frustration will render a contract unenforceable if a party’s performance under the contract is rendered meaningless due to an unforeseen change in circumstances. *Illinois-Am. Water Co. v. City of Peoria*, 774 N.E.2d 383, 390 (Ill. App. Ct. 3d Dist. 2002). To apply the doctrine of commercial frustration, there must be a frustrating event not reasonably foreseeable and the value of the parties’ performance must be totally or almost totally destroyed by the frustrating cause. *Id.*

The doctrine of frustration rests on the view that where from the nature of the contract and the surrounding circumstances the parties when entering into the contract must have known that it could not be performed unless some particular condition or state of things would continue to exist, the parties must be deemed, when entering into the contract, to have made their bargain on the footing that such particular condition or state of things would continue to exist, and the contract therefore must be construed as subject to an implied condition that the parties shall be excused in case performance becomes impossible from such condition or state of things ceasing to exist.

Leonard v. Autocar Sales & Serv. Co., 64 N.E.2d 477, 479–80 (Ill. 1945).

Commercial frustration is not to be applied liberally. *Ury*, 2016 WL 2610167, at *7 (quotation and citation omitted). The party asserting frustration must establish that: (1) the frustrating event was not reasonably foreseeable; and (2) the value of counterperformance was totally or nearly totally destroyed by the frustrating cause. *Id.*

Statutory Defenses

III. Comp. Stat. 810 ILCS 5/2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

III. Comp. Stat. 810 ILCS 5/2-615(a) (Excuse By Failure of Presupposed Conditions)

This provision of Illinois Statutes excuses non-performance where such 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 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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure*.

III. Comp. Stat. 810 ILCS 5/2A-404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Illinois Cases

- *Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850 (N.D. Ill. 1990) - If the parties include a force majeure clause in the contract, the clause supersedes the common law doctrine of impossibility. The doctrine of impossibility is an “off-the-rack” provision that governs only if the parties have not drafted a specific assignment of the risk otherwise assigned by the provision.
- *Veath v. Specialty Grains, Inc.*, 546 N.E.2d 1005 (Ill. App. Ct. 5th Dist. 1989) - Grain buyer was not entitled to recover from seller loss of profit on difference between number of bushels it estimated in contract and number of bushels actually delivered in light of *force majeure* clause under which seller was excused, because of weather conditions, from delivering total bushels due under contract.
- *N. Ill. Gas Co. v. Energy Co-op., Inc.*, 461 N.E.2d 1049 (Ill. App. Ct. 3rd Dist. 1984) - General government action generally cannot serve as a *force majeure* event, but an order that clearly directs or prohibits an act that proximately causes the nonperformance or breach of a contract may constitute *force majeure*.

Indiana

Contractual *Force Majeure*

“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.” *Acheron Med. Supp., LLC v. Cook Inc.*, No. 1:15-cv-1510-WTL-MPB, 2019 WL 2574147 (S.D. Ind. 2019). The party seeking to excuse its performance under a force majeure clause bears the burden of proof of establishing that defense. *Specialty Foods of Ind., Inc. v. City of S. Bend*, 997 N.E.2d 23, 26 (Ind. Ct. App. 2013).

The objective of any court interpreting a contract, including a *force majeure* provision, is to determine the intent of the parties at the time the contract was made by examining the language used in the contract. *Specialty Foods*, 997 N.E.2d at 26 (citing *State Farm Fire & Cas. Co. v. Riddell Nat'l Bank*, 984 N.E.2d 655, 658 (Ind. Ct. App. 2013)). Thus, the scope and effect of a *force majeure* clause depends on the specific contract language, and not on any traditional definition of the term. *Id.* at 26. In other words, when the parties have defined the nature of *force majeure* in their agreement, the contract alone defines the application, effect, and scope of *force majeure* with regard to those parties. *Id.* Reviewing courts in Indiana are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended. *Id.*

Impossibility / Frustration of Purpose

In Indiana, impossibility is an affirmative defense to performance of an executory contract and is generally invoked as a defense to an action for damages. *Wagler v. W. Boggs Sewer Dist., Inc.*, 980 N.E.2d 363, 378 (Ind. Ct. App. 2012). The law of impossibility of performance was first stated in *Krause v. Board of Trustees of School Town of Crothersville*, where the Indiana Supreme Court stated:

We regard it as thoroughly settled that the words of a mere general covenant will not be construed as an undertaking to answer for a subsequent event, happening without the fault of the covenantor, which renders performance of the covenant itself not merely difficult or relatively impossible, but absolutely impossible, owing to the act of God, the act of the law, or the loss or destruction of the subject-matter of the contract. Where performance is thus rendered impossible, the inquiry naturally arises as to whether there was a purpose to covenant against such an extraordinary and therefore presumably unapprehended event, the happening of which it was not within the power of the covenantor to prevent. The tempest, for instance, may destroy that which must exist if performance of the covenant is to remain possible, and it would seem evident in such a case that it was not within the contemplation of the parties that the maker of the covenant should answer in damages for what he could in no wise control. But, on the other hand, a person entering into a charter party might be answerable for delay caused by adverse winds, since it would be presumed that the parties contracted with such a possibility in mind.

162 Ind. 278, 283–84 (1904).

To invoke impossibility, one must demonstrate that performance is “not merely difficult or relatively impossible, but absolutely impossible, owing to the act of God, the act of the law, or the loss or destruction of the subject-matter of the contract.” *Wagler*, 980 N.E.2d at 378 (citing *Ross Clinic, Inc. v. Tabion*, 419 N.E.2d 219, 223 (Ind. Ct. App. 1981) (citation omitted)); see also *Kruse, Kruse & Miklosko, Inc. v. Beedy*, 353 N.E.2d 514 (Ind. Ct. App. 1976); *Hipskind Heating & Plumbing Co. v. Gen. Indus., Inc.*, 204 N.E.2d 339 (Ind. Ct. App. 1965).

It does not appear that Indiana recognizes the doctrine of frustration of purpose, though it also does not appear that Indiana’s highest court has yet taken up the issue. *Justus v. Justus*, 581 N.E.2d 1265, 1275 (Ind. Ct. App. 1991) (citing *Ross Clini*, 419 N.E.2d at 223).

Statutory Defenses

Ind. Code Ann. § 26-1-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Ind. Code Ann. § 26-1-2-615 (Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

Ind. Code Ann. § 26-1-2.1-404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Indiana Cases

- *State v. Int'l Bus. Machs. Corp.*, 51 N.E.3d 150 (Ind. 2016) - Where a *force majeure* provision requires notice, the failure to provide notice will prevent a party from using the *force majeure* event as an excuse for its nonperformance.
- *IPF/Ultra Ltd. P'ship v. UP Improvements, LLC*, No. 2:08-CV-21, 2008 WL 3896746 (N.D. Ind. 2008) - The issue of whether an event constitutes *force majeure* is not always a matter of law and may be one of fact for the factfinder to determine.
- *Miami Sand & Gravel, LLC v. Nance*, 849 N.E.2d 671 (Ind. Ct. App. 2006) - Gravel-pit owners' failure to comply with permanent injunction requiring removal of equipment did not constitute "*force majeure*" for purposes of mineral lease's *force majeure* clause where mining company was able in past to conduct mining operations with equipment sitting in same location.
- *Dixie Portland Flour Co. v. Kelsay-Burns Milling Co.*, 155 N.E. 526 (Ind. Ct. App. 1927) - Burning of flour mill held to excuse further performance of contract for sale of flour containing dispensation clause exonerating seller for causes beyond his control.

Iowa

Contractual *Force Majeure*

Neither the Iowa state courts, nor the federal courts applying Iowa law, have engaged in 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 to a *force majeure* clause, one Indiana federal court relied on Williston’s treatise on contracts to articulate how Iowa courts would apply such a provision. *Id.* Williston’s treatise reflects the majority view that “nonperformance dictated by economic hardship is not enough to fall within a *force majeure* provision. A mere increase in expense does not excuse performance unless there exists an extreme and unreasonable difficulty, expense, or injury.” *Id.* at 841 (internal quotation marks and citation omitted).

The *Rexing* court eventually held that a change in consumer demand, without other extenuating circumstances, did not fall within a *force majeure* provision. *Id.*; cf. *Pillsbury Co., Inc. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 439 (Iowa 2008) (applying Minnesota law to *force majeure* provision in light of mandatory choice-of-law clause).

The court does note, albeit briefly, that an example of avian flu harming egg production may plausibly constitute an unforeseeable event precipitating a dramatic change in market conditions, which could possibly fall within the scope of a *force majeure* clause, but market changes alone will not suffice. *Id.*

Commercial Frustration

Under Iowa law, there are three elements to establishing a claim of commercial frustration: (1) The purpose that is frustrated must have been a principal purpose of that party in making the contract (i.e., it must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense); (2) The frustration must be substantial and so severe that it is not fairly to be regarded as within the risks the party assumed under the contract; and (3) The non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. *Mel Frank Tool & Supply, Inc. v. Di-Chem Co.*, 580 N.W.2d 802, 806–807 (Iowa 1998).

Commercial Impracticability

In *Power Engineering & Manufacturing, Ltd. v. Krug International*, the Iowa Supreme Court interpreted commercial impracticability stringently. 501 N.W.2d 490, 494 (Iowa 1993). There, the defendant argued that it did not breach a contract to deliver machinery to Iraq because the United Nations had issued an embargo on the shipment of goods to Iraq at that time, thus making fulfillment of the contract commercially impracticable. *Id.*

The Iowa Supreme Court held that commercial impracticability did not apply. The mere fact that performance becomes economically burdensome does not excuse performance unless the increased cost is due to an unforeseen contingency which alters the essential nature of performance. *Id.* at 495. Implicit in the court’s analysis was that hostilities with Iraq were foreseeable at the time the two parties

entered into a contract. The court also noted that the embargo did not prevent defendant from fulfilling its contractual obligations, as it did not prevent a domestic purchaser from buying a machinery component intended for shipment there from a domestic manufacturer. *Id.*

Statutory Defenses

Iowa Code Ann. § 554.2614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Iowa Code Ann. § 554.2615 (Excuse By Failure of Presupposed Conditions)

This provision of an Iowa statute excuses non-performance where such 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 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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure*.

Iowa Code Ann. § 554.134-404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Iowa Cases

- *Rexing Quality Eggs v. Rembrandt Enters., Inc.*, 360 F. Supp. 3d 817 (S.D. Ind. 2018) - Interpreting Iowa law and holding that changes in market conditions alone, without some precipitous cause, were insufficient to fall under a *force majeure* clause.

- *Mel Frank Tool & Supply, Inc. v. Di-Chem. Co.*, 580 N.W.2d 802 (Iowa 1998) - Holding that lessee did not make an adequate showing of frustration of purpose as reason for abandonment of lease because lessee did not show how new government ordinance forbidding storage of chemicals would have affected lessee's inventory, profits, or how much of the now-forbidden chemicals were stored on the property.
- *Power Eng'g & Mfg., Ltd. v. Krug Int'l*, 501 N.W.2d 490 (Iowa 1993) - Holding that a UN embargo on shipment of goods to Iraq did not excuse defendant from performing its contractual obligations under the contract because the defendant could have purchased the parts required for shipment from a domestic (Iraqi) manufacturer.

Kansas

Contractual *Force Majeure*

In Kansas, the purpose of a *force majeure* clause is to relieve a contracting party from the harsh circumstances beyond its control that would make performance untenable or impossible. *N. Nat'l Gas Co. v. Approximately 9117 Acres in Pratt*, 114 F. Supp. 3d 1144, 1155 (D. Kan. 2015). “[T]he scope and effect of any *force majeure* clause depends upon its wording, but courts have construed these clauses in light of their general purpose and have limited them to circumstances beyond the lessee’s control that cannot be overcome with due diligence.” *Id.* (citation omitted). If it is a common *force majeure* clause, the court will presume that the parties “intended it to have its commonly understood meaning.” *Id.* That is, a court will follow contract law to provide the most reasonable interpretation of the clause from an objective point of view. *Hutton Contracting Co., Inc. v. City of Coffeyville*, 487 F.3d 772, 778 (10th Cir. 2007) (applying Kansas law).

Where a *force majeure* clause identifies specific contingencies that excuse performance, only the named contingencies will offer relief. *City of Topeka v. Indus. Gas Co.*, 135 Kan. 646, 651 (1932). In other words, the court will strictly construe the clause. *Welsch v. Trivestco Energy Co.*, 43 Kan. App. 2d 16, 29 (2009). One example of a common *force majeure* event is governmental interference with performance. See *N. Nat'l Gas Co.*, 114 F. Supp. 3d at 1155–56. But even if there is a *force majeure* event, if the party is able to overcome the event with due diligence (as in the case of alternative arrangements), there is no excuse for non-performance. *Benson Mineral Grp., Inc. v. N. Nat. Gas Co., Div. of Enron Corp.*, No. 86–1903, 1988 WL 404348, at *7 (D. Kan. 1988).

Commercial Impracticability

Kansas courts have applied the doctrine of commercial impracticability set forth in the Second Restatement of Contracts, which provides: “Where . . . 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 to the contrary.” *Sunflower Elec. Co-op., Inc. v. Tomlinson Oil Co.*, 7 Kan. App. 2d 131, 141 (1981) (citing Restat. (2d) of Contract § 261). Only objective, not subjective, impracticability will relieve a party of a contractual requirement. *Id.* at 139; *accord T.S.I. Holdings, Inc. v. Jenkins*, 260 Kan. 703, 717–19 (1996) (collecting cases where relief denied because of subjective impracticability); *Mid-Am Bldg. Supply, Inc. v. Schmidt Builders Supply, Inc.*, No. 11–4167–KGS, 2013 WL 1308980, at *4 n.35 (D. Kan. 2013) (same).

With respect to sales contracts, a “seller . . . will not be excused under this section [84-2-615] if (1) the non-occurrence of the contingency was the seller’s fault; (2) the seller had reason to know of the impracticability (*i.e.*, the contingency was foreseeable); or (3) the seller assumed the risk of the contingency.” *Clark v. Wallace Cty. Co-op. Equity Exch.*, 26 Kan. App. 2d 463, 466–67 (1999) (quoting comments to Kan. U.C.C. § 84-2-615). That the performance is more difficult or unprofitable will not pass

muster. See *Columbian Nat'l Title Ins. v. Twp. Title Servs., Inc.*, 659 F. Supp. 796, 802–03 (D. Kan. 1987) (citing Restat. (2d) of Contracts).

Frustration of Purpose

Although some Kansas cases treat the doctrines of impracticability and frustration as if they are one, it is clear that they are based on different assumptions and are comprised of different elements. *Id.* at 802. “[F]rustration is not a form of impracticability of performance. Under the doctrine of frustration, performance remains possible, but is excused because a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance.” *Id.* at 804 (citing 17 Am. Jur. 2d Contracts § 402 at 848).

The frustration doctrine applies to excuse a breach of contract only “where the object or purpose of a contract is frustrated or its enjoyment prevented by law.” *Berline v. Waldschmidt*, 159 Kan. 585, 588 (1945). The doctrine is predicated upon the premise that the breaching party could not reasonably protect itself against contingencies that later arose. *Id.* at 588–89. Consequently, the doctrine never applies “where the risk of the event that has supervened to cause the alleged frustration was reasonably foreseeable, and could and should have been anticipated by the parties and provision made therefor within the four corners of the agreement.” *Id.* at 589. If the supervening event appears to have been reasonably foreseeable and controllable by the parties, the breaching party may not invoke the defense and the contract is enforceable. *Id.*

There are three elements of the commercial frustration doctrine, as reflected in the Second Restatement of Contracts. “First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. Second, the frustration must be so severe that it is not fairly to be regarded as within the risks assumed under the contract. Third, the nonoccurrence of the frustrating event must have been a basic assumption on which the contract was made.” *State v. Jones*, 47 Kan. App. 2d 109, 114 (2012) (citing Restat. (2d) of Contract § 265).

Statutory Defenses

Kansas Uniform Commercial Code § 84-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Kansas Uniform Commercial Code § 84–2–615 (Excuse by Failure of Presupposed Conditions)

This provision also applies only to contracts for the sale of goods and excuses non-performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent it can still perform, must “allocate production and deliveries among its customers . . . in any manner which is fair and reasonable.” The seller must seasonably notify the buyer of any delay or non-delivery due to *force majeure*.

**Kansas Uniform Commercial Code §§ 84–2a–404, 405
(Substituted Performance/Excused Performance - Lease Contracts)**

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 84-2a-102, 103(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable Kansas Cases

- *N. Nat'l Gas Co. v. Approximately 9117 Acres in Pratt*, 114 F. Supp. 3d 1144 (D. Kan. 2015) - Recognizing that “[g]overnmental actions, including orders to halt oil and gas production, have been held to constitute *force majeure* events.”
- *Welsch v. Trivestco Energy Co.*, 43 Kan. App. 2d 16 (2009) - Concluding that financial issues could not alone trigger *force majeure* clause.
- *Hutton Contracting Co., Inc. v. City of Coffeyville*, 487 F.3d 772 (10th Cir. 2007) - Holding that delay by supplier did not grant right to contractor to invoke *force majeure* clause.
- *Clark v. Wallace Cty. Co-op. Equity Exch.*, 26 Kan. App. 2d 463 (1999) - Finding that farmer failed to identify commercial impracticability and was not excused for failing to deliver corn when late September freezes were foreseeable.
- *Benson Mineral Grp., Inc. v. N. Nat. Gas Co., Div. of Enron Corp.*, No. 86–1903, 1988 WL 404348 (D. Kan. 1988) - Holding that collapse of the natural gas market was not a contingency contemplated by *force majeure* clause to excuse performance.
- *Columbian Nat'l Title Ins. v. Twp. Title Servs., Inc.*, 659 F. Supp. 796 (D. Kan. 1987) - Concluding that “certain market conditions or the financial conditions of the parties” did not relieve title insurer on basis of impracticability and frustration of purpose.

- *Berline v. Waldschmidt*, 159 Kan. 585 (1945) - Declining to find commercial frustration on the basis that wartime regulations suspending oil drilling excused performance under contract because, at the time the parties entered into contract, it was foreseeable that country would engage in war.

Kentucky

Contractual *Force Majeure*

In Kentucky, “[p]arties are free to agree that specified events will excuse nonperformance of their obligations.” *Emerald Int’l Corp. v. WWMV, LLC*, No. CV 15-179-WOB-JGW, 2016 WL 4433357, at *3 (E.D. Ky. 2016) (citing *Ky. Utils. Co. v. S. E. Coal Co.*, 836 S.W.2d 392, 400 (Ky. 1992)). “The party claiming force majeure has the burden to prove the defense at trial.” 2016 WL 4433357, at *3 (citing *In re Clearwater Nat. Res., LP*, 421 B.R. 392, 397 (Bankr. E.D. Ky. 2009)).

A *force majeure* clause typically applies to events “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.*, 836 S.W.2d at 400. While *force majeure* clauses can often be vague and therefore not applicable to all intervening events, if a contract uses more specific wording then a court should determine whether the events conform with that definition. *Id.* at 401.

Commercial Impracticability

Courts applying Kentucky law have applied the doctrine of commercial impracticability set forth in the Second Restatement of Contracts. See *W. & S. Life Ins. Co. v. Crown Am. Corp.*, 877 F. Supp. 1041 (E.D. Ky. 1993) (“To the contrary, it is clear under Kentucky law, which follows the approach of the Restatement of Contracts, Second, that financial difficulties without more do not excuse performance in the sense that damages liability is also excused. Nor is a party excused from performance when its own actions renders it incapable of performing.”).

Frustration of Purpose

As to frustration of purpose, “[a] promise will not be discharged. . .because the performance promised in return has lost value on account of supervening fortuitous circumstances unless they nearly or quite completely destroy the purpose both parties to the bargain had in mind.” *Frazier v. Collins*, 187 S.W.2d 816, 818 (Ky. 1945).

Statutory Defenses

Ky. Rev. Stat. § 355.2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a

commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

**Ky. Rev. Stat. § 355.2-615
(Excuse By Failure of Presupposed Conditions)**

This provision excuses non-performance where such performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure*.

**Ky. Rev. Stat. § 355.2A-404/405
(Substituted Performance/Excused Performance on Lease Contracts)**

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration;” however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Kentucky Cases

- *Emerald Int’l Corp. v. WWMV, LLC*, No. CV 15-179-WOB-JGW, 2016 WL 4433357 (E.D. Ky. 2016) - Finding that a change in the market does not amount to a *force majeure* event where the parties have agreed to price terms that assume the market risks.
- *In re Clearwater Nat. Res., LP*, 421 B.R. 392 (Bankr. E.D. Ky. 2009) - Holding that the *force majeure* provision in a mining agreement does not protect the party when market forces, and not superior forces, make the arrangement unprofitable for that party.
- *Ky. Utils. Co. v. S.E. Coal Co.*, 836 S.W.2d 392 (Ky. 1992) - Noting that the definition of *force majeure* set forth in the contract was much broader than that commonly seen in case law, but that parties are free to set forth terms they desire and the court will review the claims to see if there is an event that meets the contractual definition.
- *Wickliffe Farms, Inc. v. Owensboro Grain Co.*, 684 S.W.2d 17 (Ky. 1984) - Finding that a one-sided *force majeure* provision does not render the provision unconscionable and that there is no impossibility of performance where a contract does not specify any specific acreage upon which a crop is to be grown but only specifies the amount of crop to be bought and sold.

Louisiana

Louisiana, which adheres to a civil law system, applies a strict *force majeure* doctrine, requiring contractual performance to be physically impossible for a party to obtain relief when a *force majeure* event occurs. Louisiana courts have so restrictively applied the *force majeure* doctrine that parties have often been left with no remedy even when natural disasters or other *force majeure* events arguably identified by contract impede the defendant's performance. See *MIE Properties-LA, LLC v. Huff*, No. 2011 CA 0258, 2012 WL 1203373 (La. Ct. App. 2012) (unpublished); *Associated Acquisitions, L.L.C. v. Carbone Props. of Audubon, L.L.C.*, 962 So. 2d 1102, 1103 (La. Ct. App. 2007) (increased cost of construction and financing associated with damage to property caused by Hurricane Katrina did not excuse payments on promissory note, despite repayment being more difficult); *Schenk v. Capri Constr. Co.*, 194 So. 2d 378 (La. Ct. App. 1967); *Lossecco v. Gregory*, 32 So. 985 (La. 1901).

Louisiana courts will, under the right conditions, enforce contractual *force majeure* provisions, but will first consider: (1) whether the event qualifies as a *force majeure* under the contract; (2) whether the risk of nonperformance was foreseeable and able to be mitigated; and (3) whether performance is impossible. See *City of New Orleans v. United Gas Pipe Line Co.*, 517 So. 2d 145, 156 (La. Ct. App. 1987). Louisiana courts will construe the contract as a whole to square the *force majeure* clause with the other clauses of the contract. All clauses of the contract must be interpreted in reference and relation to each other giving meaning to each clause. *Hanover Petroleum Corp. v. Tenneco Inc.*, 521 So. 2d 1234, 1239 (La. Ct. App. 1988). 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.

Common Law Defenses

As mentioned Louisiana applies an extremely strict concept of impossibility, requiring contractual performance to be literally impossible in order to rescind the contract. *Payne v. Hurwitz*, 978 So. 2d 1000 (La. Ct. App. 2008) (disruption to contract to purchase real property was only temporary and, therefore, did not excuse performance because it was not literally impossible). The common law doctrine of commercial impracticability has no application under Louisiana law. *Super. Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98 (W.D. La. 1985) ("This Court rejects this argument on the grounds that no court in Louisiana has unequivocally embraced this common law doctrine.").

Statutory Defenses

Louisiana has codified the impossibility defense. In the event that the contract does not contain a *force majeure* clause, contractual parties can still seek to excuse performance for *force majeure* events under Sections 1873–79 of the Louisiana Civil Code, subject, however, to the restrictions placed on impossibility principles articulated by the Louisiana courts.

La. Civ. Code Ann. art. 1876 (Contract Dissolved When Performance Becomes Impossible)

Louisiana Civil Code Article 1876 provides that a promise is “dissolved” and a promisor cannot be held liable for its failure to perform on a contract when “the entire performance owed by one party has become impossible because of a fortuitous event.” However, the other party may then recover any performance he has already rendered. Louisiana courts define “fortuitous events” as “irresistible forces” or “that which happens by a cause which we cannot resist.” See *Mark Invs., Inc. v. Motwane’s Am., Inc.*, 483 So. 2d 1187, 1189 (La. App. 1986).

However, under Louisiana law, an obligor is not released from its duty to perform under a contract by the mere fact that such performance has been made more difficult or more burdensome by a fortuitous event or an irresistible force. *Schenck*, 194 So. 2d at 380 (where homeowners brought an action to cancel a contract for construction of an addition to their home and to return the deposit due to hurricane flooding, the fact that performance by homeowners became more burdensome because of need of repairing their home did not release them from duty to perform); see also *Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.*, 161 La. 1077 (1926); *Sickinger v. Bd. of Dirs.*, 147 La. 479 (1920); *Pratt v. McCoy*, 128 La. 570 (1911).

Notable Louisiana Cases

- *Payne v. Hurwitz*, 978 So. 2d 1000 (La. Ct. App. 2008) - Disruption to contract to purchase real property was only temporary and, therefore, did not excuse performance because it was not literally impossible.
- *Associated Acquisitions, L.L.C. v. Carbone Props. of Audubon, L.L.C.*, 962 So. 2d 1102 (La. Ct. App. 2007) - Increased cost of construction and financing associated with damage to property caused by Hurricane Katrina did not excuse payments on promissory note, despite repayment being more difficult.
- *Super. Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98 (W.D. La. 1985) - “This Court rejects this argument on the grounds that no court in Louisiana has unequivocally embraced this common law doctrine [of commercial impracticability].”
- *Schenk v. Capri Constr. Co.*, 194 So. 2d 378 (La. Ct. App. 1967) - Where homeowners brought an action to cancel a contract for construction of an addition to their home and to return the deposit due to hurricane flooding, the fact that performance by homeowners became more burdensome because of need of repairing their home did not release them from duty to perform.

Maine

Contractual *Force Majeure*

In 1857, the Supreme Judicial Court of Maine held that a cholera epidemic in the vicinity of a saw mill was a *force majeure* event that rendered performance by a contractor impossible by disease or disability, and which entitled him to recover in quantum meruit for the work he did perform. *Lakeman v. Pollard*, 43 Me. 463, 466 (1857). The court held that prevalence of a fatal disease in the vicinity of the place where one had contracted to labor for a specified time made it unsafe and unreasonable for men of ordinary care and common prudence to remain there. *Id.*

When evaluating whether contract performance is excused, Maine courts must determine whether adequate cause justifies non-performance of contract obligations in light of the state of the facts then existing and not on the facts that later become known. *Id.* at 467. The terms of any *force majeure* clause must be interpreted to effectuate the intention of the parties as reflected in the written instrument, construed in respect to the subject matter, motive and purpose of making the agreement, and the object to be accomplished. *Coastal Ventures v. Alsham Plaza, LLC*, 1 A.3d 416 (Me. 2010); *Foster v. Foster*, 609 A.2d 1171, 1172 (Me. 1992) (“It is a well-established principle that a contract is to be interpreted to give effect to the intention of the parties as reflected in the written instrument, construed in respect to the subject matter, motive and purpose of making the agreement, and the object to be accomplished.”); *Farrington’s Owners’ Ass’n v. Conway Lake Resorts, Inc.*, 878 A.2d 504, 507 (Me. 2005) (“[C]ontractions of construction require that a contract be construed to give force and effect to all of its provisions, and we will avoid an interpretation that renders meaningless any particular provision in the contract.”).

Contractual language is “ambiguous” when it is reasonably susceptible to different interpretations. *Villas by the Sea Owners Ass’n v. Garrity*, 748 A.2d at 457, 461 (Me. 2000). If a contract is unambiguous, “its construction is . . . a question of law,” *Richardson v. Winthrop Sch. Dep’t*, 983 A.2d 400 (Me. 2009), and Maine courts will “interpret it according to the plain meaning of the language used,” *Camden Nat’ Bank v. S.S. Navigation Co.*, 991 A.2d 800 (Me. 2010), “without resort to extrinsic evidence.” *Am. Prot. Ins. Co. v. Acadia Ins. Co.*, 814 A.2d 989 (Me. 2003).

Impossibility / Frustration of Purpose

Maine law provides that when a person enters into an unqualified contract to do a lawful thing, he will be held liable for nonperformance, even if an inevitable accident occurring after the making of the contract renders performance impossible; but a contract may 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 depending on the intention of the parties as disclosed by the contract. *Cohen v. Mornault*, 120 Me. 358 (1921). With respect to the sale of goods, the measure of damages for breach of contract is the difference between the contract price and the market price at the time and place of delivery. *Id.*

Commercial Impracticability

With regard to the doctrine of impracticability, such defense may be based on “the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made . . . unless the language or the circumstances indicate the contrary.” *Bouchard v. Blunt*, 579 A.2d 261, 263 n.3 (Me. 1990) (citing Restatement (2d) of Contracts § 261, cmt. a (1981)). Although performance does not have to be “absolutely impossible” in order for the doctrine to apply, it must be rendered more than difficult or “impractical.” *Id.* (citing Restatement (2d) of Contracts § 261, cmt. d); *see also Oulette v. Bolduc*, 440 A.2d 1042 (Me. 1982) (holding that, in the state of Maine, a change in the conditions of a contract, if material and substantial, may relieve the impacted party(ies) of the contractual obligations to which both parties originally assented).

Statutory Defenses

11. M.R.S.A. § 2-614

(Substituted Performance - Sale of Goods)

Section 2-614 of the Maine Uniform Commercial Code applies only to contracts for the sale of “goods” (as opposed to services or construction). Section 2-614(1) permits a party to provide substituted performance if, “without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available.” Under this Article, in the absence of specific agreement, the normal or usual facilities enter into the agreement either through the circumstances, usage of trade or prior course of dealing.

There must be a true commercial impracticability to excuse the agreed performance and justify a substituted performance under Section 2-614. When this is the case a reasonable substituted performance tendered by either party should excuse him from strict compliance with contract terms which do not go to the essence of the agreement.

Section 2-614(2) provides that the seller may withhold or stop delivery if “the agreed means or manner of payment fails because of domestic or foreign governmental regulation” unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. In the event that delivery has already been made, “payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.”

11 M.R.S.A. § 2-615

(Excuse by Failure of Presupposed Conditions - Sale of Goods)

This section of the Maine Uniform Commercial Code applies only to contracts for the sale of “goods” (as opposed to services or construction). Except so far as a seller may have assumed a greater obligation and subject to 2-614 on substituted performance, non-performance is excused “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.” Under this Maine statute, a seller is not excused from all performance if seller’s capacity to perform is not wholesale. Rather, where possible, seller “must allocate production and deliveries among his customers...in any manner which is fair and reasonable.” Finally, the seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required among seller’s customers (including buyer), of the estimated quota thus made available for the buyer.

11 M.R.S.A. § 2-1404

(Substituted Performance - Lease Contracts)

This section of the Maine Uniform Commercial Code applies to lease agreements. Section 2-1404(1) provides that substitute performance must be tendered and accepted where a commercially reasonable substitute is available and without fault of the lessee, the lessor and the supplier, the agreed berthing, loading or unloading facilities fail, the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable.

Section 2-1404(2) provides that the lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery if “the agreed means or manner of payment fails because of domestic or foreign governmental regulation” unless the lessee provides a means or manner of payment that is commercially a substantial equivalent. In the event that delivery has already been made, “payment by the means or in the manner provided by the regulation discharges the lessee’s obligation unless the regulation is discriminatory, oppressive or predatory.”

11 M.R.S.A. § 2-1405

(Excused Performance - Lease Contract)

This section of the Maine Uniform Commercial Code applies to lease agreements. Subject to § 2-1404 on substituted performance, § 2-1405(1) provides that a delay in delivery or non-delivery in whole or in part by a lessor or a supplier who otherwise complies with the requirements of Section 2-1405 is not in 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.”

Under this Maine statute, a lessor or supplier is not excused from all performance if lessor’s or supplier’s capacity to perform is not wholesale. Rather, where possible, lessor or supplier “must allocate production and deliveries among their 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’s or supplier’s own requirements for further manufacture. The lessor or supplier may so allocate in any manner that is fair and reasonable.” Finally, the lessor must 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 non-delivery and, if allocation is required under subsection (2), of the estimated quota thus made available for the lessee.

Notable Maine Cases

- *Bouchard v. Blunt*, 579 A.2d 261 (Me. 1990) - Imposition by planning board of requirement for public sewerage after developer had sold lot did not trigger the doctrine of impracticability of performance, as the requirement was not so onerous as to require abandonment of the subdivision, but did represent a change in the contract which, if found to be material and substantial, could relieve the vendor and the purchasers of their contractual obligations.
- *Cohen v. Morneault*, 120 Me. 358 (1921) - Where agreement was not to sell or convey a particular car of potatoes, but a car of any potatoes answering a certain description, containing no condition, expressed or implied, destruction of a car of potatoes in shipment did not excuse nondelivery, and seller was liable for damages.
- *Lakeman v. Pollard*, 43 Me. 463, 466 (1857) - Holding that a cholera epidemic in the vicinity of a saw mill was a force majeure event that rendered performance by a contractor impossible by disease or disability, and which entitled him to recover in quantum meruit for the work he did perform.

Maryland

Contractual *Force Majeure*

Maryland law of excusability elevates common law defenses above contractual defenses. In other words, Maryland courts are inclined to apply general principles of impossibility and frustration of purpose even, perhaps, where the contract contains a *force majeure* clause. The Maryland case law articulating principles of excusability most commonly involve intervening “acts of God” that delay, hinder, or prevent performance.

“Act of God” Defense

In *Mark Downs, Inc. v. McCormick Properties, Inc.*, the Maryland Court of Appeals declared: “An ‘Act of God’ will excuse mortal man from responsibility only if God is the sole cause.” 51 Md. App. 171, 187 (1982). When shaping this defense, the Court defined the term ‘Act of God’ in accordance with an 1858 decision of the Maryland Court of Appeals—“a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone; such as the violence of the winds or seas, lightning, or other natural accident.” *Fergusson v. Brent*, 12 Md. 9, 31 (1858) (internal citation omitted). The “act of God” “must be the immediate cause of the loss, and without which it would not have occurred.” *Id.*

Negligence by the defendant can nullify the act of God defense. See *Freter v. Embassy Moving & Storage Co., Inc.*, 218 Md. 12, 15 (1958) (holding that “act of God” defense did not exonerate warehouseman from liability where he let goods stay wet after a hurricane and took no further action to mitigate additional damage to goods).

Frustration of Purpose / Legal Impossibility

Maryland courts have adopted the doctrine of frustration of purpose. As explained by the Court of Appeals, the “general principle underlying commercial frustration is that where the purpose of a contract is completely frustrated and rendered impossible of performance by a supervening event or circumstance, the contract will be discharged.” *Montauk Corp. v. Seeds*, 215 Md. 491, 499 (1958). To determine whether obligations have been excusably frustrated by an intervening event, courts will look at three factors:

- (1) whether the intervening act was reasonably foreseeable;
- (2) whether the act was an exercise of sovereign power; and
- (3) whether the parties were instrumental in bringing about the intervening event.

Id. The doctrine is applied sparingly, and is limited to cases of hardship and where the intervening event was unforeseeable. See *Md. Tr. Co. v. Tulip Realty Co. of Md.*, 220 Md. 399, 416 (1959) (“[W]ith respect to leases, the doctrine of frustration has been limited to cases of extreme hardship. In any event the

lessee must prove that the risk of the frustrating event was not reasonably foreseeable and that the value of the leased premises was substantially or totally destroyed.”).

The doctrine of legal impossibility is slightly different from frustration of purpose. Under the former: “If a contract is legal, when made, and no fault on the part of the promisor exist, the promisor has no liability for failing to perform the promised act, after the law itself subsequently forbids or prevents the performance of the promise.” *Wischhusen v. Am. Medicinal Spirits Co.*, 163 Md. 565 (1933). “In order to succeed under this theory, however, performance under the contract must be objectively impossible.” *Id.* High cost of performance is not enough to excuse performance. See *Acme Mkts., Inc. v. Dawson Enters., Inc.*, 253 Md. 76, 89 (1969) (noting that performance is not impossible even when performance is likely “inconvenient,” “profitless,” and “expensive”).

Statutory Defenses

Maryland Commercial Code § 2-614 (Substituted Performance)

Under this provision of the Maryland Commercial Code, where an agreed-upon delivery method becomes unavailable due to commercial impracticability, a commercially reasonable substitute, when available, must be used and accepted. Further, if the agreed-upon method of payment becomes impossible because of government regulation, “the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.”

Maryland Commercial Code § 2-615 (Excuse By Failure of Presupposed Conditions)

This provision of the Maryland Commercial Code applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance or delay where such performance “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 invalid.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure*.

In *Heat Exchangers, Inc. v. Map Construction Corporation*, the Maryland Court of Special of Appeals elucidated the proof requirements for a § 2–615 defense: “(1) a contingency must occur (2) performance must thereby be made ‘impracticable’ and (3) the non-occurrence of the contingency must have been a basic assumption on which the contract was made.” 34 Md. App. 679, 684 (1977) (quoting *Neal-Cooper Grain Co. v. Tex. Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974)). The court affirmed liability for a breach of a sole source contract where the contingency was clearly foreseeable,

because the seller delayed for approximately two months its order for parts while continuing to assure the buyer it would meet the original delivery date. *Id.* at 688–90.

Notable Maryland Cases

- *101 Geneva, LLC v. Elefant*, No. 1357, 2016 WL 327383 (Md. Ct. Spec. App. 2016) (unreported decision) - Holding that frustration of commercial purpose three-pronged test was not satisfied where a year-long delay in ratification of a foreclosure sale was reasonably foreseeable, thus failing the first prong.
- *White v. North*, 121 Md. App. 196 (1998), vacated on other grounds, 356 Md. 31 (1999) - Noting that an “unwarranted hardship” created by one’s “negligent omission” shall void a *force majeure* defense.
- *Heat Exchangers, Inc. v. Map Constr. Corp.*, 34 Md. App. 679 (1977) - Stating the proof requirements for a § 2–615 defense: “(1) a contingency must occur (2) performance must thereby be made ‘impracticable’ and (3) the non-occurrence of the contingency must have been a basic assumption on which the contract was made.”
- *Levine v. Rendler*, 272 Md. 1 (1974) - Rejecting developer’s legal impossibility argument premised on county’s revised regulation that rendered performance more expensive, therefore changing the original obligation substantially.
- *Freter v. Embassy Moving & Storage Co., Inc.*, 218 Md. 12 (1958) - Holding that “act of God” defense did not exonerate warehouseman from liability where he let goods stay wet after a hurricane and took no further action to mitigate additional damage to goods.

Massachusetts

Contractual *Force Majeure*

In Massachusetts, unambiguous contracts will be enforced according to their terms. *Sherman v. Emp'rs' Liab. Assurance Corp.*, 343 Mass. 354, 356 (1961). To determine the parties' intent, Massachusetts courts construe *force majeure* clauses with reference to other contract clauses governing the terms of the parties' performance obligations. *Goldman Envtl. Consultants, Inc. v. Kids Replica Ballpark, Inc.*, 964 N.E. 2d 370, at *1–2 (Mass. App. Ct. 2012) (unpublished decision) (citing *Baetjer v. New England Alcohol Co.*, 66 N.E. 2d 798, 801 (Mass. 1946)).

Where a party seeks to avoid liability for non-performance based on the occurrence of a *force majeure* event, Massachusetts courts look to whether the alleged *force majeure* event proximately caused the nonperformance. *Bellerman vs. Fitchburg Gas & Elec. Light Co.*, No. WOCV0923B 2009 WL 3086005, at *2–3 (Mass. Super. 2009).

Most *force majeure* clauses include a contingency for “act of God.” Massachusetts courts have defined an act of God as “an irresistible physical force not attributable in any degree to the conduct of man and not in reason preventable by human foresight, strength or care.” *L. G. Balfour Co. v. Ablondi & Boynton Corp.*, 338 N.E.2d 841, 844 (1975) (quoting *Hecht v. Boston Wharf Co.*, 107 N.E. 990, 991 (1915)). A party may escape liability for damage resulting from an act of God only when such event is of such magnitude that the damage cannot be reasonably anticipated, or when reasonable preventative measures are insufficient to avoid the damage. *Id.*

If parties unambiguously allocate the risk of specified *force majeure* events by contract, the courts should not need to evaluate whether such event was foreseeable. However, where the parties do not include a *force majeure* clause in their contract, they must resort to common law remedies such as commercial frustration of purpose. In Massachusetts, absent a *force majeure* clause, a court's decision whether to excuse an impacted party's performance during a *force majeure* event depends on the foreseeability of such event. *Saab v. Norton Family, Inc.*, No. 9641, 2000 WL 910385, at *2 (Mass. App. Ct. 2000).

Commercial Impracticability

In Massachusetts, performance under a contract is excused on the grounds of impracticability if the hardships or risks “are so unusual and have such severe consequences that they must have been beyond the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties.” *Mishara Constr. Co., Inc. v. Transit–Mixed Concrete Corp.*, 365 Mass. 122, 129 (1974). Factors to be considered include “the foreseeability of the supervening event, allocation of the risk of the occurrence of the event, and the degree of hardship to the promisor.” *Chase Precast Corp. v. John J. Paonessa Co.*, 409 Mass. 371, 375 n.4 (1991).

A temporary impossibility or impracticability of performance suspends the duty to perform while the impossibility or impracticability exists; however, it does not excuse performance after the impossibility or impracticability ends, unless such later performance would subject the promisor to a substantially greater

burden than would have been imposed without the temporary impossibility or impracticability. *Fauci v. Denehy*, 332 Mass. 691, 696–97 (1955); *King v. Allen*, 5 Mass. App. Ct. 868, 869 (1977).

Impossibility / Frustration of Purpose

The Supreme Judicial Court has held that frustration of purpose is a companion rule to the doctrine of impossibility. *Karaa v. Kuk Yim*, 86 Mass. App. Ct. 714, 717 (2014). The court has adopted the definition in the Second Restatement of Contracts § 265. *Chase Precast Corp. v. John J. Paonessa Co.*, 409 Mass. 371, 375 (1991). “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.” When applying the doctrine of frustration of purpose, a judge must consider “the foreseeability of the supervening event, allocation of the risk of occurrence of the event, and the degree of hardship to the promisor.” *Id.* at 375 n.4.

Under the doctrine of frustration of purpose, the performance of the contract is not impossible or impracticable, but because of unanticipated events for which the party seeking to avoid the contract is not responsible, the other party’s performance would be totally useless or valueless to him. See *Chase Precast Corp. v. John J. Paonessa Co.*, 28 Mass. App. 639, 644 n.5 (1990), *aff’d*, 409 Mass. 371 (1991) (“Performance [by highway contractor’s purchasing of concrete median barriers after state highway department canceled their use] was not literally impossible.”). It is not sufficient that a particular event has made a party’s performance more difficult or unprofitable; rather, it is essential that the purpose or object of the contract, which was within the contemplation of both parties, has been defeated. *Perry v. Champlain Oil. Co.*, 101 N.H. 97 (1957). “The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.” *Mass. Mun. Wholesale Elec. Co. v. Town of Danvers*, 411 Mass. 39, 52 n.8 (1991). However, a party who assumes the risk of the happening of an event making the contract less advantageous for him is not excused from performance and cannot invoke the doctrine of frustration of purpose.

Statutory Defenses

106 M.G.L.A. § 2-614

(Substituted Performance)

Section 2-614 of the Massachusetts Uniform Commercial Code applies only to contracts for the sale of “goods” (as opposed to services or construction). Section 2-614(1) permits a party to provide substituted performance if, “without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.” *Cf.* § 2-615 (Excuse by Failure of Presupposed Conditions) which deals with excuse and complete avoidance of the contract where the occurrence or non-occurrence of a contingency which was a basic assumption of the contract makes the expected performance impossible. The Comments to this section provide that there must be a true commercial impracticability to excuse the agreed to performance and justify a substituted performance. When this is the case a reasonable substituted performance tendered by either party

should excuse him from strict compliance with contract terms which do not go to the essence of the agreement.

Section 2-614(2) provides that the seller may withhold or stop delivery if “the agreed means or manner of payment fails because of domestic or foreign governmental regulation” unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. In the event that delivery has already been made, “payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.”

106 M.G.L.A. § 2-615

(Excuse by Failure of Presupposed Conditions)

This section of the Massachusetts Uniform Commercial Code applies only to contracts for the sale of “goods” (as opposed to services or construction). Except so far as a seller may have assumed a greater obligation and subject to 2-614 on substituted performance, non-performance is excused “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.” Under this Massachusetts statute, a seller is not excused from all performance if seller’s capacity to perform is not wholesale. Rather, where possible, seller “must allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” Finally, the seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required among seller’s customers (including buyer), of the estimated quota thus made available for the buyer.

Notable Massachusetts Cases

- *Gen. Dynamics Info. Tech., Inc. v. Wireless Props., LLC*, 714 F. Supp. 2d 211 (D. Mass. 2020) - Where contract contains notice and mitigation obligations on the impacted party, in the event of a *force majeure*, party must comply with such requirements.
- *Harper v. N. Lancaster, LLC*, 132 N.E.3d 555 (Mass. App. Ct. 2019) (unpublished decision) - In evaluating whether *force majeure* event was beyond the control of defendant, court determined that payment obligations in settlement agreement were not contingent on conditions where no limitation was included in parties’ settlement agreement or agreement for judgment.
- *Nantasket Beachfront Condominiums, LLC v. Hull Redevelopment Auth.*, 87 Mass. App. Ct. 455 (2015) - Party’s inability to obtain financing did not constitute a *force majeure* event excusing its performance.
- *Karaa v. Kuk Yim*, 86 Mass. App. Ct. 714 (2014) - Where residential tenant knew or should have known of possibility that her family’s visa status might change and voluntarily undertook that risk, doctrine of frustration of purpose did not excuse the tenant’s obligations to pay rent under lease,

notwithstanding tenant's claim that her principal purpose in leasing property was to send her daughter to school locally.

- *Gurwitz v. Mercantile/Image Press, Inc.*, No. 051887A, 2006 WL 1646144 (Mass. Super. Ct. 2006) - Discussing the related concepts of frustration of purpose and impracticability, Massachusetts courts have held that economic downturns and other market shifts making performance more difficult do not constitute unanticipated circumstances that excuse performance.
- *Ferguson v. Host Int'l, Inc.*, 53 Mass. App. Ct. 96 (2001) - Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.
- *Iodice v. Bradco Cleaners, Inc.*, 1993 Mass. App. Div. 54, 1993 WL 71040 (1993) - Retail lessee in shopping center was not excused from obligations under lease after unexpected departure of center's anchor stores and consequent reduction of consumer traffic and business opportunity in center, since risk of economic downturn in center was imposed exclusively on lessee.
- *Itek Corp. v. 1st Nat'l Bank of Boston*, 730 F.2d 19 (1st Cir. 1984) - *Force majeure* provision in contract between American manufacturer and Iranian government, permitting cancellation of the contract should United States government cancel manufacturer's necessary export licenses, was triggered when the license was suspended and not renewed, there being virtually no probability of renewal, due to intervention of Iranian revolution; such circumstances showed cancellation.
- *Essex-Lincoln Garage, Inc. v. City of Boston*, 342 Mass. 719 (1961) - Lease of parking facility would not be rescinded due to city's change in traffic pattern resulting in diminution of business at parking facility, since this was risk assumed by lessee.
- *Baetjer v. New England Alcohol Co.*, 319 Mass. 592 (1946) - Buyer of Puerto Rican molasses assumed known risk of inability to obtain shipping because of war conditions.

Michigan

Contractual *Force Majeure*

Generally, in Michigan, “the purpose of a force-majeure clause is to relieve a party from penalties for breach of contract when circumstances beyond the party’s control render performance untenable or impossible.” *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich. 437, 438–39 (2015) (citing *Erikson v. Dart Oil & Gas Corp.*, 189 Mich. App. 679 (1991)). Courts will construe the clause in harmony with contract law by honoring the intent of the parties and giving terms their ordinary meaning. *Id.* at 446 (citation omitted). Indeed, these clauses “are typically narrowly construed, such that the clause will generally only excuse a party’s nonperformance if the event that caused the party’s nonperformance is specifically identified.” *Id.* (internal quotation and citations omitted).

Furthermore, a party may not invoke a *force majeure* clause to excuse performance where the delaying condition was caused by the party invoking it or could have been prevented by exercise of prudence, diligence, and care. *Erikson*, 189 Mich. App. at 688 (citation omitted). A party’s “failure to explore or utilize available options to overcome the delaying condition can constitute lack of due diligence.” *Id.* (citation omitted). In addition, to the extent the reason for a delay in performance is the government, the court will presume that, at the time of the contract, the parties had knowledge of any existing law, meaning that application or enforcement of that law is not an excusable *force majeure* event. *Id.*

Commercial Impracticability

Michigan courts have applied the doctrine of commercial impracticability set forth in the Second Restatement of Contracts, which provides: “Where . . . 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 to the contrary.” See *Liggett Rest. Grp., Inc. v. City of Pontiac*, 260 Mich. App. 127, 133 n.9 (2003) (citing Restat. (2d) of Contracts § 261).

A shift in the market catalyzing a change in profits will not excuse performance under the doctrine of commercial impracticability. See *Hemlock Semiconductor Operations, LLC v. SolarWorld Indus. Sachsen GmbH*, 867 F.3d 692, 703–04 (6th Cir. 2017); *Karl Wendt Farm Equip. Co., Inc. v. Int’l Harvester Co.*, 931 F.2d 1112, 1117–18 (6th Cir. 1991) (citing Restat. (2d) of Contract § 261); *Chainworks, Inc. v. Webco Indus., Inc.*, No. 1:05-CV-135, 2006 WL 461251, at *9 (W.D. Mich. 2006).

Impossibility / Frustration of Purpose

Michigan considers the doctrines of commercial impracticability and impossibility to be similar, but not quite the same. See *Liggett Rest. Grp.*, 260 Mich. App. at 133; *Hemlock Semiconductor Corp. v. Deutsche Solar GmbH*, 116 F. Supp. 3d 818, 834 (E.D. Mich. 2015); *Flathead-Mich. I, LLC v. Peninsula Dev., L.L.C.*, No. 09–14043, 2011 WL 940048, at *4 (E.D. Mich. 2011).

Under the doctrine of frustration, a party must show three elements: “(1) the contract must be at least partially executory; (2) the frustrated party’s purpose in making the contract must have been known to both parties when the contract was made; (3) 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.” *Liggett Rest. Grp.*, 260 Mich. App. at 134–35 (citing Restat. (2d) of Contract § 265).

Similarly, impossibility will excuse performance only if the intervening event objectively frustrates one party’s performance.. *Roberts v. Farmers Ins. Exch.*, 275 Mich. App. 58, 73–74 (2007) (citing *Bissell v. L.W. Edison Co.*, 9 Mich. App. 276, 284 (1967)). While the impossibility need not be absolute, “there must be a showing of impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.” *Id.* at 74 (internal quotation and citation omitted). Performance is excused “if an unanticipated circumstance had made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.” *Id.*

While an event’s lack of foreseeability at the time of contracting may pass muster, “[s]ubsequent 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].” *Chase v. Clinton Cty.*, 241 Mich. 478, 484 (1928) (citations omitted); see also *Milligan v. Haggerty*, 296 Mich. 62, 71 (1941); *Vergote v. K Mart Corp.*, 158 Mich. App 96, 110 (1987).

Statutory Defenses

Mich. Comp. Laws § 440.2614

(Substituted Performance; Acceptance, Payment)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Mich. Comp. Laws § 440.2615

(Failure of Presupposed Conditions; Nondelivery, Partial Delivery, Excuse)

This provision of the Michigan Uniform Commercial Code also applies only to contracts for the sale of goods and excuses non-performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller must seasonably notify the buyer of any delay or non-delivery due to *force majeure*.

Mich. Comp. Laws §§ 440.2934, 440.2935
(Substituted Performance/Excused Performance)

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 440.2802, 440.2803(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable Michigan Cases

- *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich. 437 (2015) - Recognizing that economic hardships caused by market shifts could not trigger force majeure clause to excuse obligation to purchase polysilicon.
- *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn., LLC*, 871 F. Supp. 2d 843 (D. Minn. 2012) - Interpreting Michigan law to conclude that the 2008 financial crisis is insufficient to trigger force majeure clause because failure to obtain financing is a foreseeable event.
- *City of Flint v. Chrisdom Props., Ltd.*, 283 Mich. App. 494 (2009) - Concluding that plaintiff delayed defendant developer's receipt of construction permit, thereby frustrating purpose of contract.
- *Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C.*, 276 Mich. App. 146 (2007) - Holding that former employees could not rely on obligation to relocate after office closure to excuse nonperformance of client solicitation clause because this circumstance was foreseeable.
- *Erikson v. Dart Oil & Gas Corp.*, 189 Mich. App. 679 (1991) - Holding that failure to acquire permit in time did not qualify as a *force majeure* circumstance to permit extension of lease.
- *Molnar v. Molnar*, 110 Mich. App. 622 (1981) - Unexpected death of son before his eighteenth birthday frustrated purpose of divorce settlement that obligated ex-husband to pay partial mortgage payments for the home where ex-wife and son resided.
- *Sheldon-Seatz, Inc. v. Coles*, 319 Mich. 401 (1947) - Finding that lack of profit as a result of government ceiling on price of scooter bikes did not excuse performance.
- *Chase v. Clinton Cty.*, 241 Mich. 478 (1928) - Denying excuse of economic hardship brought by World War I.

Minnesota

Contractual *Force Majeure*

In Minnesota, the purpose of a *force majeure* clause is to disclaim responsibility for damages sustained by events “which human vigilance and industry can neither foresee nor prevent.” *State v. Dist. Ct., Ramsey Cty.*, 138 Minn. 260, 262 (1917) (internal quotation and citation omitted). The *force majeure* clause excuses “performance in the event an unforeseen circumstance occurs.” *Melford Olsen Honey, Inc. v. Adeo*, 452 F.3d 956, 963 (8th Cir. 2006).

Minnesota courts will interpret *force majeure* clauses so that the contract is construed as a whole, with its terms harmonized. *Johnson Bros. Corp. v. Rapidan Redevelopment Ltd. P’ship*, 423 N.W.2d 725, 729 (Minn. App. 1988). That is, the “primary goal of contract interpretation is to determine and enforce the intent of the parties.” *Toll Bros., Inc. v. Sienna Corp.*, No. 06–4378 (DSD/JJG), 2009 WL 961379, at *6 (D. Minn. 2009) (quoting *Travertine Corp. v. LexingtonSilverwood*, 683 N.W.2d 267, 271 (Minn. 2004)). The party invoking the defense bears the burden of proof. *Id.* Where the *force majeure* clause includes an explicit notice provision, a party may not find relief from the clause unless it has advanced such notice to the other side. *Id.*

Commercial Impracticability

Minnesota courts have applied the doctrine of commercial impracticability set forth in the Second Restatement of Contracts, which provides: “Where . . . 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 to the contrary.” *J.J. Brocksbank Co. v. Budget Rent–A–Car Corp.*, 337 N.W.2d 372, 377 (Minn. 1983) (citing Restat. (2d) of Contract § 261).

For sales contracts, 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) (citing Minn. Stat. Ann. § 336.2-615).

“Under the doctrine of commercial impracticability, the element of unforeseeability requires a determination of whether the risk of the given contingency was so unusual or unforeseen and would have such severe consequences that to require performance would be to grant the promisee an advantage for which he could not be said to have bargained in making the contract.” *Upsher-Smith Labs., Inc. v. Mylan Labs., Inc.*, 944 F. Supp. 1411, 1429 (D. Minn. 1996) (citation omitted); see *Barbarossa & Sons*, 265 N.W.2d at 659–60 (“A partial failure of a seller’s source of supply generally has been treated as a foreseeable contingency, the risk of which is allocated to the seller absent a specific provision to the contrary in the contract.”).

Frustration of Purpose

Minnesota also recognizes the doctrine of frustration. See *Nat'l Recruiters, Inc. v. Toro Co.*, 343 N.W.2d 704, 707 (Minn. App. 1984) (citing *J.J. Brooksbank Co.*, 337 N.W.2d at 377). For a party to avail itself of this defense requires meeting three elements: first, the principal purpose of the contract must be frustrated; second, the party invoking the defense must be without fault; and third, the non-occurrence of the event must be a basic assumption on which the contract was made. *Id.* (citation omitted). The principal purpose “must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense.” *City of Savage v. Formanek*, 459 N.W.2d 173, 176 (Minn. App. 1990) (quoting Restat. (2d) of Contract § 265, cmt. a (1981)).

“It is not enough that the transaction has become less profitable for the affected party;” rather, the “frustration must be so severe that it is not fairly to be regarded as within the risks . . . assumed under the contract.” *Id.* (citation omitted). Further, frustration does not mean that the purpose of the contract has become impossible, but rather the purpose must be “*substantially* frustrated.” *Id.* at 177 (internal citation omitted) (emphasis in original). The fact that the intervening event is foreseeable “does not compel the conclusion that its non-occurrence was not such a basic assumption.” *Id.* Furthermore, a party may not use this doctrine by pointing to frustration of the *other* party’s performance. See *Little Canada Charity Bingo Hall Ass’n v. Movers Warehouse, Inc.*, 498 N.W.2d 22, 25 (Minn. App. 1993) (rejecting the “use [of] the defense of frustration of purpose as a sword rather than a shield” and noting absence of case law that allows a party “to avoid its contractual duties based solely upon the frustration of the other party’s purpose”).

Impossibility

Relatedly, Minnesota recognizes an impossibility defense to the extent a circumstance arises after the execution of the contract that renders the contract void for reasons beyond the control of the party. *In re Mr. Movies, Inc.*, 287 B.R. 178, 186 (Bankr. D. Minn. 2002) (citations omitted). In other words, the doctrine of impossibility does not apply if the party is responsible for the circumstance. *Id.*

Likewise, impossibility normally applies in the event of unforeseeable impossibilities. *Id.* (citation omitted); see also *Powers v. Siats*, 244 Minn. 515, 521 (1955) (“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.”) (citation omitted).

Statutory Defenses

Minn. Stat. Ann. § 336.2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the

agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Minn. Stat. Ann. § 336.2-615

(Excuse by Failure of Presupposed Conditions)

This provision also applies only to contracts for the sale of goods and excuses non-performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller must seasonably notify the buyer of any delay or non-delivery due to *force majeure*.

Minn. Stat. Ann. §§ 336.2A-404, -405

(Substituted Performance; Excused Performance)

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 336.2A-102, 336.2A-103(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable Minnesota Cases

- *Toll Bros., Inc. v. Sienna Corp.*, No. 06–4378 (DSD/JJG), 2009 WL 961379 (D. Minn. 2009) - Ruling that a developer failed to prove *force majeure* defense when the alleged intervening circumstances were within the developer’s control to avoid, such as conducting a feasibility study, submitting a draft of an environmental report, and applying for a watershed permit; and further finding that the developer neglected to provide advanced notice of defense.
- *M.W. Johnson Constr., Inc. v. Progress Land Co.*, No. A04–2303, 2005 WL 1869679 (Minn. App. 2005) (unpublished decision) - Concluding that the delay in receiving city approval is a condition beyond land developer’s control and, therefore, excused performance by *force majeure* clause.
- *Metro. Sports Facilities Comm’n v. Minn. Twins P’ship*, 638 N.W.2d 214 (Minn. App. 2002) - Finding that sports commission established substantial likelihood of success in support of injunctive relief in part because *force majeure* clause did not excuse professional baseball team from playing in the stadium.

- *In re Mr. Movies, Inc.*, 287 B.R. 178 (Bankr. D. Minn. 2002) - Denying debtor's argument that the bankruptcy made it impossible to comply with contract because the decision to file for bankruptcy was a self-inflicted wound.
- *City of Savage v. Formanek*, 459 N.W.2d 173 (Minn. App. 1990) - Holding that, because the parties assumed at the time of contract no further permitting was necessary for development which proved incorrect later, the contract was frustrated.
- *Opera Co. of Bos. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094 (4th Cir. 1987) (applying Minnesota law) - Remanding case to determine "whether the possible foreseeability of the power failure in this case was of that degree of reasonable likelihood as to make improper the assertion by Wolf Trap of the defense of impossibility of performance."
- *Selland Pontiac-GMC, Inc. v. King*, 384 N.W.2d 490 (Minn. App. 1986) - Recognizing commercial impracticability where contract explicitly identified the supplier and supplier then ceased business.
- *Village of Minneota v. Fairbanks, Morse & Co.*, 226 Minn. 1 (1948) - Holding that, while "inconvenience or increased costs of compliance ordinarily will not excuse a defendant from performance," the bombing of Pearl Harbor was a "unique situation" that prohibited company from constructing for five years, thereby rendering completion impossible, if only temporarily.

Mississippi

Contractual *Force Majeure*

The majority of Mississippi cases dealing with the doctrine of *force majeure* discuss the state's *force majeure* statute, which applies to the sale of goods. Miss. Code. Ann. § 75-2-617.

With respect to contractual *force majeure* provisions, Mississippi courts recognize that *force majeure* is an affirmative defense and the party asserting defense bears the burden of proving that its performance is excused. See *Pro-Logistics Forwarding (Pty) Ltd. v. Robison Tire Co.*, No. 2:13CV83-KS-MTP, 2013 WL 6507347, at *4 (S.D. Miss. 2013). Mississippi courts are likely to review the language of the clause and then determine whether the supervening event alleged to excuse performance falls under one of the categories of the provision. *Day v. Tenneco, Inc.*, 696 F. Supp. 233, 235 (S.D. Miss. 1988) (analyzing both contractual *force majeure* clauses and the Mississippi statute). The *force majeure* event must not have been contemplated by the parties and must be outside the risk the party agreed to accept when it consented to the contract. *Id.* The fact that an event is “unexpected . . . is insufficient by itself to show that an event is a force majeure.” *Id.*

In addition, Mississippi courts have held that an “Act of God” will excuse non-performance of duty created by law, but not of duty created by contract. “[I]f a party desires relief from the performance of his contract because of an act of God, he must contract specially against that contingency.” *Bunting v. Orendorf*, 152 Miss. 327, 120 So. 182, 183 (1929); see *Mars v. Hendon*, 178 Miss. 157, 171 So. 880 (1937) (holding that, at common law, an act of God excused performance of obligation, unless specially provided for in undertaking); *Mitchell v. Hancock Cty.*, 91 Miss. 414 (1908) (bridge constructor that provided a statutory bond stipulating that bridge “shall be removed from any cause, fire excepted” for 5 years was not excused from performance where bridge was destroyed by an unprecedented flood). Accordingly, under Mississippi law, in order to raise the defense of contractual *force majeure*, a *force majeure* clause must be specifically included in the parties’ contract.

Commercial Impracticability / Impossibility / Frustration of Purpose

Mississippi courts also recognize the common law defenses of commercial impracticability, impossibility, and frustration of purpose.

“[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 v. Green*, 618 So. 2d 76, 78 (Miss. 1993) (quoting *Browne & Bryan Lumber Co. v. Toney*, 188 Miss. 71, 194 So. 296, 298 (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 (citing *Toney*, 194 So. at 298). 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 common situations 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; and 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 (quoting *Toney*, 194 So. at 298; see also *Watkins Dev., LLC v. Jackson Redevelopment Auth.*, 283 So. 3d 170, 179 (Miss. 2019) (discovery that building had construction flaw which would cost \$1.5 million to remedy did not excuse tenant’s nonperformance of construction deadlines imposed as lease obligations because structural faults were within realm of foreseeability and could have been, and indeed were, dealt with by contract).

Mississippi courts have held that the commercial impracticability doctrine “may be utilized only when the promisor has exhausted all its alternatives, when in fact it is determined that all means of performance are commercially senseless. There can be little sympathy for contractors who seek refuge behind the label of commercial senselessness (impracticability) without proof that they have made an effort to obtain performance in an alternative fashion.” *Evan Johnson & Sons Constr., Inc. v. State*, 877 So. 2d 360, 367 (Miss. 2004). Accordingly, to invoke commercial impracticability, a party must show that it has taken reasonable efforts to perform and sought alternatives.

Statutory Defenses

Miss. Code Ann. § 75-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Miss. Code Ann. § 75-2-615 (Excuse by Failure of Presupposed Conditions)

This provision applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller must seasonably notify the buyer of any delay or non-delivery due to *force majeure*.

Miss. Code Ann. § 75-2-617 (Force Majeure)

Unlike most states adopting the UCC, the Mississippi Commercial Code also includes a statutory force majeure clause, which provides:

Deliveries 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 manufacture of the goods is dependent. If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller may allocate its available supply among itself and all of its customers, including those not under contract, in an equitable manner. Such deliveries so suspended shall be cancelled without liability, but the contract shall otherwise remain unaffected.

Under this statute, if a contract does not contain a *force majeure* clause, and the contract does not indicate that a party assumes the risk of non-performance, a delay or non-delivery of goods is excusable for any of the causes enumerated. *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652 (Miss. 1975) (applying *force majeure* statute where soybean buyer brought action against farmer to recover damages for breach of soybean delivery contract and farmer asserted that his performance was excused due to a drought. Nonperformance was excused in the absence of an express condition in the contract to the contrary.); see also *Noonan Constr. Co. v. Warren Bros. Co.*, 632 F.2d 1189 (5th Cir. 1980). Further, under the statute, where a seller is impacted by a supervening event, the seller may allocate production and delivers among its customers in a fair and reasonable manner.

Notable Mississippi Cases

- *Watkins Dev., LLC v. Jackson Redevelopment Auth.*, 283 So. 3d 170 (Miss. 2019) - Discovery that building had construction flaw which would cost \$1.5 million to remedy did not excuse tenant's nonperformance of construction deadlines imposed as lease obligations because structural faults were within realm of foreseeability and could have been, and indeed were, dealt with by contract.
- *Evan Johnson & Sons Constr., Inc. v. State*, 877 So. 2d 360, 367 (Miss. 2004) - Holding that commercial impracticability doctrine "may be utilized only when the promisor has exhausted all its alternatives, when in fact it is determined that all means of performance are commercially senseless. There can be little sympathy for contractors who seek refuge behind the label of commercial senselessness (impracticability) without proof that they have made an effort to obtain performance in an alternative fashion."
- *Olin Corp. v. Cent. Indus., Inc.*, 576 F.2d 642 (5th Cir. 1978) - Where contract between fertilizer manufacturer and warehouseman contained broad force majeure provision excusing either party for nonperformance caused by acts of God, and where evidence revealed that flood on Mississippi River interfered with warehouseman's operations for three months during critical season, trial court, applying Mississippi law to manufacturer's suit against warehouseman for alleged breach of warehousing contract, correctly submitted to jury fact question as to whether guaranteed annual payment due under contract should be reduced by reason of flood.

- *Mitchell v. Hancock Cty.*, 91 Miss. 414, 45 So. 571 (1908) - Bridge constructor provided a statutory bond to public owner that stipulated if the bridge “shall be removed from any cause, fire excepted” for 5 years. The bridge was destroyed by an unprecedented flood. The court rejected the contractor’s *force majeure* defense and found that the contractor was liable for rebuilding the bridge because the parties’ contract did not except a casualty such as a flood.

Missouri

Contractual *Force Majeure*

In Missouri, parties “typically address the risk of supervening events in a *force majeure* or other escape clause.” *Clean Unif. Co. St. Louis v. Magic Touch Cleaning, Inc.*, 300 S.W.3d 602, 610 (Mo. App. 2009) (citation omitted). Such a clause is 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.” *Id.* (quoting Black’s Law Dictionary 718 (9th ed. 2009)).

Force majeure clauses cannot relieve a party of a foreseeable event; conversely, the purpose of a *force majeure* clause “is to relieve a party of liability when the parties’ expectations are frustrated due to an unforeseeable occurrence beyond the parties’ control.” *Id.* (internal quotation and citations omitted). And where the clause includes a notice requirement and a party fails to follow that requirement, the party may not invoke the clause. See *ASI Indus. GmbH v. MEMC Elec. Materials, Inc.*, No. 4:06CV951 CDP, 2008 WL 413819, at *4 (E.D. Mo. 2008).

Commercial Impracticability

Missouri courts have applied the doctrine of commercial impracticability set forth in the Second Restatement of Contracts, which provides: “Where . . . 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 to the contrary.” See *Farmers’ Elec. Co-op., Inc. v. Mo. Dep’t of Corrections*, 977 S.W.2d 266, 271 (Mo. 1998) (en banc) (citing Restat. (2d) of Contract § 261); *Gaunt v. Shelter Mut. Ins. Co.*, 808 S.W.2d 401, 407 (Mo. App. 1991) (same). The occurrence of the “supervening, unforeseen event . . . must go to the heart of the contract.” *Mo. Pub. Serv. Co. v. Peabody Cole Co.*, 583 S.W.2d 721, 725–26 (Mo. App. 1979) (citing Mo. Rev. St. § 400.2–615).

Commercial Frustration

Moreover, Missouri recognizes the doctrine of commercial frustration. See, e.g., *Howard v. Nicholson*, 556 S.W.2d 477, 481–84 (Mo. App. 1977). The commercial frustration doctrine arises “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.” *Kassebaum v. Kassebaum*, 42 S.W.3d 685, 698–99 (Mo. App. 2001) (quoting *Howard*, 556 S.W. at 481–82). If the event was reasonably foreseeable, then the parties should have provided for its occurrence in the contract. *Adbar, L.C. v. New Beginnings C-Star*, 103 S.W.3d 799, 801 (Mo. App. 2003) (citing *Werner v. Ashcraft Bloomquist, Inc.*, 10 S.W.3d 575, 577 (Mo. App. 2000)). Without a provision, the promisor assumes the risk. *Id.* To assess foreseeability, courts consider the terms of the contract and the circumstances surrounding the formation of the contract. *Id.*

“The doctrine of commercial frustration grew out of the demands of the commercial world to excuse performance in cases of extreme hardship.” *Kassebaum*, 42 S.W.3d at 699. This doctrine is limited so as to preserve the certainty of contracts. *Howard*, 556 S.W.2d at 483; *accord Shop ‘N Save Warehouse Foods, Inc. v. Soffer*, 918 S.W.2d 851, 862 (Mo. App. 1996). Ultimately, the doctrine’s purpose “is to do equity—to intervene when enforcement of a contract would be unjust. . . . The doctrine determines where the courts should allocate risk for unanticipated happenings which destroy, or nearly destroy, the value or purpose of a contract between two parties which have not brought on the happening.” *Am. Lamintes, Inc. v. J.S. Latta Co.*, 980 S.W.2d 12, 20 (Mo. App. 1998).

Impossibility

Missouri also recognizes the doctrine of impossibility, but only to the extent performance is rendered impossible by an act of God, the law, or the other party. See *Werner*, 10 S.W.3d at 577 (citation omitted); *Kan. City Terminal Ry. Co. v. Atchison, T & S.F. Ry. Co.*, 512 S.W.2d 415, 422 (Mo. App. 1974); see also *Burlington N. & Sante Fe Ry. Co. v. Kan. City S. Ry. Co.*, 45 F. Supp. 2d 847, 852 (D. Kan. 1999) (“The common law doctrine of impracticability is an outgrowth of the doctrine of legal impossibility. . . . Over time, the terms ‘impossibility’ and ‘impracticability’ have become somewhat interchangeable.”) (applying Missouri law); *Deibel v. Deibel*, 512 F. Supp. 135, 139 (E.D. Mo. 1981); cf. *Howard*, 556 S.W. 477 at 482 (recognizing that the doctrine of commercial frustration is close to but distinct from the doctrine of impossibility of performance). This defense is “a rather narrow exception to the general rule of *pacta sunt servanda*—agreements must be observed.” *Mo. Hous. Dev. Comm’n v. Brice*, No. 86–1574 C (5), 1988 WL 142978, at *3 (E.D. Mo. 1988).

A general change in economic conditions that increases expenses will not normally excuse performance, but “extreme and unforeseen difficulties in performance” may provide a legitimate excuse of impossibility. *Kan. City, Mo. v. Kan. City, Kan.*, 393 F. Supp. 1, 7 (W.D. Mo. 1975). Conversely, Missouri courts will not permit an impossibility defense unless “virtually every action possible to promote compliance with the contract has been performed.” *Breitenfeld v. Sch. Dist. off Clayton*, 399 S.W.3d 816, 835 (Mo. 2013) (en banc) (citation omitted).

Statutory Defenses

Mo. Rev. Stat. § 400.2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Mo. Rev. Stat. § 400.2–615 (Excuse By Failure of Presupposed Conditions)

This provision of the Missouri Uniform Commercial Code also applies only to contracts for the sale of goods and excuses non-performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller must seasonably notify the buyer of any delay or non-delivery due to *force majeure*.

**Mo. Rev. Stat. §§ 400.2A-404, 405
(Substituted Performance/Excused Performance)**

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 400.2A-102, 400.2A-103(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable Missouri Cases

- *Clean Uniform Co. St. Louis v. Magic Touch Cleaning, Inc.*, 300 S.W.3d 602 (Mo. App. 2009) - Concluding that *force majeure* clause did not excuse contractor’s contract with a subcontractor where prime contract’s non-renewal was foreseeable.
- *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258 (10th Cir. 2008) - Holding that geological problems were not a *force majeure* event excusing performance where coal company failed to provide notice and instead relied on unproven labor shortage as reason for excuse.
- *McBee v. Gustaff Vandecnocke Revocable Trust*, 989 S.W.2d 170 (Mo. 1999) (en banc) - Destruction of farmhouse by fire did not excuse performance because farmhouse “did not constitute so large a part of the total value of the estate.”
- *Conlon Grp., Inc. v. City of St. Louis*, 980 S.W.2d 37 (Mo. App. 1998) - Rejecting argument that structural problems commercially frustrated contract when problems were foreseeable for 100-year-old building.
- *Mo. Pub. Serv. Co. v. Peabody Cole Co.*, 583 S.W.2d 721 (Mo. App. 1979) - Finding that rising costs borne by coal company did not qualify as an event to trigger doctrine of commercial impracticability.
- *Howard v. Nicholson*, 556 S.W.2d 477 (Mo. App. 1977) - Excusing contractor from building bridal salon when intended tenant declared bankruptcy, an unforeseen event rendering performance of the contract valueless.

- *Kan. City, Mo. v. Kan. City, Kan.*, 393 F. Supp. 1 (W.D. Mo. 1975) - Holding that an intervening law—the Federal Water Pollution Control Act Amendments of 1972—excused the plaintiff from accepting the defendant’s sewage. The federal law imposed treatment of sewage discharged into the Missouri River, leading to unforeseen additional expenses. As a consequence, the court found that the added expense of such treatment would impose a significant, unreasonable burden on the plaintiff.

Montana

Contractual *Force Majeure*

No Montana case has articulated specific parameters for interpreting contractual *force majeure* provisions, other than to say that ordinary rules of contract interpretation apply to *force majeure* clauses. *Sociedad Aeronautica De Santander S.A. v. Weber*, No. CV 09-103-M-DWM-JCL, 2010 WL 2803044, at *4 (D. Mont. 2010).

Indeed, there does not appear to be a single case applying Montana law, in which a court was asked to interpret a contractual *force majeure* clause. One court has suggested in dicta, however, that *force majeure* is *not* a valid defense in Montana where the intervening event is within the control of the party seeking to excuse its own performance. *Edington v. Creek Oil Co.*, 213 Mont. 112, 120 (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.”)

Additionally, certain Montana cases highlight that *force majeure* cannot excuse performance where the parties subsequently modify the contract or waive specific conditions precedent stated in the contract. For instance, in *Hein v. Fox*, the agreement provided that it was only valid if the Montana Director of the Farmer’s Association approved a project to drill a well. 126 Mont. 514 (1953). Although the defendant abandoned his obligation to drill a well under the contract, the trial court found that this failure was excused by the fact that the Director refused to approve the drilling. On appeal, the Montana Supreme Court found that the defendant had waived its right to argue *force majeure* by his receipt of two checks and partial performance of the drilling work. Furthermore, the court stated: “where a party enters into a contract knowing that permission of government officers will be required during the course of performance, that such permission was not forthcoming when required does not constitute an excuse for nonperformance.” *Id.* at 519.

Commercial Impracticability / Frustration of Purpose

Montana cases addressing common law defenses based on intervening events are equally as sparse as cases addressing contractual *force majeure* provisions. The few cases discussing these defenses suggest that the doctrine of commercial impracticability and impossibility are interchangeable in Montana.

In *Cape-France Enterprises v. Estate of Peed*, the Montana Supreme Court observed that the common law defenses based on intervening causes were “invented by the court in order to supplement the defects of the actual contract in the interest of reason, justice and fairness.” 305 Mont. 513, 517 (2001). In that case, the court held that the defendant was excused from performing a contract for the sale of land, which was contingent on the subdivision of the property and the drilling of a well. Specifically, performance was excused by the Montana Department of Environmental Quality’s finding that the land was located on a

groundwater contamination site. In its opinion, the court gave detailed insight of how Montana courts are likely to apply commercial impracticability and impossibility, blending the two concepts:

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. . . . The doctrine of impossibility found in the Restatement is relied upon by various courts . . . conclude[ing] that the doctrine of impossibility is a valid defense not only when performance is impossible, but also when supervening circumstances make performance impracticable. . . . Courts may determine that an act is “impossible” in legal contemplation when it is not practicable. Such an act is impracticable when it can only be done at an excessive, unreasonable and unbargained-for cost. While the doctrine of impossibility or impracticability is not set in stone, it is applied by courts where, aside from the object of the contract being unlawful, the public policy underlying the strict enforcement of contracts is outweighed by the senselessness of requiring performance.

305 Mont. at 517–18 (internal citations omitted); *Voit v. Mertz*, 375 Mont. 551 (2014).

Interestingly, the Montana Supreme Court expanded its analysis not only to include practical and economic considerations, but also to implicate *constitutional* considerations. In holding that performance was excused, the court stated: “Causing a party to go forward with the performance of a contract where there is a very real possibility of substantial environmental degradation and resultant financial liability for cleanup is not in the public interest; is not in the interests of the contracting parties; and is, most importantly, not in accord with the guarantees and mandates of Montana’s Constitution, Article II, Section 3 and Article IX, Section 1.” *Id.* at 520. The constitutional provisions identified in the court’s analysis specifically guaranteed that the “inalienable rights” of Montana citizens include “the right to a clean and healthful environment.” Mont. Const. Art. II.

Not all of the justices in the *Cape-France* case agreed that performance of the contract should have been excused. In a dissenting opinion, one Justice opined that “the majority misapplies the doctrine of impossibility and impracticability” and challenged the constitutional breadth of the majority’s holding. 305 Mont. at 521. Citing to older Montana precedent, the dissent advocated for a stricter construction of common law excusability defenses, writing: “Impossibility of performance is a strict standard that can only be maintained where the circumstances truly dictate impossibility.” *Id.* The dissent went on to contend that “the doctrine of impossibility or impracticability is . . . applied by courts where . . . the public policy underlying the strict enforcement of contracts is outweighed by the senselessness of requiring performance. I respectfully submit that the Court, in employing such vague concepts, has done a disservice to fundamental contract law which will create considerable uncertainty.” *Id.*; *see also CNJ Distrib. Corp. v. D & F Farms, Inc.*, 372 Mont. 28, 37 (2013) (“Impossibility is a defense to performance . . . [and] it is not a defense to a claim alleging poor *quality* of performance.”) (emphasis in original).

Statutory Defenses

Mont. Stat. Ann. § 30-2-614
(Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Mont. Stat. Ann. § 30-2-615
(Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

Mont. Stat. Ann. §§ 40-2A-404/405
(Substituted Performance/Excused Performance)

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 2A-102, -103(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable Montana Cases

- *Sociedad Aeronautica De Santander S.A. v. Weber*, No. CV 09-103-M-DWM-JCL, 2010 WL 2803044 (D. Mont. 2010) - Government’s wrongful seizure of bank deposit made for purchase of helicopter did not qualify as a “circumstance outside the reasonable control of either party,” excusing performance where contract provided for non-refundable deposit and parties agreed to extended closing date on helicopter in consideration of the deposit.
- *Cape-France Enters. v. Estate of Peed*, 305 Mont. 513 (2001) - Excusing performance of land sale contract under doctrine of commercial impracticability where regulatory agency determined that land was located on contaminated groundwater site, which would have resulted in extreme environmental damage and wasted remediation costs.
- *Edington v. Creek Oil Co.*, 213 Mont. 112 (1984) - *Force majeure* clause stated that failure to perform under oil and gas lease was excused where compliance with obligations was “hindered, delayed, prevented, or interrupted.” Appellate court affirmed finding Montana Oil and Gas Commission order to

shut down facility was not a force majeure because order was based on defendant's failure to seal a saltwater pit.

- *Hein v. Fox*, 126 Mont. 514 (1953) - Abandonment of contract to drill a well was not excused by government refusal to permit drilling where evidence suggested that the parties agreed to waive the requirement of government approval in exchange for monetary consideration.

Nebraska

In Nebraska, “a force majeure provision is a contractual provision that allocates 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.” *Blue Creek Farm, Inc. v. Aurora Co-op. Elevator Co.*, 259 Neb. 1032, 1034 (2000) (citing Black’s Law Dictionary 657 (7th ed. 1999)). Such a clause “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 parties’ intervention as could not have been prevented by prudence, diligence and care.” *1st Data Res., Inc. v. Int’l Gateway Exch., LLC*, No. 8:03CV137, 2004 WL 2187566, at *7 (D. Neb. Sept. 28, 2004) (internal citation omitted).

Applying principles of contract law, Nebraska courts will give words in a *force majeure* clause their plain and ordinary meaning as a reasonable person would understand them. See *Kreikemeier v. McIntosh*, 223 Neb. 551, 555 (1986). A contract may be construed against the party preparing it when there is a question as to its meaning. *Id.* Accordingly, a “court is not free to speculate about terms absent from a written contract; where the parties have clearly expressed an intent to accomplish a particular result, it is not the province of a court to rewrite a contract to reflect the court’s view of a fair bargain.” *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 536 (1992) (citation omitted). “The rights of the parties must be measured by the contract which they themselves made.” *Wilson & Co., Inc. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 177 (1950), *abrogated on other grounds, Dowd v. 1st Omaha Sec. Corp.*, 242 Neb. 347, 354, 495 N.W.2d 36, 40 (1993).

Business Necessity / Frustration of Purpose

In Nebraska, the defense of business necessity is “sometimes called impossibility of performance, extreme impracticability, frustration of contract, or implied condition in the promise.” *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 262 (1985). The burden of proof is on the party asserting any one of these defenses. *Id.* at 261. These defenses are not available after complete performance of contract. See *Turbines Ltd. v. Transupport, Inc.*, 285 Neb. 129, 141–42 (2013).

A party may invoke the defense of frustration of contract: “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.” *Cleasby*, 221 Neb. at 263 (citing Restat. (2d) of Contract § 265). “An imprudent or bad bargain in and of itself is not an excuse for nonperformance of a contract.” *Mohrlang v. Draper*, 219 Neb. 630, 635 (1985) (citation omitted); *accord Young v. Tate*, 232 Neb. 915, 919 (1989); *In re Sears*, 536 B.R. 286, 297 (Bankr. D. Neb. 2015).

Commercial Impracticability / Impossibility

The “doctrine of impossibility of performance, often now called impracticability of performance, excuses a promisor’s failure to perform a duty under a contract where performance has been rendered severely impracticable or impossible by unforeseen circumstance.” *Armstrong v. Clarkson Coll.*, 297 Neb. 595, 620

(2017). “[T]he true distinction is not between difficulty and impossibility. A man may contract to do what is impossible. The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor.” *Id.* at 621.

For purposes of commercial impracticability, Nebraska courts have applied the principles set forth in the Second Restatement of Contracts, which provides: “Where . . . 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 to the contrary.” *Cleasby*, 221 Neb. at 263 (citing Restat. (2d) of Contract § 261).

“Performance of a contractual duty is not impracticable merely because it has become inconvenient or more expensive. Mere difficulty of performance is not enough.” *Armstrong*, 297 Neb. at 621 (citations omitted). If there are reasonable alternatives available to overcome any intervening event, then the breaching party may not use this defense. *Id.* at 622 (citations omitted).

Statutory Defenses

Neb. Rev. Stat. Ann. U.C.C. § 2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Neb. Rev. State. Ann. U.C.C. § 2-615 (Excuse by Failure of Presupposed Conditions)

This provision also applies only to contracts for the sale of goods and excuses non-performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent it can still perform, must “allocate production and deliveries among [its] customers . . . in any manner which is fair and reasonable.” The seller must seasonably notify the buyer of any delay or non-delivery due to *force majeure*.

Neb. Rev. State. Ann. U.C.C. §§ 2A-404, -405 (Substituted Performance/Excused Performance)

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 2A-102, -103(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable Nebraska Cases

- *In re Sears*, 536 B.R. 286 (Bankr. D. Neb. 2015) - Rejecting debtor’s defense of frustration hinged on inability to pay for contract as a result of bankruptcy.
- *Turbines Ltd. v. Transupport, Inc.*, 285 Neb. 129 (2013) - Declining to apply common law excusability defenses after contract for sale of a helicopter had been fully performed.
- *1st Data Res., Inc. v. Int’l Gateway Exch., LLC*, No. 8:03CV137, 2004 WL 2187566 (D. Neb. 2004) - Concluding that, in light of the “very broad scope” of the force majeure clause, detrimental actions of affiliate of non-breaching party excused performance of breaching party that depended on affiliate.
- *ConAgra, Inc. v. Bartlett P’ship*, 248 Neb. 933 (1995) - Holding that, where contract did not identify source of crops with particularity, farmer cannot invoke defense of impracticability in light of alternative sources available.
- *Lambert v. City of Columbus*, 424 Neb. 778 (1993) - Finding that failure of source to deliver is unavailing for defense of impracticability.
- *Young v. Tate*, 232 Neb. 915 (1989) - Denying investor’s frustration argument that dissatisfaction of construction development excused payment because this was “within the contemplation of the parties when the agreement was consummated.”
- *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254 (1985) - Excusing termination of manager’s overseas assignment after illness caused manager’s prolonged absence.
- *Wilson & Co., Inc. v. Fremont Cake & Meal Co.*, 153 Neb. 160 (1950), abrogated on other grounds, *Dowd v. 1st Omaha Sec. Corp.*, 242 Neb. 347 (1993) - Finding that an unusual rise in the price of goods was not within *force majeure* clause and therefore cannot excuse performance.
- *Matousek v. Galligan*, 104 Neb. 731 (1920) - Declining to disturb jury finding that, although contract included no *force majeure* clause, seller of hay excused by “act of God” because of torrential rain that inhibited delivery.

Nevada

Contractual *Force Majeure*

To date, no Nevada court has excused performance or declared a contract unenforceable due to an act of God, natural disaster, or other catastrophe. But where *force majeure* clauses are contained in a contract, the court will enforce them, if applicable. For example, in *J.A. Jones Construction Company v. Lehrer McGovern Bovis, Inc.*, the court held that contract's "no damages for delay" provision which excused delay damages where work was delayed or obstructed by "fire, lightning, earthquake, enemy action, act of God or similar catastrophe; by Government restrictions in respect to materials or labor; or by an industry-wide strike beyond Contractor's reasonable control" was valid and enforceable. 89 P.3d 1009, 1015 (Nev. 2004).

Frustration of Purpose / Commercial Impracticability

In Nevada, the defense of impossibility is available to a promisor where his performance is made impossible or highly impractical by the occurrence of unforeseen contingencies. *Nebaco, Inc. v. Riverview Realty Co.*, 482 P.2d 305, 307 (Nev. 1971). Nevada follows Section 261 of the Second Restatement of Contracts and recognizes the impracticability defense to a contract in both UCC and service contracts, though the standards for showing impracticability under the two kinds of contracts differ somewhat. See *Helms Constr. & Dev. Co. v. State, ex rel. Dep't of Highways*, 634 P.2d 1224, 1225 (Nev. 1981).

Under the common law, performance of contractual obligations is excused if performance is made impossible or highly impractical by the occurrence of unforeseen contingencies. But if the unforeseen contingency is one which should have been anticipated this defense is unavailable. *Helms*, 634 P.2d at 1225 (citations omitted) (Arab oil embargo of the late 1970s which dramatically increased costs of petroleum products was not an unforeseen contingency under the rule). Typically, events that come within the rule stated in the Restatement are due either to acts of God or to acts of third parties. See Restatement (2d) of Contracts § 261, cmt. d. An unforeseen cost increase, for example, can excuse performance where the increase is more than merely onerous or expensive, but is so great that it is positively unjust to hold the parties bound. *Helms*, 634 P.2d at 1225.

Statutory Defenses

Nevada Code § 104.2614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: "(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a

commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Nevada Code § 104.2615

(Excuse by Failure of Presupposed Conditions)

This provision of the Nevada Code applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance where such performance “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 invalid.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer.

Nevada Code §§ 104A.2404/2405

(Substituted Performance/Excused Performance)

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 2A-102, -103(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable Nevada Cases

- *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009 (Nev. 2004) - Holding that a contractual provision which excused construction delay damages where work was delayed or obstructed by “fire, lightning, earthquake, enemy action, act of God or similar catastrophe; by government restrictions in respect to materials or labor; or by an industry-wide strike beyond Contractor’s reasonable control” was valid and enforceable.
- *Helms Constr. & Dev. Co. v. State, ex rel. Dep’t of Highways*, 634 P.2d 1224 (Nev. 1981) - Rejecting the impossibility and commercial impracticability defenses based on increased petroleum costs resulting from Arab oil embargo.
- *Nebaco, Inc. v. Riverview Realty Co.*, 482 P.2d 305 (Nev. 1971) - Clause mandating that defendant conduct reasonable diligence to obtain financing for a lease contract did not excuse its ultimate inability to obtain financing.

New Hampshire

Contractual *Force Majeure*; Acts of God

There is a paucity of case law in New Hampshire evaluating contractual *force majeure*; however, New Hampshire courts will likely review *force majeure* clauses in the same manner it would other contract provisions. Under New Hampshire contract law, all parts of an agreement are to be given a meaning whenever reasonably possible. *Rivier Coll. v. St. Paul Fire & Marine Ins. Co.*, 104 N.H. 398 (1963).

In evaluating the meaning of contract provisions, the courts will look to what the parties meant by the language of the agreement. *Paisner v. Renaud*, 102 N.H. 27 (1959) (To determine meaning of guarantee clause in specifications which were expressly made a part of agreement between owners and construction contractor, agreement and specifications would be examined as a whole and language used would be given meaning which would usually be given to it by persons in general reading and acting upon it). The courts will review the matter holistically and consider the written agreement, all of its provisions, its subject matter, the situation of the parties as the time of the contract, and the object intended. *Thiem v. Thomas*, 119 N.H. 598 (1979). The court will not ignore express provisions of the contract unless it concludes that such interpretation reflects what the parties actually intended. *Id.* (adopting interpretation of ambiguous clause which would be in harmony with remainder of document so that all provisions would have meaning and effect). Where possible, New Hampshire courts will avoid construing contract language in a manner that leads to harsh and unreasonable results or places one party at mercy of other. *Id.*; see also *Griswold v. Heat Inc.*, 108 N.H. 119 (1967).

A party relying on a *force majeure* provision must establish that the cause of its non-performance is the result of a *force majeure* event specifically identified in the clause. There is no New Hampshire reported case interpreting whether broad, catch-all language such as “and other circumstances beyond the party’s reasonable control” would be triggered in light of a pandemic.

Most *force majeure* clauses cover “acts of God.” Under New Hampshire law, to excuse non-performance based on an act of God, the party seeking to avoid obligations under the contract must establish that its fault was not a contributing cause for the wrong complained of. *Goddard v. Berlin Mills Co.*, 82 N.H. 225 (1926). In 2015, the Supreme Court of New Hampshire evaluated whether the trial court erred when it declined to enter summary judgment in regard to a town’s “act of God” defense in an action arising out of damage to his residence cause by trees owned by the town that fell onto his property. The Supreme court in *Dutton v. Town of Salem* noted: “To excuse [the Town] on this ground, it must appear that its fault was not a contributing cause for the wrong complained of.” No. 2014–0081, 2015 WL 11071114 (2015) (unreported decision).

Commercial Impracticability

In New Hampshire, it is black letter law that “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.” Restat. (2d) of Contracts § 261. In *Fuller*

Ford, Inc. v. Ford Motor Co., 2001 DNH 144 (D.N.H. 2001), the court held that a promisor's defense of impossibility of performance based on an obstacle presented by a state law could be negated if it reasonably should have foreseen that legal obstacle.

Commercial Frustration / Impossibility

The doctrine of commercial frustration is similar to doctrine of impossibility of performance in that both require extreme hardship to excuse the promisor, but "commercial frustration" is different from impossibility of performance in that it assumes the possibility of literal performance but excuses performance because supervening events have essentially destroyed the purpose for which contract was made. *Perry v. Champlain Oil Co.*, 101 N.H. 97 (1957). The doctrine of frustration is applicable to leases but there must be complete or nearly complete frustration. *Id.*

Under New Hampshire law, a promise will not be discharged because the performance promised in return has lost value on account of supervening fortuitous circumstances, unless they almost completely destroy the purpose that both parties to the bargain had in mind in entering the contract. *Id.* at 99. Nor can the doctrine of commercial frustration be used to allow a party to withdraw from a poor bargain. The mere fact that the non-performing party has lost value is not ground for rescission. *Bourn v. Duff*, 96 N.H. 194 (1977) (holding that defense does not extend to hardship which results from an improvident bargain voluntarily assumed by contract).

Statutory Defenses

N.H. Rev. Stat. § 382-A:2-614 (Substituted Performance)

Section 382-A:2-614 of the New Hampshire Uniform Commercial Code applies only to contracts for the sale of "goods" (as opposed to services or construction). Section 382-A:2-614(1) permits a party to provide substituted performance if, "without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted." The Comments to this section provide that there must be a true commercial impracticability to excuse the agreed to performance and justify a substituted performance. When this is the case a reasonable substituted performance tendered by either party should excuse him from strict compliance with contract terms which do not go to the essence of the agreement.

Section 382-A:2-614(2) provides that the seller may withhold or stop delivery if "the agreed means or manner of payment fails because of domestic or foreign governmental regulation" unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. In the event that delivery has already been made, "payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory."

**N.H. Rev. Stat. § 382-A:2-615
(Excuse by Failure of Presupposed Conditions)**

This provision also applies only to contracts for the sale of goods. Except so far as a seller may have assumed a greater obligation and subject to § 382-A:2-614(2) on substituted performance, non-performance is excused “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.” Under this New Hampshire statute, a seller is not excused from all performance if seller’s capacity to perform is not wholesale. Rather, where possible, seller “must allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” Finally, the seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required among seller’s customers (including buyer), of the estimated quota thus made available for the buyer.

**N.H. Rev. Stat. § 382-A:2A-404
(Substituted Performance - Lease Contract)**

This section of the New Hampshire Uniform Commercial Code applies to lease agreements. Section 382-A:2A-404(1) provides that substitute performance must be tendered and accepted where a commercially reasonable substitute is available and without fault of the lessee, the lessor and the supplier, the agreed berthing, loading or unloading facilities fail, the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable.

Section 382-A:2A-404(2) provides that the lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery if “the agreed means or manner of payment fails because of domestic or foreign governmental regulation” unless the lessee provides a means or manner of payment that is commercially a substantial equivalent. In the event that delivery has already been made, “payment by the means or in the manner provided by the regulation discharges the lessee’s obligation unless the regulation is discriminatory, oppressive or predatory.”

**N.H. Rev. Stat. § 382-A:2A-405
(Excused Performance - Lease Contract)**

This section of the New Hampshire Uniform Commercial Code applies to lease agreements. Subject to § 382-A:2A-404 on substituted performance, § 382-A:2A-405(a) provides that a delay in delivery or non-delivery in whole or in part by a lessor or a supplier who otherwise complies with the requirements of Section 382-A:2A-404 is not in 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.”

Under subsection (b) of this New Hampshire statute, a lessor or supplier is not excused from all performance if lessor’s or supplier’s capacity to perform is not wholesale. Rather, where possible, lessor or supplier “must allocate production and deliveries among their 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's or supplier's own requirements for further manufacture. The lessor or supplier may so allocate in any manner that is fair and reasonable." Finally, under subsection (c), the lessor must 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 non-delivery and, if allocation is required under subsection (b), of the estimated quota thus made available for the lessee.

Notable New Hampshire Cases

- *Cloutier v. City of Berlin*, 154 N.H. 13 (2006) - Whether damage was "caused solely by inclement weather is a factual issue for the jury to decide."
- *Gen. Linen Servs., Inc. v. Smirnioudis*, 153 N.H. 441 (2006) - Doctrine of commercial frustration did not apply to contract in which company leased linens to owner of restaurants, although one restaurant was destroyed by fire; owner breached contract prior to fire.
- *Fuller Ford, Inc. v. Ford Motor Co.*, No. CIV. 00-530-B, 2001 WL 920035 (D.N.H. 2001) - Promisor's defense of impossibility of performance based on an obstacle presented by a state law could be negated if it reasonably should have foreseen that legal obstacle.
- *Bower v. Davis & Symonds Lumber Co.*, 119 N.H. 605 (1979) - To justify termination of contract on account of impossibility of performance, the impossibility must be complete and permanent. Under commercial frustration doctrine, frustration is relative, and usually is not deemed present when contract's main purpose is obtainable.
- *Auger v. Chapdelaine*, 106 N.H. 246 (1965) - Where performance by contracting party is excused by reason of supervening impossibility, he is liable to other party for that part of purchase price which represented value of that part of contract impossible of performance.
- *Perry v. Champlain Oil Co.*, 101 N.H. 97 (1957) - In an action by lessor to rescind lease of gasoline filling-station distributor whose franchise had been canceled after execution of lease, evidence was sufficient to support finding that subsequent substitution of franchise did not frustrate main purpose to material degree sufficient to justify rescission, even though substitution resulted in decreased rent due to decreased sales.
- *Bourn v. Duff*, 96 N.H. 194 (1950) - The mere fact that the performance on the part of the defendant has lost value is not ground for rescission.
- *Goddard v. Berlin Mills Co.*, 82 N.H. 225 (1926) - To excuse liability on the grounds that an act of God is responsible for alleged liability, it must appear that the party raising such affirmative defense must establish that its fault was not a contributing cause for the wrong complained of.
- *Reed v. Hatch*, 55 N.H. 327 (1875) - Stating that an occurrence is not an act of God excusing human accountability, unless resulting from "a cause which operates without interference or aid from man."

New Jersey

Contractual *Force Majeure*

A *force majeure* clause provides a means by which the parties may anticipate in advance a condition that will make performance impracticable or impossible. See, e.g., *Facto v. Pantagis*, 390 N.J. Super. 227, 231, 915 A.2d 59, 61 (App. Div. 2007). In New Jersey, *force majeure* clauses are generally interpreted narrowly, like any other contractual provision, in light of the contractual terms, the surrounding circumstances, and the purpose of the contract; therefore, for an event to qualify as excusable *force majeure* it must be outlined in the clause at issue. *Seitz v. Mark-O-Lite Sign Contractors, Inc.*, 210 N.J. Super. 646, 650 (1986).

The “catch-all” provision commonly found in most *force majeure* clauses will also be construed narrowly “as contemplating only event or things of the same general nature or class as those specifically enumerated.” *Id.* Generally, these *force majeure* clauses anticipate events such as riots, acts of God or other unforeseen events beyond the control of the parties. *Facto*, 390 N.J. Super. at 230. Notably, Practical Law recently updated its standard *force majeure* clause for New Jersey to include “other potential disasters or catastrophe(s) such as epidemics.”

One commonly occurring event, an “act of God” is defined more broadly in New Jersey than in other jurisdictions. Under New Jersey law, an “act of God” has been construed not just to refer to natural events such as storms but to include misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent. *Id.* at 233.

In *Facto*, the plaintiffs contracted with the defendant to rent a banquet hall for a wedding reception and payment was made entirely in advance. *Id.* at 228. The contract specifically contained a *force majeure* clause that excused the defendant from performance under the contract if it was prevented from performing “by an act of God (e.g. flood, power failure, etc.) or other unforeseen events or circumstances.” *Id.* Shortly after the reception began, there was a power failure in the area, which caused the lights and air conditioning to stop working while other wedding related vendors such as the band and the photographer were unable to perform. *Id.* at 229. The appellate court affirmed the trial court’s judgment in favor of the defendant, finding that the power outage made performance by the defendant impossible or impracticable and because the power failure was an “unusual extraordinary unexpected circumstance” that could not be avoided by “reasonable human foresight.” *Id.* at 233.

Impossibility / Commercial Impracticability / Frustration of Purpose

New Jersey courts embrace commercial impracticability and frustration of purpose as defined and explained under the Second Restatement of Contracts, Sections 261 and 265, and the corresponding comments. A successful defense of impossibility (or impracticability) of performance excuses a party from having to perform its contractual obligations, where performance has become literally impossible, or at least inordinately more difficult, because of the occurrence of a supervening event that was not within the

original contemplation of the contracting parties. *JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass'n*, 431 N.J. Super. 233, 245 (App. Div. 2013); *M.J. Paquet, Inc. v. N.J. Dep't of Transp.*, 171 N.J. 378 (2002).

Common law defenses in New Jersey are not displaced by the existence of a *force majeure* clause; rather, they complement the contract language. For example, in *Facto*, the court held that “[e]ven if a contract does not expressly provide that a party will be relieved of the duty to perform if an unforeseen condition arises that makes performance impracticable, ‘a court may relieve him of that duty if performance has unexpectedly become impracticable as a result of a supervening event.’” 390 N.J. Super. at 231 (quoting Restat. (2d) of Contracts § 261, cmt. a (1981)).

By comparison, under the related doctrine of frustration of purpose, the obligor’s performance can still be carried out, but the supervening event fundamentally has changed the nature of the parties’ overall bargain. *Edwards v. Leopoldi*, 20 N.J. Super. 43, 55 (1952) (observing that the frustration doctrine pertains to situations in which the parties’ “common object” has been frustrated by “destruction or cessation [that] demolishes the attainment of the vital and fundamental purpose of the contracting parties”). Frustration of purpose is limited in its application requiring “clear and convincing proof.” *A-Leet Leasing Corp. v. Kingshead Corp.*, 150 N.J. Super. 384, 397 (App. Div. 1977).

Statutory Defenses

New Jersey Code § 12A:2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. The statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

New Jersey Code § 12A:2-615 (Excuse by Failure of Presupposed Conditions)

This provision of the New Jersey Code applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance where such performance “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 invalid.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer.

**New Jersey Code §§ 12A:2A-614/615
(Substituted Performance/Excused Performance)**

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 2A-102, -103(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable New Jersey Cases

- *Connell v. Parlavecchio*, 255 N.J. Super. 45 (App. Div. 1992) - Court emphasized that impossibility or impracticability of performance is a complete defense where a fact essential to performance is assumed by the parties but does not exist at the time of performance; personal inability to perform because of financial condition is not a defense.
- *Facto v. Pantagis*, 390 N.J. Super. 227 (App. Div. 2007) - Fact that a power failure is not absolutely unforeseeable during the hot summer months does not preclude relief from the obligation to perform under the contract or under the Restatement and holding that “even in the absence of a force majeure clause, absolute unforeseeability of a condition is not a prerequisite to the defense of impracticability [in New Jersey].”
- *A-Leet Leasing Corp. v. Kingshead Corp.*, 150 N.J. Super. 384 (App. Div. 1977) - Relief from performance of contractual obligations on the theory of frustration of purpose “will not be lightly granted; the evidence must be clear, convincing and adequate.”

New Mexico

Contractual *Force Majeure*

New Mexico courts recognize the contractual defense of *force majeure*. *King v. Estate of Gilbreath*, 215 F. Supp. 3d 1149, 1177 (D.N.M. 2016) (holding that, under New Mexico law, “an argument under a *force majeure* clause . . . is the equivalent to an affirmative defense, and therefore the burden is on the party invoking the clause to prove that the events were beyond their control”). Nevertheless, New Mexico has no reported cases applying *force majeure* clauses. See *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626, 636 (N.M. 2003) (stating that New Mexico has no cases interpreting a *force majeure* clauses). In *Maralex*, the Supreme Court of New Mexico stated the general rule that “[w]hat types of events constitute *force majeure* depends on the specific language included in the clause.” *Id.* New Mexico courts, therefore, look to the language of the clause to interpret what constitutes a *force majeure* event excusing performance under a contract.

Commercial Frustration

New Mexico courts also recognize the common law defense of commercial frustration of purpose. See, e.g., *Hartman v. El Paso Nat. Gas Co.*, 763 P.2d 1144, 1145 (N.M. 1998) (reviewing commercial impracticability and frustration of purpose defenses to breach of contract for the sale of oil and gas). To invoke the doctrine of commercial frustration, there must be an unforeseeable event that frustrates the purpose of the contract and renders performance impracticable. *Id.* The doctrine of commercial frustration is founded on the rules that a party to a contract is excused from performance if: (1) the contract depends upon existence of a given person or thing and such person or thing perishes; or (2) the contract is rendered impossible by act of God, the law, or other party. *Wood v. Bartolino*, 146 P.2d 883 (N.M. 1944). To find that performance is excused, there must be some kind of event that causes, “extreme or unreasonable difficulty, injury or loss, making the contract vitally different from that contemplated by the parties.” *Id.* Courts will not hold the contract to be frustrated merely because of an increase in cost to one of the parties. See *Hartman*, 107 N.M. at 680.

Statutory Defenses

N.M. Stat. Ann. § 55-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

N.M. Stat. Ann. § 55-2-615**(Excuse By Failure of Presupposed Conditions)**

This provision excuses non-performance where such performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure*.

N.M. Stat. Ann. §§ 55-2A-404/405**(Substituted Performance/Excused Performance of Leases)**

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 2A-102, -103(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable New Mexico Cases

- *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626 (N.M. 2003) - Lessee of oil and gas lease brought action against former lessees to declare that the original lease had terminated for lack of production because original lessees failed to tender shut-in royalty payments when the well stopped producing. Original lessees asserted that the *force majeure* clause excused their performance because the wells’ lack of production was beyond their control. The court analyzed the clause and found that the original lessees failed to present any evidence establishing that the cessation of production was the result of an external cause beyond their control.
- *King v. Estate of Gilbreath*, 215 F. Supp. 3d 1149 (D.N.M. 2016) - Where lessors brought action to rescind oil and gas lease, the court found that the defendants failed to carry their burden under the *force majeure* clause, and therefore their performance was not excused.

New York

Contractual *Force Majeure*

A *force majeure* clause allocates the risk of performance delays or breach of contract due to events beyond the control of either party. What is deemed to be a *force majeure* event depends on the specific language of the *force majeure* clause. There is no uniform *force majeure* language in New York; these provisions may vary from a narrowly tailored, specific list of enumerated events to a broadly worded provision that captures any event outside the control of the breaching party.

New York courts have generally interpreted *force majeure* clauses narrowly. New York cases have consistently found that a party will be excused from performance under a *force majeure* clause only if the clause expressly includes the event in question and the event actually prevents the party's performance of its obligations under the contract. See *Castor Petroleum, Ltd. v. Petroterminal De Panama, S.A.*, 968 N.Y.S.2d 435 (App. Div. 2013); *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 910 N.Y.S.2d 408 (Sup. Ct. 2010); *Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8 (App. Div. 2009); *Kel Kim Corp. v. Cent. Mkts.*, 70 N.Y.2d 900, 903 (N.Y. 1987).

"The burden of demonstrating force majeure is on the party seeking to have its performance excused . . . and 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." *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, No. 06-CV-6155-CJS-MWP, 2009 WL 368508, at *7 (W.D.N.Y. 2009) (quoting *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985)). "Mere impracticality or unanticipated difficulty is not enough to excuse performance" under a *force majeure* clause. See *id.*

In line with the general principle of narrow interpretation of *force majeure* provisions, parties in New York asserting excusable non-performance should keep in mind that a *force majeure* provision with broadly drafted "catch-all" language will not necessarily save the day if the provision does not otherwise specifically cover the event causing non-performance. New York courts have held that the occurrence of the non-listed event must be of the same kind or nature as the particular matters specifically listed. *Kel Kim Corp.*, 70 N.Y.2d at 903; see also *Rochester Gas*, 2009 WL 368508, at *8.

In addition, when the event being alleged to cause non-performance is not specifically listed, certain New York cases indicate that the party relying on a catch-all provision must also prove that the event was unforeseeable. For example, a New York court rejected a non-performing party's attempt to rely on a catch-all provision based on an increase in the price of manufacturing supplies, where such increase could have been reasonably anticipated. *Rochester Gas*, 2009 WL 368508, at *8-9; *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (explaining that "force majeure clauses are aimed narrowly at events that neither party could foresee or guard against in the agreement").

In any case, it is important to note that the application of *force majeure* clauses will require an extensive fact-based analysis reviewing, among other things, the clause itself, the event alleged to cause non-performance, whether performance has truly become impossible or substantially prevented as a result of the event (as opposed to, for example, just more expensive), and the purpose of the contract at issue.

Acts of God Under *Force Majeure* Clauses

While events such as “pandemics,” “epidemics,” and “disease outbreaks” are typically not specified in commercial *force majeure* clauses, an “act of God” is a commonly included event. As of now, modern-day New York courts do not appear to have addressed the issue of whether a disease outbreak or a pandemic would be considered an “act of God” under New York law. *But see Coombs v. Nolan*, 7 Ben. 301 (S.D.N.Y. 1874) (delayed shipment excused because of epidemic among horses).

New York courts have consistently found that an act of God denotes “those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God.” *Prashant Enters. Inc. v. State*, 614 N.Y.S.2d 653 (App. Div. 1994) (internal quotation omitted). New York cases addressing acts of God generally address breach of contract caused by hurricanes, floods and similar natural disasters. Under these cases, an act of God must not be caused by humans, but only by forces of nature that were not reasonably avoidable by any amount of prudence, diligence or foresight. Human intervention or negligence cannot have contributed to the disruption. *Lesser ex rel. Lesser v. Camp Wildwood*, 282 F. Supp. 2d 139, 151 (S.D.N.Y. 2003) (internal quotations omitted).

Impossibility / Frustration of Purpose

To the extent a contract does not contain a *force majeure* clause, common law defenses of impossibility of performance and frustration of purpose may be applicable in New York. The application of these defenses principally relies on whether the event causing non-performance was foreseeable. In general, impossibility may be equated with an inability to perform as promised due to intervening events, such as an act of state or destruction of the subject matter of the contract. Frustration of purpose, on the other hand, focuses on events which materially affect the consideration received by one party for its performance.

Under New York law, “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” and the impossibility was “produced by an unanticipated event that could not have been foreseen or guarded against in the contract.” *H. Daya Int’l Co., Ltd. v. Arazi*, 348 F. Supp. 3d 304, 304 (S.D.N.Y. 2018) (citing *Kel Kim Corp.*, 70 N.Y.2d at 900). However, impossibility of performance that is solely caused by financial hardship or economic trouble, even to the extent of bankruptcy, would not be excused. See *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 359 (N.D.N.Y. 2013). Likewise, a “financial crisis” or downturn in the market will not suffice. *Twin Holdings of Del. LLC v. CW Capital, LLC*, 906 N.Y.S.2d 784, 2010 WL 309022, at *5 (Sup. Ct. 2010) (quoting Restat. (2d) of Contracts § 261).

Frustration of purpose does not necessarily require that the performance of a contract becomes impossible but that the contract no longer provides the benefits the parties bargained for, again, because of intervening unforeseeable events, and the frustrated purpose was the primary reason for entering into such contract. “Frustration of purpose excuses performance when a ‘virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party.’” *United States v. Gen. Douglas MacArthur Senior Vill. Inc.*, 508 F.2d 377, 381 (2d Cir. 1974). Indeed, “it is not enough that the transaction

has become less profitable for the affected party or even that he will sustain a loss.” *Gander Mountain Co.*, 923 F. Supp. 2d at 359.

Temporary Impossibility

The doctrine of temporary impossibility, developed during wartime conditions, was resurrected in the aftermath of 9/11, with one court holding that “it is entirely appropriate for this Court to consider and follow wartime precedents which developed the law of temporary impossibility. Stated succinctly, where a supervening act creates a temporary impossibility, particularly of brief duration, the impossibility may be viewed as merely excusing performance until it subsequently becomes possible to perform rather than excusing performance altogether.” *Bush v Protravel Int’l, Inc.*, 746 N.Y.S.2d 790, 797 (Civ. Ct. 2002). Like most jurisdictions, this doctrine is most often applied to excuse late notice. *Id.*

Statutory Defenses

N.Y. Uniform Comm. Code 2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

N.Y. Uniform Comm. Code § 2-615 (Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

N.Y. Uniform Comm. Code §§ 2-A-404/405 (Substituted Performance/Excused Performance of Leases)

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 2A-102, -103(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable New York Cases

- *H. Daya Int'l Co. v. Arazi*, 348 F. Supp. 3d 304 (S.D.N.Y. 2018) - Placement of contested orders of clothing apparel from seller at the behest of third party, and cancellation of orders and refusal to provide payment by third party, did not excuse completion of contract by buyer under doctrine of impossibility, as buyer produced no evidence to suggest that it could not have guarded against the risk of third party's cancellation.
- *Castor Petroleum v. Petroterminal De Panama*, 968 N.Y.S.2d 435 (App. Div. 2013) - Holding that Panamanian judicial ruling attaching plaintiff's oil on the grounds that it was not licensed to do business in Panama was a "government embargo or interventions" that excused non-performance under contractual *force majeure* provision.
- *Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8 (App. Div. 2009) - Holding that a temporary restraining order qualified as a "governmental prohibition" that required extension of rent abatement period under *force majeure* provision.
- *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, No. 06-CV-6155-CJS-MWP, 2009 WL 368508 (W.D.N.Y. 2009) - Under New York UCC principles, increase in the market price of steel needed to build transformers did not excuse non-performance of contract with utility because mere increase in price of inputs does not constitute *force majeure* event under the statute.
- *Lesser ex rel. Lesser v. Camp Wildwood*, 282 F. Supp. 2d 139 (S.D.N.Y. 2003) - Stating that an injury is caused by an "act of God" only where the "event happens by direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the powers of man ..."
- *Prashant Enters., Inc. v. State*, 614 N.Y.S.2d 653 (1994) - Stating that the term "act of God" denotes "those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God."
- *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900 (N.Y. 1987) - Inability to obtain insurance coverage due to a liability crisis in the insurance industry was foreseeable and, therefore, was not excused under *force majeure* provision in lease agreement disclaiming breach for "other similar causes beyond the control of such party."
- *Coombs v. Nolan*, 7 Ben. 301 (S.D.N.Y. 1874) - Excusing reasonable delay of shipping because of epidemic among horses.

North Carolina

Contractual *Force Majeure*

Applying contract principles, North Carolina courts will enforce the “plain, ordinary meaning of a term” in a contract, including a *force majeure* clause. *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 326 N.C. 133, 151 (1990). Indeed, when unambiguous, the courts “must enforce the contract as written” and cannot, under the guise of interpretation, “rewrite the contract or impose [terms] on the parties not bargained for and found” within the contract.” *Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 266 (2001) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506 (1978)). In North Carolina, courts will not excuse performance due to *force majeure* if the clause excludes the alleged intervening event. *S. Coll. St., LLC v. Charlotte Sch. of Law, LLC*, No. 18 CVS 787, 2018 WL 3830008, at *5 (N.C. Super. Aug. 10, 2018) (unpublished decision) (defendant was not relieved of paying rent where such payment is specifically excepted from the *force majeure* clause).

Impossibility of Performance

In North Carolina, the doctrine of impossibility of performance excuses “a party from performing under an executory contract if the subject matter of the contract *is destroyed* without fault of the party seeking to be excused from performance.” *Brenner v. Little Red Sch. House, Ltd.*, 302 N.C. 207, 210 (1981) (emphasis added); see also *Steamboat Co. v. Trans. Co.*, 166 N.C. 582 (1914) (applying doctrine of impossibility to contract between ship owner and party leasing it for ferrying purposes when ship was destroyed by fire through no fault of parties); *Barnes v. Ford Motor Co.*, 95 N.C. App. 367 (1989) (affirming trial court’s instruction on doctrine of impossibility where subject matter of lease, a tractor, was destroyed). For the doctrine to apply, it must be that “*no one* could perform under it, not just the current parties.” *WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 253 (2007) (emphasis in original).

Impossibility also applies where the “performance is rendered impossible by the law, provided the promisor is not at fault and has not assumed the risk of performing whether impossible or not.” *UNCC Props., Inc. v. Greene*, 111 N.C. App. 391, 397 (1993) (quoting *Messer v. Laurel Hill Assocs.*, 102 N.C. App. 307 (1991)); see also Restat. (2d) of Contracts §§ 261, 264. North Carolina expressly recognizes that “[g]overnment actions . . . may be a basis for a finding of legal impossibility.” *UNCC Props.*, 111 N.C. App. At 397 (citing Restat. (2d) of Contracts § 264). Courts generally require that the event was not reasonably foreseeable. *Id.*

Commercial Impracticability / Frustration of Purpose

In North Carolina, frustration of purpose is distinct from impossibility of performance. *WRI/Raleigh*, 183 N.C. App. at 254. Frustration of purpose excuses performance “whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance.” *Id.* (quoting *Brenner*, 302 N.C. at 211).

For the defense to apply, “there must be [1.] an implied condition to the contract that a changed condition would excuse performance; [2.] this changed condition causes a failure of consideration or the expected value of performance; and [3.] that the changed condition was not reasonably foreseeable.” *Faulconer v. Wysong & Miles Co.*, 155 N.C. App. 598, 602 (2002). The doctrine is inapplicable “where the frustrating purpose was reasonably foreseeable.” *WRI/Raleigh*, 183 N.C. App. at 254 (quoting *Brenner*, 302 N.C. at 211). Additionally, a party may not invoke the doctrine to escape its obligations if the parties “contracted in reference to the allocation of the risk involved in the frustrating event.” *Brenner*, 302 N.C. at 211.

Statutory Defenses

N.C.G.S.A. § 25-2-614

(Substituted Performance)

This provision applies only to contracts for the sale of goods and permits a party to provide substitute performance if, without fault, “the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available.” Relatedly, a buyer, in the event the seller withholds or stops delivery because “the agreed means or manner of payment fails because of domestic or foreign governmental regulation,” may provide a commercially substantial equivalent of means or manner of payment. Where delivery has already occurred, “payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.”

N.C.G.S.A. § 25-2-615

(Excuse by Failure of Presupposed Conditions)

This provision also applies only to contracts for the sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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.” If such causes affect only a part of seller’s capacity to perform, the seller must allocate, in a fair and reasonable manner, “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.” In this instance, the seller must notify the buyer that there will be a delay or nondelivery and of the estimated quota that will be made available.

Notable North Carolina Cases

- *Botts v. Tibbens*, 232 N.C. App. 537 (2014) - Holding that contractor’s lack of proper license to complete installation of a septic system did not render performance impossible where contractor had sufficient time to obtain the license and could have subcontracted out under the agreement.
- *Faulconer v. Wysong & Miles Co.*, 155 N.C. App. 598 (2002) - Explaining that a frustration of purpose defense is not viable based on a business’s distinct period of decline, because such decline is

reasonably foreseeable and is thus a situation in which the parties could have reasonably protected against.

- *UNCC Props., Inc. v. Greene*, 111 N.C. App. 391 (1993) - Discharging defendant's obligation to convey an easement where such conveyance became impossible due to county's condemnation and transfer of subject property to county.

North Dakota

Contractual *Force Majeure*

In North Dakota, a *force majeure* clause is a “contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp[ecially] as a result of an event or effect that the parties could not have anticipated or controlled.” *Entzel v. Moritz Sport & Marine*, 841 N.W.2d 774, 778 (N.D. 2014) (quoting Black’s Law Dictionary 718 (9th ed. 2009)). The party relying on the clause to excuse performance bears the burden of proof. *Id.* A *force majeure* provision “relieves one of liability only where nonperformance is due to causes beyond the control of a person who is performing under a contract. 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.” *Id.* (quoting 30 *Williston on Contracts* § 77.31, at 366 (4th ed. 2004)).

In construing the *force majeure* clause, North Dakota courts will look to the specific language in the clause and adopt the ordinary and popular sense of words. *Id.* (internal citation omitted). Courts will “give effect to the parties’ mutual intent at the time the contract was formed, and if possible, we look to the writing alone to determine the parties’ intent.” *Id.* The court will read the contract as a whole, giving effect to each clause. *City of Moorhead v. Bridge Co.*, 867 N.W.2d 339, 343 (N.D. 2015).

Impossibility/Frustration of Purpose

The doctrines of frustration of purpose and impossibility:

[A]re closely related. Frustration of purpose occurs when 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. The doctrine of impossibility . . . is similarly described as [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 the circumstances indicate the contrary. Neither doctrine applies if either the frustration or the impossibility is caused by a party to the contract.

Red River Wings, Inc. v. Hoot, Inc., 751 N.W.2d 206, 226–27 (N.D. 2008) (internal citations omitted) (emphasis in original); see also *Huber v. Farmers Union Serv. Ass’n of N.D.*, 787 N.W.2d 268, 274–75 (N.D. 2010) (concluding that party invoking defense of frustration and impossibility was the cause of supervening event and therefore could not rely on these defenses); *WFND, LLC v. Fargo Marc, LLC*, 730 N.W.2d 841, 851 (N.D. 2007) (denying frustration doctrine because plaintiff was partially at fault for misunderstanding circumstances giving rise to agreement).

“To establish impossibility, [a party] must demonstrate that, among other things, its performance is strictly impossible or impracticable because of extreme and unreasonable difficulty, expense, injury or loss.”

Tallackson Potato Co., Inc. v. MTK Potato Co., 278 N.W.2d 417, 424 n.6 (N.D. 1979) (internal citations omitted).

Nevertheless, “impossibility may arise upon the sickness or death of either party or the inability of one party to give or receive performance, occasioned by the prevalence of an epidemic.” *Sandy v. Brooklyn Sch. Dist. No. 78 of Williams Cty.*, 182 N.W. 689, 691–92 (N.D. 1921).

Commercial Impracticability

North Dakota courts have applied the doctrine of commercial impracticability set forth in the Second Restatement of Contracts, which provides: “Where . . . 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 to the contrary.” *Red River Wings*, 751 N.W.2d at 226 (citing Restat. (2d) of Contract § 261).

Statutory Defenses

N.D. Cent. Code Ann. § 41-02-77 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

N.D. Cent. Code Ann. § 41-02-78 (Excuse by Failure of Presupposed Conditions)

This provision also applies only to contracts for the sale of goods and excuses non-performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent it can still perform, must “allocate production and deliveries among [its] customers . . . in any manner which is fair and reasonable.” The seller must seasonably notify the buyer of any delay or non-delivery due to *force majeure*.

N.D. Cent. Code Ann. §§ 41-02.1-45, -46 (Substituted Performance/Excused Performance)

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on

approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 41-02.1-02, -03(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable North Dakota Cases

- *Pennington v. Cont'l Res., Inc.*, 932 N.W.2d 897 (N.D. 2019) - Finding a genuine issue of material fact existed regarding whether party, after claiming its inability to obtain drilling permit was a *force majeure* event, used its good faith and diligence in seeking the permit.
- *City of Moorhead v. Bridge Co.*, 867 N.W.2d 339 (N.D. 2015) - Holding that city's delay in exercising options clause was excused by *force majeure* of flooding.
- *City of Harwood v. City of Reiles Acres*, 859 N.W.2d 13 (N.D. 2015) - Relying on Restat. (2d) of Contract § 265 to hold that expansion of city population outgrowing capacity of facility frustrated the parties' agreement to share common expenses to maintain facility.
- *Entzel v. Moritz Sport & Marine*, 841 N.W.2d 774 (N.D. 2014) - Recognizing that, while flooding was the type of event excusable under *force majeure* clause, clause was exclusively for landlord's benefit and could not excuse tenant's non-performance.
- *Resolution Trust Corp. v. Gosbee*, 536 N.W.2d 698 (N.D. 1995) - Finding that "temporary economic adversity" is not an "irresistible superhuman cause" amounting to an act of God excusing payment by mortgagor.
- *Red River Commodities, Inc. v. Eidsness*, 459 N.W.2d 805 (N.D. 1990) - Holding that drought depleting sunflowers was a *force majeure* event but remanding for trial court to assess whether agent had actual notice of defense, which would supersede requirement of written notice.
- *Tallackson Potato Co., Inc. v. MTK Potato Co.*, 278 N.W.2d 417 (N.D. 1979) - Establishing that the failure of a third-party source to provide monies was not an impossibility that excused obligating party from making payments.
- *Sandry v. Brooklyn Sch. Dist. No. 78 of Williams Cty.*, 182 N.W. 689 (N.D. 1921) - Relying in part on *Lakeman v. Pollard*, 43 Me. 463 (1857), which excused lumberjack from performing because of a cholera epidemic, to excuse schools on basis of commercial impossibility from paying drivers tasked with transporting teachers and students during 13-weeks closure as a result of an influenza epidemic.

Ohio

Contractual *Force Majeure*

Excusability on account of *force majeure* is a relatively new concept in Ohio. *Force majeure* has been characterized by Ohio courts as a defense that has some overlap with the common law defenses of impossibility or impracticability. *Jarupan v. Hanna*, 173 Ohio App. 3d 284 (2007) (internal citation omitted). Under Ohio law, courts must look to the language of the contract's *force majeure* provision to determine its applicability. *Haverhill Glen, L.L.C. v. Eric Petroleum Corp.*, 67 N.E.3d 845, 850 (Ohio Ct. App. 2016).

The *force majeure* clause defines the scope of unforeseeable events that might excuse nonperformance by either party. *Stand Energy Corp. v. Cinergy Servs., Inc.*, 144 Ohio App. 3d 410 (2001). To use a *force majeure* clause as an excuse for nonperformance, the nonperforming party bears the burden of proving that the event was beyond the party's control and without its fault or negligence. *Id.*

When a party assumes risk of certain contingencies in entering into a contract, such contingencies cannot later constitute an excusable *force majeure*. *Dunaj v. Glassmeyer*, 580 N.E. 2d 98, 100–01 (Ohio Ct. Com. Pl. 1990). Nor do mistaken assumptions about future events or bad economic conditions qualify as a *force majeure*. *Id.* Unless the contract provides that specific exclusions apply to excuse performance of the non-performing party, courts will not excuse a party where performance proves difficult, burdensome, or economically disadvantageous. *State ex rel. Jewett v. Sayre*, 109 N.E. 636 (Ohio 1914); *see also In re Millers Cove Energy Co., Inc.*, 62 F.3d 155 (6th Cir. 1995); *Stand Energy*, 133 Ohio App. 3d at 410.

If parties unambiguously allocate the risk of specified *force majeure* events by contract, the courts should not need to evaluate whether such event was foreseeable. However, where the parties do not include a *force majeure* clause in their contract, they must resort to common law remedies such as commercial frustration of purpose, which imposes a foreseeability requirement.

Frustration of Purpose

Where there is no *force majeure* clause in a contract, the court's decision whether to excuse an impacted party's performance depends largely on the foreseeability of the event. One who contracts to render a performance for which government approval is required assumes duty of obtaining such approval, and risk of its refusal is on him. *Sec. Sewage Equip. Co., d.b.a. Sec. Septic Tank Co. v. McFerren*, 14 Ohio St. 2d 251 (1968). Under Ohio law, governmental interference cannot excuse performance unless it truly supervenes in such a manner as to be beyond the seller's assumption of risk. *Id.* at 254. To excuse performance, the contingency must be unforeseen and unusual. *Id.*

Statutory Defenses

Ohio R.C. § 1302.72

(Substituted Performance - Sale of Goods)

Section 1302.72 of the Ohio Revised Code applies only to contracts for the sale of “goods” (as opposed to services or construction). Section 1302.72(A) provides for tender and acceptance of substituted performance where, “without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available.” There must be a true commercial impracticability to excuse the agreed performance and justify a substituted performance. When this is the case, a reasonable substituted performance tendered by either party should excuse it from strict compliance with contract terms which do not go to the essence of the agreement.

Section 1302.72(B) provides that the seller may withhold or stop delivery if “the agreed means or manner of payment fails because of domestic or foreign governmental regulation” unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. In the event that delivery has already been made, “payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.”

Ohio R.C. § 1302.73
(Excuse by Failure of Presupposed Conditions - Sale of Goods)

This provision also applies only to contracts for the sale of goods. Except so far as a seller may have assumed a greater obligation and subject to § 1302.72 on substituted performance, non-performance is excused “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.” Under this Ohio statute, a seller is not excused from all performance if seller’s capacity to perform is not wholesale. Rather, where possible, seller “must allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” Finally, the seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required among seller’s customers (including buyer), of the estimated quota thus made available for the buyer.

Ohio R.C. § 1310.43
(Substituted Performance - Leases)

This provision applies to lease agreements. Section 1310.43(A) provides that substitute performance must be tendered and accepted where a commercially reasonable substitute is available and without fault of the lessee, the lessor and the supplier, the agreed berthing, loading or unloading facilities fail, the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable.

Section 1310.43(B) provides that the lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery if “the agreed means or manner of payment fails because of domestic or foreign governmental regulation” unless the lessee provides a means or manner of payment that is commercially a substantial equivalent. In the event that delivery has already been made, “payment by

the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive or predatory."

Ohio R.C. § 1310.44
(Impracticability of Performance - Lease Contract)

This provision applies to lease agreements. Subject to § 1310.43 on substituted performance, § 1310.44 provides that a delay in delivery or non-delivery in whole or in part by a lessor or a supplier who otherwise complies with the requirements of Section 1310.44 is not in 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."

Under this Ohio statute, a lessor or supplier is not excused from all performance if lessor's or supplier's capacity to perform is not wholesale. Rather, where possible, lessor or supplier "must allocate production and deliveries among their 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's or supplier's own requirements for further manufacture. The lessor or supplier may so allocate in any manner that is fair and reasonable." Finally, the lessor must 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 non-delivery and, if allocation is required under subsection (2), of the estimated quota thus made available for the lessee.

Ohio R.C. § 1310.45
(Termination or Modification Where Performance Impracticable)

This provision applies to lease agreements. Under this Ohio statute, "if the lessee receives notification of a material or indefinite delay or of an allocation justified under section 1310.44 of the Revised Code, the lessee, by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired as provided in section 1310.56 of the Revised Code," may either (1) terminate the lease subject to division (B) of section 1310.51 of the Revised Code; or (2) except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

Pursuant to section 1310.44(B) of the Revised Code, if, after receipt of a notification from the lessor under division (C) of section 1310.44 of the Revised Code, the lessee fails to modify the lease agreement in accordance with division (A)(2) of this section within a reasonable time not exceeding thirty days, the lease contract lapses with respect to any deliveries affected.

Notable Ohio Cases

- *Dunaj v. Glassmeyer*, 580 N.E. 2d 98 (Ohio Ct. Com. Pl. 1990) - Managers of hotel were not excused from performing obligations by “*force majeure*,” where contract defined “*force majeure*” by reference to such events as strikes, lockouts, accidents, inability to obtain supplies, or employees, war or other emergency, and managers asserted unfavorable economic conditions or inaccurate projections concerning expenses of performance.
- *United Gulf Marine, LLC v. Cont’l Ref. Co., LLC*, No. CV 2017 0040, 2018 WL 10036528 (Ohio Ct. Com. Pl. 2018) - Where contract listed fire as a *force majeure* event, and a fire occurred, the party invoking the provision was not released from liability where another provision of the contract made the party 100% liable for the product made available to it by the seller under the agreement since the fire made it difficult, but not impossible, for the receiving party to process the product it was contractually obligated to take from the seller.
- *United Arab Shipping Co. v. PB Express, Inc.*, No. 96162, 2011 WL 3860639 (Ohio Ct. App. 2011) - Where parties specify *force majeure* events in their contract and a specified event occurs, the impacted party is normally excused from performance since the parties intended to allocate the risk of such specified events to the non-impacted party.
- *Athens Bone & Joint Surgery, Inc. v. Mgmt. Consulting Grp., Inc.*, No. 02CA24, 2003 WL 21152871 (Ohio Ct. App. 2003) (unreported decision) - Seller’s performance of contract to sell x-ray machine was not rendered impracticable by compliance in good faith with governmental regulation; thus, seller breached contract by failing to timely deliver machine. Compliance with governmental regulations was not a term or condition of contract, other commercial suppliers sold x-ray machines without requiring buyer to provide safety specifications for room in which machine was to be installed, seller’s nonperformance was due to refurbisher’s failure to deliver x-ray machine to seller, and seller did not give reasonable notice of non-delivery to buyer.
- *Stand Energy Corp. v. Cinergy Servs., Inc.*, 144 Ohio App. 3d 410 (2001) - Stating that Ohio courts generally require the impacted party to prove that an event was beyond its control and without its fault or negligence.
- *Paramount Supply Co. v. Sherlin Corp.*, 16 Ohio App. 3d 176 (1984) - Federal customs agents’ seizure of truck turbochargers to be delivered from seller as result of possible illegal exportation into Iran prevented seller from accomplishing delivery aboard ship if seller had such contractual duty, thus discharging any further delivery obligation on part of seller under doctrine of impossibility of performance.
- *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983) (applying Ohio law) - Generally, a party asserting the defense of commercial impracticability must prove that an unforeseeable event occurred, that the nonoccurrence of the event was a basic assumption underlying the agreement, and that the event rendered performance impracticable.

- *Bailey & Shearer Bros., Inc. v. Reash Bros., Inc.*, No. 82-C-38, 1983 WL 6712 (Ohio Ct. App. 1983) (unreported decision) - Upholding trial court's dismissal of complaint for money damages for supplier's failure to provide an agreed quantity of merchantable potatoes for resale by purchaser to potato chipping plants, forcing purchaser to secure potatoes from alternative source at substantially greater cost. Court held that performance was excused because of an excessive amount of rainfall that caused rotting of available crop making performance by supplier impossible.
- *Dep't of Admin. Servs. v. Serv. Supply, Ltd.*, No. 82AP-74, 1982 WL 4351 (Ohio Ct. App. 1982) - Seller's failure to deliver 584 picnic tables was excused by the defense of impracticability where specified wood was unavailable and seller promptly notified buyer that such wood was not available and that the agreement was impossible to perform.
- *Sec. Sewage Equip. Co., d.b.a. Sec. Septic Tank Co. v. McFerren*, 14 Ohio St. 2d 251 (1968) - Risk that department of health would reject plans for central sewage treatment plant for residential subdivision fell on construction contractor who had agreed to install and make plant ready for use and operation, and lack of approval did not constitute a breach of construction contract for which subdivision developers would be liable to contractor.
- *Beth Hachneseth Yad Charutzim Congregation v. Kesmo Delegation*, 81 N.E.2d 543 (Ohio Ct. App. 1948) - Stating that parties must exercise a reasonable amount of care to prevent the happening of any listed contingency.

Oklahoma

Contractual *Force Majeure*

In Oklahoma, many of the *force majeure* cases revolve around the oil and gas industry. A *force majeure* clause generally “excuses [a party] from performing if prevented from doing so by any circumstance or condition beyond its control.” *21st Century Inv. Co. v. Pine*, 734 P.2d 834, 841 (Okla. App. 1986). A contract may excuse performance under certain conditions covered by a *force majeure* clause. See *Golsen v. ONG W., Inc.*, 756 P.2d 1209, 1210 (Okla. 1988); see also *Grindstaff v. Oaks Owners’ Ass’n, Inc.*, 386 P.3d 1035 (Okla. App. 2016) (quoting *Facto v. Pantagis*, 915 A.2d 59, 62 (N.J. Super. Ct. App. Div. 2007)) (holding that 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).

Commercial Impracticability / Impossibility

A party asserting the defense of commercial impracticability is required to 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 non-occurrence of which was a basic assumption of the contract. *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1174 (W.D. Okla. 1989) (citations omitted). A judicially required third element for relief on the basis of commercial impracticability is that the occurrence making performance impracticable must have been unforeseeable. *Id.*

Absent a specific contract provision creating a cognizable excuse for performance, as a matter of law, the defendant is not excused because of changes or a decrease in the market demand for natural gas or because of “restructuring of the natural gas industry.” *RJB Gas Pipeline Co. v. Colo. Interstate Gas Co.*, 813 P.2d 1, 10 (Okla. App. 1989). “In the absence of specific clauses, which expand conditions, which the parties agree will excuse performance, the contracting parties are assumed to have allocated the risk . . . [and] the trial court did not err in striking CIG’s defenses based on commercial impracticability and frustration of purpose.” *Id.*

Frustration of Purpose

The defense of frustration of purpose is defined as follows:

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.

Sabine Corp., 725 F. Supp. at 1178 (quoting Restat. (2d) of Contracts, § 265). To avail itself of the defense, a party must establish three elements: (1) frustration of the principal purpose of the contract; (2) the frustration is substantial; and (3) the non-occurrence of the frustrating event or occurrence was a basic assumption on which the contract was made. *Id.*

Statutory Defenses

12A Okla. Stat. Ann § 2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

12A Okla. Stat. Ann. § 2-615 (Excuse By Failure of Presupposed Conditions)

This provision excuses non-performance where such performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure*.

12A Okla. Stat. Ann. §§ 2-404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Oklahoma Cases

- *Kaiser-Francis Oil Co. v. Producer’s Gas Co.*, 870 F.2d 563 (10th Cir. 1989) - The inability to sell gas at a profit due to market conditions was not sufficient to invoke a *force majeure* clause.
- *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157 (W.D. Okla. 1989) - The failure to give proper notice is fatal to a defense based upon a *force majeure* clause requiring notice.
- *Kuykendall v. Helmerich & Payne, Inc.*, 741 P.2d 869 (Okla. 1987) - A *force majeure* clause may apply where an order of the Oklahoma Corporation Commission or other applicable law prevents the lessee from producing on the premises.

Oregon

Contractual *Force Majeure*

There are surprisingly few reported Oregon cases discussing the concept of contractual *force majeure*; and in none of these cases was the court asked to specifically interpret or apply such contractual language. This is not to say that Oregon courts *discourage* such clauses, only that they have not been the subject of much litigation in the State. As discussed below, the absence of cases interpreting contractual *force majeure* may not be all that important, as Oregon has a fairly robust body of case law regarding frustration of purpose and commercial impracticability.

“Supervening Impossibility” / Frustration of Purpose

In Oregon, the impossibility defense dates back to the 1905 holding of *Fleishman v. Meyer*, 46 Or. 267 (1905). There, the plaintiff hired the defendant to ship and deliver a large quantity of medicinal plant bark to San Francisco, no later than October 1, 1903. The contract did not specify the means by which the defendant was to transport the shipments, though the defendant claimed there was a mutual understanding that the goods would be shipped by sea vessel. The defendant ultimately failed to deliver the goods, contending that seasonal storms at the port of Siuslaw Bay prevented it from fulfilling its obligations. The court disagreed that the purpose of the contract had been frustrated. In rejecting the impossibility defense, the court observed that it was still feasible for the defendant to transport the goods by land, and that therefore, it was still possible to perform the obligation to deliver. The court stated that “unless the original contract stipulated that the inability to transport the bark by water would justify a violation of the agreement, the nonperformance of its terms by reason of the interruption of navigation afforded no defense to the action.” *Id.* at 271.

In *Savage v. Peter Kiewit Sons’ Co*, the Oregon Supreme Court addressed the impossibility argument in a construction case. 249 Or. 147 (1967). The plaintiff (Savage) subcontracted with defendant (Kiewit) to clean and paint steel on a public works project for the State Highway Commission. As permitted by the project documents, Savage planned to air-blast the steel in order to clear the surface before painting. This method, however, caused a neighbor to seek and file an injunction against the practice, which it claimed to have damaged its equipment. In court, Savage argued that the injunction frustrated its purpose under the steel painting subcontract with Kiewit, thereby excusing its performance. *Id.* at 152. The trial court agreed.

Addressing this argument on appeal, the Oregon Supreme Court first recited the Restatement principles of contract, noting that: “Supervening impossibility occurs where, after the formation of a contract facts that a promisor had no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the contract impossible, the duty of the promisor is discharged, unless a contrary intention has been manifested.” *Id.* The court further observed: “Included as one of the supervening events which in a proper case may excuse performance is prohibition by a court order.” *Id.* (citing Restat. of Contracts §§ 457, 458 (1932)).

Despite noting the possibility that a court order can, in the right circumstances, excuse performance, the *Savage* court overturned the lower court finding that *Savage* was absolved from finishing its sand-blasting subcontract. Most importantly, the holding of *Savage* hinges on the concept of foreseeability. As elucidated by the court, foreseeable contingencies are virtually never excusable:

Unexpected difficulties and expense, therefore, whether caused by injunction or by other causes, do not necessarily excuse performance of a contract. The question is whether the unforeseen hazard was one that reasonably should have been guarded against. One purpose of a contract is to shift reasonably foreseeable business risks to the party promising the performance so that the promisee can devote his energies and capital to other matters. A mere showing of commercial unprofitability, without more, will not excuse the performance of a contract.

Id. at 153 (citing *Learned v. Holbrook*, 87 Or. 576 (1918)). Reading the contract as a whole, the court held that various clauses allocating to *Savage* the risk of selected means and methods of construction indicated that the damage to third parties (which was the cause of the injunction) was foreseeable. *Id.*

More recent Oregon cases have articulated a multi-part test for impossibility, but this test mimics the principles set forth in earlier cases. To excuse contractual performance based on impossibility or frustration of purpose, a party must show: “(1) a particular purpose was its primary purpose in entering into a contract; (2) that purpose was mutually understood, even if not mutually shared; (3) that purpose was substantially frustrated; and (4) the frustration was the result of circumstances that the parties mutually assumed would not occur, and the risk of the frustrating circumstance was not impliedly allocated to the party who later seeks rescission.” *Chang v. Pacificorp*, 212 Or. App. 14 (2007). Importantly, however, these more recent cases retain the requirement of foreseeability. *Id.* (“[I]f the occurrence is reasonably foreseeable, courts normally take the position that the promisor has assumed the risk of frustration.”).

Commercial Impracticability

Oregon courts treat commercial impracticability as a subset of the impossibility doctrine. As explained in *Savage*: “In applying the doctrine of impossibility, courts recognize that unexpected difficulty or expense may approach such an extreme that a practical impossibility exists. . . . To operate as a discharge, however, the hardship must be so extreme as to be outside any reasonable contemplation of the parties.” 249 Or. at 152–53 (citations omitted). The court rejected the view that *Savage*’s performance was commercially impracticable. *Id.* at 153; *see also Schafer v. Sunset Packing Co.*, 256 Or. 539, 542 (1970) (“It may have been unprofitable for defendant to have supplied the [strawberry] pickers, but the evidence does not establish that it was impossible. A mere showing of unprofitability, without more, will not excuse the performance of a contract.”).

Statutory Defenses

Or. Rev. Stat. Ann. § 72.6140
(Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Or. Rev. Stat. Ann. § 72.6150
(Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

Notable Oregon Cases

- *Chang v. Pacifcorp*, 212 Or. App. 14 (2007) - Defendant argued that fluctuations in the electricity market due to regulatory changes and sham Enron transactions allowed it to rescind contract to purchase electricity, which was a market-based price contract. Overturning the trial court, the appellate court held that, despite evidence of manipulative practices in the energy market, defendant had assumed the risk of fluctuations in the price of electricity.
- *Water Power Co. v. PacifiCorp*, 99 Or. App. 125 (1989) - Affirming trial court’s refusal to issue jury instruction on *force majeure* based on defendant’s failure to timely enter into a transmission agreement prior to closing purchase agreement with power producer because such a failure was not “beyond the reasonable control” of the defendant.
- *Savage v. Peter Kiewit Sons’ Co.*, 249 Or. 147 (1967) - Where a neighboring property to a construction project obtained a judicial injunction against sand-blasting operation, sand-blasting subcontractor was not excused from performance under doctrine of frustration of purpose or commercial impracticability because injunction was foreseeable at the time of contracting.
- *Fleishman v. Meyer*, 46 Or. 267 (1905) - Holding that, where contract did not specify whether delivery of goods was to be made by land or by sea vessel, storms closing down port of entry did not excuse performance under impossibility doctrine.

Pennsylvania

Contractual *Force Majeure*

In Pennsylvania, for an express *force majeure* provision to excuse a party's contractual obligations, "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. Acts of a third party making performance impossible do not excuse failure to perform if such acts were foreseeable." *Martin v. Commonwealth, Dep't of Env'tl. Res.*, 120 Pa. Cmwith. 269, 273–74 (1988) (citations omitted); see also *Allegheny Energy Supply Co., LLC v. Wolf Run Mining Co.*, 2012 Pa. Super. 163 (2012) (holding that "trial court did not err in determining that [breaching party's] underperformance was not excused by the terms of the force majeure clause" when breaching party was on notice of problem and chose to take less aggressive action in response thereto).

Supervening Impracticability

Pennsylvania courts have applied the doctrine of supervening impracticability as well as the doctrine of supervening frustration of purpose, both of which are set forth in the Second Restatement of Contracts. In *Dom v. Stanhope Steel, Inc.*, the court explained that "[u]nder the doctrine of supervening impracticability, a party's duty to perform pursuant to a contract is discharged where such performance is made 'impracticable,' through no fault of its own, 'by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.'" 368 Pa. Super. 557, 584 (1987) (citing Restat. (2d) of Contracts § 261). "Impracticable" is defined under comment d to Section 261, as follows:

Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved. A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule stated in this Section. Performance may also be impracticable because it will involve a risk of injury to person or to property, of one of the parties or of others, that is disproportionate to the ends to be attained by performance. However, "impracticability" means more than "impracticality." A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover.

Id. at 584–85.

Supervening Frustration

The doctrine of supervening frustration is set forth in § 265 of the Restatement, which states:

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.

Id. at 585.

In *Dorn*, the court noted the “doctrines of commercial impracticability and frustration of purpose are to be applied sparingly.” *Id.* at 586. Mere economic loss is not commercial impracticability. The *Dorn* court held that the breacher failed to establish the economic loss it had incurred (including losing money over a three-year period, inability to secure loans, and inability to pay its operating and payroll expenses) along with heightened interest rates at the time were so severe to rise to the level of commercial impracticability. *Id.* at 585–86. That is, mere loss from performance on a contract is not enough; rather the loss must be “especially severe and unreasonable.” *Id.* at 587 (citing *Gulf Oil Corp. v. Fed. Power Comm’n*, 563 F.2d 588 (3rd Cir. 1977)). This high standard, as the court explained, is necessary because “otherwise, every agreement that becomes disadvantageous to a party as a result of a subsequent downturn in the economy, would entitle that party to be excused from performing under the agreement.” *Id.* at 586.

“Act of God” Defense

Absent a specific *force majeure* clause, the common law “act of God” defense (known as *vis major*) is available in Pennsylvania. “It is well-established that the affirmative defense of *vis major* or force of nature (formerly “act of God”) is the concept of a natural force of such inevitability and irresistibility that man cannot cope with it, either to predict it, forestall it or control it when it arrives. “It is also defined as an unusual, extraordinary, sudden and unexpected manifestation of the forces of nature which cannot be prevented by human care, skill or foresight.” *Woodbine Auto, Inc. v. Se. Penn. Transp. Auth.*, 8 F. Supp. 2d 475, 481 (E.D. Pa. 1998) (internal quotation marks and citations omitted).

Courts will apply this framework, for example, whether the “intervening cause of an injury is wind, snow, storm, or sea, the test . . . remains the same: Did the [breaching party] do all that a reasonable person could have been expected to do to avoid the happening which is the cause of the plaintiff's injuries? If he did, he is not liable in damages. If he did not, he is liable.” *Bowman v. Columbia Tel. Co.*, 406 Pa. 455, 464 (1962). In cases involving *vis major* defenses, a judge or jury will need to determine whether the event is indeed an “act of God.” See *Goldberg v. R. Grier Miller & Sons, Inc.*, 408 Pa. 1, 9 (1962) (“[T]he judge is to direct the jury to decide whether that phenomenon of weather was so unpredictable, so extensive, and so unprecedented in vehemence and destructive fury, that the defendant could not have made preparations to prevent or mitigate the catastrophic effects.”).

Statutory Defenses

13 Pa. C.S.A. § 2614

(Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

13 Pa. C.S.A. § 2615

(Excuse By Failure of Presupposed Conditions)

This provision of the Pennsylvania Commercial Code applies only to contracts for the sale of “goods” (as opposed to services or construction – see § 2105 for full definition) and excuses non-performance or delay where such performance “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 invalid.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure*.

Pennsylvania Commercial Code §§ 2A404/2A405

(Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Pennsylvania Cases

- *Allegheny Energy Supply Co., LLC v. Wolf Run Mining Co.*, 53 A.3d 53 (Pa. Super. Ct. 2012) - Holding that the “trial court did not err in determining that [breaching party’s] underperformance was not excused by the terms of the *force majeure* clause” when breaching party was on notice of problem and chose to take less aggressive action in response.

- *Woodbine Auto, Inc. v. Se. Penn. Transp. Auth.*, 8 F. Supp. 2d 475 (E.D. Pa. 1998) - Denying summary judgment based on a genuine issue of disputed fact as to whether storms were so extraordinary as to constitute a “force of nature” excusing performance.
- *Martin v. Commonwealth, Dep’t of Env’tl. Res.*, 548 A.2d 675 (Pa. 1988) - Holding that a *force majeure* clause was null and void where defendant failed to timely notify the opposing party of the *force majeure* event in the time prescribed by contract.
- *Dorn v. Stanhope Steel, Inc.*, 368 Pa. Super. 557 (1987) - Stating that, where a corporation voluntarily dissolves itself, the corporation remains responsible for contractual obligations because performance was rendered impossible by its own doing.
- *Goldberg v. R. Grier Miller & Sons, Inc.*, 408 Pa. 1 (1962) - “[T]he judge is to direct the jury to decide whether that phenomenon of weather was so unpredictable, so extensive, and so unprecedented in vehemence and destructive fury, that the defendant could not have made preparations to prevent or mitigate the catastrophic effects.”

Puerto Rico

Contractual *Force Majeure*

In Puerto Rico, courts are likely to define *force majeure* as a “natural phenomenon, such as a natural disaster, but unforeseeable human events, such as war, may also constitute force majeure.” *La Carpa Corp. v. Am. Spaceframe Fabricators, LLC*, No. CV 09-2014 (DRD/BJM), 2014 WL 12889278, at *6 (D.P.R. 2014) (citing *O.E.G. v. Rivera*, 153 D.P.R. 184, 192 (2001)). To determine whether an event constitutes a *force majeure*, courts consider the frequency or probability of the event, whether the event was unusual, and whether precautions were taken in anticipation of the event. *Id.* (citing *Rivera v. Caribbean Home Constr. Corp.*, 100 D.P.R. 106, 112–13 (1971)).

Rebus Sic Stantibus / Impossibility

Courts in Puerto Rico apply the doctrine of *rebus sic stantibus*, which “allows for the modification of conditions in a contract or even its termination when unforeseen changes in the circumstances are such that it is too burdensome or impossible for a party to comply with its duties.” *Medina & Medina v. Country Pride Foods Ltd.*, 631 F. Supp. 293, 298 (D.P.R. 1986). The doctrine is “an extraordinary remedy to be applied only in extreme circumstances.” *Id.*; see also *Casera Foods, Inc. v. Estado Libre Asociado de P.R.*, 108 D.P.R. 850 (P.R. 1979).

For the doctrine to apply, the Puerto Rico Supreme Court has laid out several elements, which include: (1) a contract, in whole or in part, is not yet complete; (2) that after the parties entered into the contract; (3) an unforeseeable event of some circumstance arises; (4) that as a result thereof, performance by the promisor becomes significantly more costly burdensome; (5) that the parties’ actions be free of deceit; and (6) that the interested party move the court for relief. *Lopez Morales v. Hosp. Hermanos Melendez, Inc.*, 460 F. Supp. 2d 288, 292 (D.P.R. 2006) (citing *Casera Foods*, 108 D.P.R. at 856). If not all elements are proven, the courts may still intervene in the interest of justice. See *PR Asset Portfolio 2013 1 Int., LLC v. Negron Falcon*, No. FBCI201201129, 2014 WL 7367391, at *16 (P.R. Cir. 2014) (citing *BPPR v. Sucn. Talavera*, 174 D.P.R. 686, 715 (P.R. 2008)). The determining factor justifying relief is unforeseeability. *Medina & Medina*, 631 F. Supp. 293 at 298.

Puerto Rico courts have explained that the more sophisticated or experienced a party is in an industry, the more foreseeable an event tends to be. See *La Carpa Corp.*, 2014 WL 12889278, at *6 (citing *Casera Foods*, 108 D.P.R. at 858).

Statutory Defenses

31 L.P.R.A § 3022

(Unforeseen or Inevitable Events)

“No one shall be liable for events which could not be foreseen, or which having been foreseen were inevitable, with the exception of the cases expressly mentioned in the law or those in which the obligation so declares.”

31 L.P.R.A. § 3191
(When Loss Extinguishes Obligation)

“An obligation, consisting in the delivery of a specified thing, shall be extinguished when said thing should be lost or destroyed without fault of the debtor and before he should be in default.”

31 L.P.R.A. § 4142
(Liability for Loss or Damage)

“Carriers are also liable for the loss of and damage to the things which they receive, unless they prove that the loss or damage arose from a fortuitous event or force majeure.”

31 L.P.R.A. § 4672
(Loss of Thing Through Force Majeure and Receipt of Another)

“The bailee, who may have lost the thing bailed through force majeure and received another in its place, shall be obliged to deliver the latter to the bailor.”

10 L.P.R.A. § 1542
(Merchandise Held for Account of Another)

“An agent who has in his possession merchandise or goods for the account of another person, shall be responsible for their preservation in the condition in which he received the same. This responsibility shall cease when their destruction or impairment is due to accidental causes, force majeure, lapse of time, or by a defect in the article. In cases of total or partial loss on account of lapse of time or defect in the goods, the agent shall be obliged to prove the impairment of the merchandise in a legal manner, informing the principal thereof as soon as it is observed.”

10 L.P.R.A. § 1783
(Risk on Merchandise Transported)

“Merchandise shall be transported at the risk of the shipper, unless the contrary was expressly stipulated. Therefore, all damages and impairment suffered by the goods in transportation, by reason of accident, force majeure, or by virtue of the nature or defect of the articles, shall be for the account and risk of the shipper. The proof of these accidents is incumbent on the carrier.”

Notable Puerto Rico Cases

- *Bancredito Int'l Bank Corp. v. Data Hardware Supply, Inc.*, No. 18-1005, 2019 WL 4458839 (D.P.R. 2019) - Denying defense of force majeure where a third party failed to pay defendant due to the crisis in Venezuela, because defendant's contractual obligations did not depend on defendant's receipt of

payment from the third party. The court recognized that the crisis in Venezuela may give rise to *force majeure*, but such crisis was not relevant to defendant's contract with plaintiff.

- *La Carpa Corp. v. Am. Spaceframe Fabricators, LLC*, No. CV 09-2014 (DRD/BJM), 2014 WL 12889278 (D.P.R. 2014) - Concluding that neither the increase in steel prices which began prior to the contract being executed nor the economic recession of 2008 was a *force majeure* or the basis for applying *rebus sic stantibus*, because these events were not unforeseeable.
- *Medina & Medina v. Country Pride Foods Ltd.*, 631 F. Supp. 293 (D.P.R. 1986) - Denying the request to apply the *rebus sic stantibus* doctrine where there was insufficient evidence to establish defendant's inability to perform under a supply agreement based on economic grounds and where alleged circumstances prompting price increases were foreseeable.
- *Casera Foods, Inc. v. Estado Libre Asociado de P.R.*, 108 D.P.R. 850 (P.R. 1979) - Holding that the availability of natural papayas on a commercial scale was not unforeseeable to a manufacturer specialized in the industry.

Rhode Island

Contractual *Force Majeure*

In interpreting contractual terms, Rhode Island courts look at the intent of the parties. “If the terms are found to be unambiguous . . . the task of judicial construction is at an end and the parties are bound by the plain and ordinary meaning of the terms of the contract.” *Zarella v. Minn. Mut. Life Ins. Co.*, 824 A.2d 1249, 1259 (R.I. 2003); *Capital Props., Inc. v. State*, 749 A.2d 1069, 1081 (R.I. 1999); *Rivera v. Gagnon*, 847 A.2d 280, 284 (R.I. 2004).

Under Rhode Island law, where a party seeks to avoid liability for non-performance based on the occurrence of a *force majeure* event, the courts will evaluate whether the *force majeure* event was foreseeable at the time of contracting. *URI Cogeneration Partners L.P. v. Bd. of Governors for Higher Ed.*, 915 F. Supp. 1267 (D.R.I. 1996). A *force majeure* clause that doesn’t specifically list events that excuse a party’s performance obligations will not be saved by the use of broad, catch-all language specifying the covered events where such events were foreseeable. *Id.* (holding that *force majeure* clause did not cover cogenerators’ inability to secure zoning approval for project so as to excuse cogenerators from their financing obligations under agreement).

Impossibility / Frustration of Purpose

The underlying principle of the doctrine of frustration of purpose is to excuse a party from performing under a contract in the event of an intervening or supervening condition that substantially frustrates the main purpose for which the parties entered into the contract in the first place. *Tri-Town Constr. Co., Inc. v. Commerce Park Assocs. 12, LLC*, 139 A.3d 467 (R.I. 2016). For the doctrine of frustration of purpose to apply, the parties, in making a contract, must have been operating under a basic assumption that the intervening or supervening event would not take place. *Id.* at 475.

Under Rhode Island law, a party cannot create an impossibility preventing performance on a contract and then be shielded from its obligations under the contract by hiding behind an impossibility that it created. *Bradford Dyeing Ass’n, Inc. v. J. Stog Tech GmbH*, 765 A.2d 1226 (R.I. 2001). Furthermore, to succeed on a theory of frustration of purpose based upon the occurrence of a supervening event, a party must show that: (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 (R.I. 1998).

For the doctrine of frustration of purpose to apply, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that it had in mind some specific object without which it would not have made the contract; the object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. Restat. (2d) of Contracts § 265, cmt. a (1981).

When defending against a claim for breach of contract, a party cannot avoid its contractual obligations merely because its performance under the agreement becomes more costly or difficult. Moreover, it is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss; the frustration must be so severe that it is not fairly to be regarded as within the risks that it assumed under the contract. *Id.* A party's obligation under a contract "will not be set aside merely because the performance under the contract becomes more difficult or expensive than originally anticipated." *Iannuccillo*, 713 A.2d at 1239; *City of Warwick v. Boeng Corp.*, 472 A.2d 1214, 1219 (R.I. 1984) (stating that "the purpose underlying the contract must be totally and unforeseeably destroyed").

Statutory Defenses

R.I. Stat. § 6A-2-614

(Substituted Performance)

Section 2-614 of the Rhode Island Uniform Commercial Code applies only to contracts for the sale of "goods" (as opposed to services or construction). Section 2-614(1) permits a party to provide substituted performance if, "without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available." The comments to this section provide that there must be a true commercial impracticability to excuse the agreed performance and justify a substituted performance. When this is the case, a reasonable substituted performance tendered by either party should excuse it from strict compliance with contract terms which do not go to the essence of the agreement.

Section 6A-2-614(2) provides that the seller may withhold or stop delivery if "the agreed means or manner of payment fails because of domestic or foreign governmental regulation" unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. In the event that delivery has already been made, "payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory."

R.I. Stat. § 6A-2-615

(Excuse by Failure of Presupposed Conditions)

This section of the Rhode Island Uniform Commercial Code also applies only to contracts for the sale of goods. Except so far as a seller may have assumed a greater obligation and subject to 6A-2-614 on substituted performance, non-performance is excused "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." Under this Rhode Island statute, a seller is not excused from all performance if seller's capacity to perform is not wholesale. Rather, where possible, seller "must allocate production and deliveries among his customers . . . in any manner which is fair and reasonable." Finally, the seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required among seller's customers (including buyer), of the estimated quota thus made available for the buyer.

As to partial performance, Rhode Island courts have held that a landowner was entitled to recompense for portion of work subsequently performed by second contractor that first contractor was originally obligated to perform pursuant to excavation contract, prior to first contractor's performance being rendered impracticable by discovery of ledge. *Iannuccillo v. Material Sand & Stone Corp.*, 713 A.2d 1234 (R.I. 1998).

R.I. Stat. §§ 6A-2.1-404/405

(Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of "lease contracts," which include contracts involving "a transfer of the right to possession and use of goods for a term in return for consideration"; however, "a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease." In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Rhode Island Cases

- *Bradford Dyeing Ass'n Inc. v. J. Stog Tech GmbH*, 765 A.2d 1226 (R.I. 2001) - Buyer was not relieved of its obligations under a purchase contract by claiming impossibility due to a delay in government approval that it created by its own inactions.
- *Iannuccillo v. Material Sand & Stone Corp.*, 713 A.2d 1234 (R.I. 1998) - Discovery of ledge so increased burden on contractor that further performance pursuant to terms of excavation contract was rendered impracticable, even though existence of ledge was not completely beyond realm of foreseeable consequences; ledge was not exposed or anticipated at time that parties entered into contract which limited contractor's obligation to removal of "existing rock now exposed," and discovery of ledge substantially altered complexity, difficulty, and expense necessary to achieve desired result.
- [*Grady v. Grady*, 504 A.2d 444 \(R.I. 1986\)](#) - Stating that the ultimate inquiry for the purposes of accepting or rejecting a defense of frustration of purpose is whether the intervening changes in circumstances were so unforeseeable that the risk of increased difficulty or expense should not be properly borne by the nonperforming party.
- *City of Warwick v. Boeng Corp.*, 472 A.2d 1214 (R.I. 1984) - Purpose of contract not frustrated by elimination of statutory requirement that municipal approval be sought before property could be sold.

South Carolina

Contractual *Force Majeure*

There are no South Carolina cases expressly interpreting the legitimacy of a *force majeure* provision, although South Carolina does have long-standing precedent acknowledging that an “act of God” can vitiate a contract. *Pearce-Young-Angel Co. v. Charles R. Allen, Inc.*, 50 S.E.2d 698 (S.C. 1948).

Impossibility / Frustration of Purpose

The South Carolina Court of Appeals has stated that a party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or a third party, and that this impossibility must be real and not a mere inconvenience. *Hawkins v. Greenwood Dev. Corp.*, 493 S.E.2d 875, 879 (S.C. Ct. App. 1997). “A party to a contract cannot be excused from performance on the theory of impossibility of performance unless it is made to appear that the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible.” *Id.*

As one might expect, impossibility is a high bar to meet, with South Carolina courts usually interpreting “great difficulty” to mean “inconvenience” and not “impossibility.” See, e.g., *V.E. Amick & Assocs., LLC v. Palmetto Env’tl Grp., Inc.*, 716 S.E.2d 295, 299–300 (S.C. Ct. App. 2011) (describing defendant’s claim for excused performance, due to plaintiff not having hired an engineer to properly certify its work, as an inconvenience instead of an impossibility excusing performance); *MPI S. Carolina-1, LLC v. Levy Ctr., LLC*, No. 2011–UP–065, 2011 WL 11733080 (S.C. Ct. App. 2011) (holding that the imposition of a building moratorium and significant changes in zoning did not create an impossibility of performance in part because MPI continued to go forward with the contract even after learning of the moratorium); *Pearce-Young-Angel Co.*, 50 S.E.2d at 701 (excusing performance due to impossibility where a massive rainfall damaged a pea crop and left defendant unable to harvest enough peas of the quality required by the contract).

Statutory Defenses

S.C. Stat. Ann. § 36-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

S.C. Stat. Ann. § 36-2-615**(Excuse By Failure of Presupposed Conditions)**

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

S.C. Stat. Ann. §§ 36-2A-404/405**(Substituted Performance/Excused Performance on Lease Contracts)**

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable South Carolina Cases

- *MPI S. Carolina-1, LLC v. Levy Ctr., LLC*, No. 2011–UP–065, 2011 WL 11733080 (S.C. Ct. App. 2011) - Holding that the imposition of a building moratorium and significant changes in zoning did not create an impossibility of performance, in part because MPI continued to go forward with the contract even after learning of the moratorium.
- *V.E. Amick & Assocs., LLC v. Palmetto Env't'l Grp., Inc.*, 716 S.E.2d 295 (S.C. Ct. App. 2011) - Describing defendant Palmetto’s claim for excused performance, due to plaintiff’s not having hired an engineer to properly certify Palmetto’s work, as an inconvenience instead of an impossibility that frustrated the purpose of the contracts between the parties.
- *Hawkins v. Greenwood Dev. Corp.*, 493 S.E.2d 875 (S.C. Ct. App. 1997) - Stating that a party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or a third party, and that this impossibility must be real and not a mere inconvenience.
- *Coker Int'l, Inc. v. Burlington Indus., Inc.*, 935 F.2d 267 (4th Cir. 1991) - Affirming a district court order holding that “subjective impossibility of performing does not relieve a party from the contract unless the contract so states.”
- *Opera Co. of Boston v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094 (4th Cir. 1987) - Holding that a party seeking to rely on the defense of impossibility of performance must establish: (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its

non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable.

South Dakota

Contractual *Force Majeure*

There are no reported South Carolina cases interpreting or applying a contractual *force majeure* provision. Generally speaking, South Dakota courts interpret contracts in accordance with the plain and ordinary meaning of the language used by the parties to the contract. Courts “will not make a forced construction or a new contract for the parties.” *Berkley Reg'l Specialty Ins. Co. v. Dowling Spray Serv.*, 864 N.W.2d 505, 512 (S.D. 2015).

Commercial Frustration

South Dakota follows the Second Restatement of Contracts definition of commercial frustration: “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 circumstances indicate the contrary.” *Groseth Int'l, Inc. v. Tenneco, Inc.*, 410 N.W.2d 159, 165 (S.D. 1987).

There are three elements to a claim of commercial frustration: (1) The purpose that is frustrated must have been a principal purpose of that party in making the contract; (2) the frustration must be substantial (i.e., so severe that it is not fairly to be regarded as within the risks assumed under the contract); and (3) the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. *Id.* at 165–66. Importantly, if the frustrating event was within the promisor’s control or due to its fault, performance of contractual obligations is not excused. *Id.* at 167. The frustration must cause more than a net loss. *Mueller v. Cedar Shore Resort, Inc.*, 643 N.W.2d 56, 70 (S.D. 2002).

The South Dakota Supreme Court has held that, as a general rule, unexpected difficulty, expenses, or hardship involved in performance will not excuse performance where performance has not become objectively impossible. *Id.* There may be excuse from performance where very greatly increased difficulty is caused by facts that are both unanticipated and inconsistent with the facts that the parties assumed would be unlikely to continue to exist. *Id.*

Statutory Defenses

S.D.C.L. § 57A-2-614

(Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a

commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

S.D.C.L. § 57A-2-615

(Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

S.D.C.L. §§ 57A-2A-404/405

(Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

S.D.C.L. § 20-6-2

(Uncontrollable Cause Excusing Want or Delay of Performance)

Under this provision: “Want of performance, or of an offer of performance, or any delay therein, is excused when 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, unless the parties have expressly agreed to the contrary.”

S.D.C.L. § 35-8A-6

(Conditions for Terminating, Failing to Renew, or Refusing to Continue Under Agreement by Supplier--Notice to Wholesaler)

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 . . . : (8) 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.

Notable South Dakota Cases

- *Mueller v. Cedar Shore Resort, Inc.*, 643 N.W.2d 56 (S.D. 2002) - Explaining that the inability to pay promissory note was fairly regarded within the risks that the parties assumed under the promissory note contract.
- *Groseth Int'l, Inc. v. Tenneco, Inc.*, 410 N.W.2d 159 (S.D. 1987) - Denying claim for frustration of purpose but remanding the claim for commercial impracticability because of the uncertainty of plaintiff's financial condition at the moment of breach of contract.

Tennessee

Contractual *Force Majeure*

The cases in Tennessee interpreting *force majeure* clauses suggest that *force majeure* language will be strictly enforced. See *Bayader Fooder Trading, LLC v. Wright*, No. 13-2856, 2014 WL 5369420, at *3 (W.D. Tenn. 2014) (*force majeure* provision defined the exclusive scope of unforeseeable events that might excuse nonperformance by a party); see also *Robert J. Young Co. v. Nashville Hockey Club Ltd. P'ship*, No. M20062511COAR3CV, 2008 WL 820488 (Tenn. Ct. App. 2008) (unpublished decision). If the contract includes a *force majeure* clause, it will likely be enforced as written; if it does not, Tennessee may still recognize other defenses to contract performance, including “acts of God,” as discussed below.

Impossibility

In Tennessee, an unforeseen event that causes impossibility of performance of a contract may be used as a defense. *Silsbe v. Houston Levee Indus. Park, LLC*, 165 S.W.3d 260, 265 (Tenn. Ct. App. 2004). The doctrine of impossibility of performance is usually employed defensively, excusing nonperformance of a contract, rather than offensively, in order to reform a contract. *Id.* Moreover, the doctrine of impossibility of performance does not apply where performance becomes impossible due to factors which should have been foreseen and provided against. *Id.*

Frustration of Commercial Purpose

The doctrine of frustration of commercial purpose, recognized by the Tennessee Supreme Court in *North American Capital Corporation v. McCants*, 510 S.W.2d 901 (Tenn. 1974), may excuse performance due to unforeseeable and uncontrollable supervening events about which the contract is silent.

[I]f the happening of an event, not foreseen by the parties to the contract and neither caused by nor under the control of either party, has destroyed or nearly destroyed either the value of performance or the object or purpose of the contract, then the parties are excused from further performance. The *McCants* court stated the “supervening event” must be “wholly outside the contemplation of the parties” but, if such frustrating event was reasonably foreseeable, the doctrine is not a defense. The doctrine is predicated on the premises of giving relief where the parties could not provide themselves, by the provisions of the contract, against the happening of the supervening event.

Haun v. King, 690 S.W.2d 869, 871–72 (Tenn. App. 1984) (citations omitted). Frustration of commercial purpose does not apply where the frustrating event was reasonably foreseeable by one party. *Scruggs v. Roach*, 1993 WL 93362, at *3 (Tenn. Ct. App. 1993).

“Act of God” Defense

Any misadventure or casualty is said to be caused by the “Act of God” when it happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of

man and without human intervention. It must be of such character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by the aid of any appliances which the situation of the party might reasonably require him to use. *Butts v. City of S. Fulton*, 565 S.W.2d 879 (Tenn. Ct. App. 1977); *cf. Am. Book Co. v. Consol. Grp. of Cos., Inc.*, No. 3:09-CV-112, 2011 WL 11969, at *2 (E.D. Tenn. 2011) (events that are not acts of God, including the adoption of a new government regulation, are not a force of nature, uncontrolled or uninfluenced by the power of man and without human intervention).

Statutory Defenses

Tenn. Code Ann. § 47-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Tenn. Code Ann. § 47-2-615 (Excuse By Failure of Presupposed Conditions)

This provision of Tennessee Code excuses non-performance where such performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure*.

Tenn. Code Ann. §§ 47-2-404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Tennessee Cases

- *Rural Devs., LLC v. Tucker*, No. M200800172COAR3CV, 2009 WL 112541 (Tenn. Ct. App. Jan. 14, 2009) (unpublished decision) - The doctrine of frustration of purpose applies only in cases of the most extreme hardship where there has been an unanticipated circumstance that, under the equities at play, justifies placing the risk of avoidance of the contract on the party not claiming frustration of purposes.
- *Bayader Fooder Trading, LLC v. Wright*, No. 13-2856, 2014 WL 5369420 (W.D. Tenn. 2014) - A force majeure provision in a contract defines the scope of unforeseeable events that might excuse nonperformance by a party.
- *N. Am. Capital Corp. v. McCants*, 510 S.W.2d 901 (Tenn. 1974) - The courts have required a promisor seeking to excuse itself from performance of its obligations 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 promisor, or if counterperformance remains valuable.

Texas

Contractual *Force Majeure*

In order to determine whether a certain event excuses performance under a contract, Texas courts will look to the language that the parties specifically bargained for in the *force majeure* clause, rather than resorting to any traditional definition of the term. See *Sun Operating Ltd. v. Holt*, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, no pet.). Central to the *force majeure* question is whether the parties expressly or impliedly assumed the risk of the contingency at the time they entered the contract. Courts tend to narrowly construe *force majeure* provisions and will strictly enforce the specific language in the contract. *Va. Power Energy Mktg., Inc. & Dominion Res., Inc. v. Apache Corp.*, 297 S.W.3d 397, 402 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

When assessing enforceability of a *force majeure* provision, Texas courts will also consider other factors including:

- *Whether the language of the agreements specifically includes or excludes the qualifying activity;*
- *Whether the risk of non-performance was foreseeable;*
- *Whether the risk can be mitigated; and*
- *Whether performance is truly impossible or just impracticable, difficult or “too expensive”?*

When parties specify certain *force majeure* events, there is no need to show that the occurrence of such an event was unforeseeable, but when the party seeking to avoid performance relies on a catch-all provision, it must show that the event at issue was unforeseeable. *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 182 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

In Texas, acts of God do not excuse performance of a contract unless specifically provided in the contract. *GT & MC, Inc. v. Tex. City Ref., Inc.*, 822 S.W.2d 252, 259 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Bayou Place Ltd. P’shp. v. Allepp’s Grill, Inc.*, No. RDB-18-2855, 2020 WL 1235010, at *7 (D. Md. 2020) (applying Texas law and collecting cases). With respect to *force majeure* provisions disclaiming responsibility in the event of an “act of God,” Texas cases suggest that acts of God are tantamount to forces of nature or natural causes. *In re Downstream Addicks*, No. 17-9002, 2020 WL 808686, at *9 (Fed. Cl. 2020) (finding Harvey was a 2000-year storm that “could not have been reasonably expected or provided against”); *Landgraf v. Nat’l Res. Conservation Serv.*, No. 6:18-CV-0061, 2019 WL 1540643, at *2 (S.D. Tex. 2019) (finding flooding caused by storm surge from Harvey attributable solely to an Act of God); *McClure v. Greater San Antonio Trans. Co.*, No. SA-08-CA-112-FB, 2008 WL 11334957, at *10 (W.D. Tex. 2008) (an occurrence is caused by an act of God if it is caused directly and exclusively by the violence of nature, without human intervention or cause, and could not have been prevented with reasonable foresight or care). Finally, the party claiming *force majeure* must demonstrate that the alleged *force majeure* event was the proximate cause of nonperformance of the contract.

Commercial Impracticability

The doctrine of commercial impracticability is available as a defense to a breach of contract claim, regardless of whether there is a *force majeure* provision in the contract. In Texas, this defense is based on Section 261 of the Second Restatement of Contracts. See *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W.3d 60, 65 (Tex. App.—Houston [14th Dist.] 2003). As defined by the Restatement, cmt. d, “performance may be impracticable because of extreme and unreasonable difficulty or expense . . . or a severe shortage of raw materials or of supplies due to . . . an unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or prevents performance altogether.” To prevail under this theory, however, one must also show every reasonable effort to surmount the obstacle in order to perform. *Id.* at 68. Importantly, like the enforcement of a *force majeure* provision, the application of commercial impracticability is fact-specific.

Statutory Defenses

Tex. Bus. & Com. Code Ann. § 2.614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Tex. Bus. & Com. Code Ann. § 2.615 (Excuse by Failure of Presupposed Conditions)

This provision of the Texas Code applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance where such performance “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 invalid.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer. When applying this section, Texas courts routinely acknowledge that the impossibility exception of Section 2.615 does not apply when the contingency in question is sufficiently foreshadowed at the time of contracting. See *Westech Eng’g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 202 (Tex. App.—Austin 1992, no writ).

Tex. Bus. & Com. Code Ann. §§ 2A.404–05**(Substituted Performance/Excused Performance on Lease Contracts)**

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Texas Cases

- *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) - Holding that where parties specify certain force majeure events, there is no need to show that the occurrence of such an event was unforeseeable, but when the party seeking to avoid performance relies on a catch-all provision, it must show that the event at issue was unforeseeable. The parties agreed by contract to test-drill land in search of oil and gas. At the time the contract was signed, the price of oil was over \$100 a barrel. By December 2015 it was around \$40. As a result of the significant drop in the global oil market, Olmos could not get the financing it needed to do the drilling and invoked the force majeure clause to extend the deadline, arguing that the worldwide drop in oil prices and resulting inability to obtain financing was “beyond the reasonable control” of Olmos. The Court of Appeals disagreed. The court held that the change in the oil and gas market making it impossible for Olmos to obtain financing was not a force majeure event as defined by the contract. The court reasoned that a “foreseeable” event—such as a decline in the oil and gas market—cannot qualify as force majeure under the “catch-all” provision of the force majeure clause.
- *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W.3d 60 (Tex. App.—Houston [14th Dist.] 2003), opin. supplemented on overruling of reh’g, 118 S.W.3d 929 (Tex. App.—Houston [14th Dist.] 2003) - Stating that impracticability excuses a party’s breach of contract when the contract itself doesn’t provide an escape clause and the doctrine’s other requirements are satisfied. In particular, the excuse is limited to circumstances in which both parties held a basic (though unstated) assumption about the contract that proves untrue and noting that the “basic assumption” of the parties in most cases is relatively obvious. For example, in a contract for personal services, the death or incapacity of the person involved makes the contract impracticable. Similarly, a contract to lease or insure a building is rendered impracticable if the building is destroyed. A change in the law that makes performance illegal also renders it impracticable. In each of these circumstances, it takes little imagination to see that both contracting parties entertained a basic assumption about the contract that proved untrue.
- *Centex Corp. v. Dalton*, 840 S.W.2d 952 (Tex. 1992) - Relying on sections 261 and 264 of the Restatement in setting out the proper elements of the defense of impracticability, although the Supreme Court referred to the defense as “impossibility” rather than impracticability.
- *GT & MC, Inc. v. Tex. City Ref., Inc.*, 822 S.W.2d 252 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Bayou Place Ltd. P’shp v. Allepp’s Grill, Inc.*, No. RDB-18-2855, 2020 WL 1235010 (D. Md.

2020) (applying Texas law and collecting cases) - Stating that acts of God do not excuse performance of a contract unless specifically provided in the contract.

Utah

Contractual *Force Majeure*

Utah construes *force majeure* clauses according to their express terms. Consequently, where an event of *force majeure* was defined as “any cause beyond the reasonable control [of the parties] that, despite the exercise of due diligence, such party is unable to prevent or overcome,” the court required evidence of both conditions—lack of control and inability to mitigate. *Desert Power, LP v. Pub. Serv. Comm’n*, 173 P.3d 218, 222 (Utah Ct. App. 2007); see also *Seal v Tayco, Inc.*, 400 P.2d 503, 505 (Utah 1965) (*force majeure* clause did not excuse performance, but only applied to limit consequential damages).

At least one court has suggested that when a contract includes a *force majeure* clause, the common law defenses of *force majeure*, impossibility of performance, frustration of purpose and the UCC defense of excuse are not available. In *Aquila, Inc. v. C. W. Mining*, the court held that C. W. Mining (“CWM”) could not invoke these gap-filler doctrines to be excused of its contractual obligation to supply coal because the parties’ contract contained a *force majeure* clause that expressly spelled out when supervening events would excuse performance. The terms of the *force majeure* clause—including a notice requirement—had not been satisfied, so “CWM cannot rely on common law defenses and the U.C.C., thereby circumventing the terms and limitations that the parties negotiated in the Contract.” No. 2:05-CV-00555 TC, 2007 WL 9643101, at *5 (D. Utah 2007).

Commercial Impracticability / Impossibility

Under the doctrine of impossibility/commercial impracticability, “a party may be relieved of performing an obligation under a contract where supervening events, unforeseeable at the time the contract is made, render the performance of the contract impossible.” *Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856, 861 (Utah 1978); see also *Bitzes v Sunset Oaks, Inc.*, 649 P.2d 66, 69 (Utah 1982) (noting that more contemporary formulations of the defense of impossibility are defined by phrases such as impracticability) (citing Restat. (2d) of Contracts § 261).

In general, commercial impracticability is not available to excuse a party’s performance due to an increased cost to perform, nor is it available as a basis for adjusting the contract price. *Kilgore Pavement Maint., LLC v. W. Jordan City*, 257 P.3d 460, 462 (Utah Ct. App. 2013) (rejecting request for equitable adjustment of contract price based on impracticability due to sudden and dramatic increase of cost of goods). Moreover, a party is not excused from performance if the event leading up to the impracticability was known to the parties prior to contracting. *Cent. Utah Water Conservancy Dist. v. Upper E. Union Irrigation Co.*, 321 P.3d 1113, 1120 (Utah 2013) (where party assumed risk of obtaining permits, inability to get permits does not excuse performance). Whether impracticability affords a party relief from its obligations under a contract is a question of law. *Id.*

Frustration of purpose, on the other hand, excuses performance where it would be “pointless” to proceed. *W. Props. v. S. Utah Aviation, Inc.*, 776 P.2d 656, 659 (Utah Ct. App. 1989). For example, a tenant sought to avoid its lease obligations when, during build-out, its employees walked out. Characterizing the walk out as an “unforeseen crippling blow,” the tenant claimed the purpose of the lease was “pointless.”

The Court disagreed: the change in tenant's economic conditions made the lease more difficult to perform but not pointless. *Tech Ctr. 2000 LLC v. Zri, LLC*, 363 P.3d 566, 575 (Utah Ct. App. 2015).

Statutory Defenses

Utah Code Ann. § 70-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: "(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted."

Utah Code Ann. § 70A-2-615 (Excuse by Failure of Presupposed Conditions)

This provision of the Utah Code applies only to contracts for the sale of "goods" (as opposed to services or construction) and excuses non-performance where such performance "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 invalid." Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must "allocate production and deliveries among his customers . . . in any manner which is fair and reasonable." The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure* and, where allocation is required, the estimated quota that will be made available to the buyer. See *Bernina Distrib., Inc. v. Bernina Sewing Mach. Co., Inc.*, 646 F.2d 434, 439 (10th Cir. 1981) (applying Utah law and holding that devaluation of dollar making contract significantly less profitable is not unforeseeable so section 2-615 is inapplicable).

Utah Code Ann. §§ 70A-2A-404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of "lease contracts," which include contracts involving "a transfer of the right to possession and use of goods for a term in return for consideration"; however, "a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease." In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Utah Cases

- *Cent. Utah Water Conservancy Dist. v. Upper E. Union Irrigation Co.*, 321 P.3d 1113 (Utah 2013) - Stating that a party may not defend on grounds of impracticability where that party takes on the risk that a supervening event may occur and denying relief to contractor who assumed risk of obtaining permits.
- *Aquila, Inc. v. C. W. Mining*, No. 2:05-CV-00555 TC, 2007 WL 9643101 (D. Utah 2007) - Stating that inclusion of force majeure clause precludes reliance on common law and gap-filler doctrines such as impossibility and impracticability of performance and frustration of purpose.
- *Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856 (Utah 1978) - Rejecting defense of impracticability due to excessive rise in cost of operations where defendant failed to offer evidence of operational costs attributable to plaintiff versus operation costs attributable to defendant.

Vermont

Contractual *Force Majeure*

Few Vermont cases have ever discussed the *force majeure* defense in detail, though Vermont courts ostensibly would apply a contractual *force majeure* provision. As explained by the U.S. Bankruptcy Court for the District of Vermont: “It has been observed that the concept of *force majeure* is similar to the common law concept of an “act of God,” which has been defined as a “providential occurrence or extraordinary manifestation of the forces of nature which could not have been foreseen and the effect thereof avoided by exercise of reasonable prudence, diligence and care, or by the use of those means which the situation renders reasonable to employ.” *In re Bushnell*, 273 B.R. 359, 364 (Bankr. D. Vt. 2001). “The burden is on the party claiming *force majeure* to demonstrate that an act of God or similar event occurred and prevented the party’s performance.” *Id.*

Impossibility / Commercial Impracticability

Vermont appears to acknowledge a blended concept of the impossibility and commercial impracticability doctrines. According to *SKI, Ltd. v. Mountainside Prop., Inc.*, the party asserting common law excusability defenses must establish evidence that the defenses of how performance was rendered impossible or commercially impracticable (though the court does not precisely articulate what those terms mean under Vermont law). 198 Vt. 384, 398 n.9 (2015). As stated by that court: “A party who created the circumstances that brought about the impossibility or frustration of purpose cannot raise these doctrines as defenses.” *Id.*; see *Williams v. Carter*, 129 Vt. 619, 623 (1971) (subcontractor’s failure to obtain sub-subcontractor to clear areas for roads and lift lines was not “impossible” because “impossibility of performance is recognized in our law only in the nature of the thing to be done, and not in the inability of the party to do it”)

Statutory Defenses

9A V.S.A. § 2-614

(Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

9A V.S.A. § 2-615

(Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

Notable Vermont Cases

- *SKI, Ltd. v. Mountainside Prop., Inc.*, 198 Vt. 384 (2015) - Noting that the impossibility defense is fact-intensive and requires evidence of the financial impact on the party raising the defense.
- *Williams v. Carter*, 129 Vt. 619 (1971) - Subcontractor’s failure to obtain sub-subcontractor to clear areas for roads and lift lines was not “impossible” because “impossibility of performance is recognized in our law only in the nature of the thing to be done, and not in the inability of the party to do it.”
- *Cushman v. Outwater*, 121 Vt. 426 (1960) - Declining to excuse performance based on impossibility. Because the “defendants elected to terminate the situation by their own act when it became ‘impossible’ as to them, it is difficult to see where they could sustain any claim for damages at law.”

US Virgin Islands

Contractual *Force Majeure*

In the U.S. Virgin Islands, courts will strictly construe *force majeure* clauses so that a party is not excused from performance unless the event is identified in the clause. *1st Am. Dev. Grp./Carib, LLC v. WestLB AG*, 53 V.I. 107, 124 (Super. Ct. 2010). Because the invocation of the clause is a defense, it cannot serve as a claim for relief. *1st Am. Dev. Grp./Carib, LLC v. WestLB AG*, 55 V.I. 316, 334 (Super. Ct. 2011).

Applying contract principles, the court will consider the “words of the agreement,” assigning words their “general usage” unless stated otherwise. *Joseph v. Henry*, 958 F. Supp. 238, 241 (D.V.I. 1997) (internal citations omitted). Courts will not render a clause worthless or “frustrate the clearly expressed intent of the parties.” *Frederick v. Hess Oil V.I. Corp.*, 492 F. Supp. 1338, 1345 (D.V.I. 1980).

Commercial Impracticability

Courts in the U.S. Virgin Islands have applied the doctrine of commercial impracticability set forth in the Second Restatement of Contracts, which provides: “Where . . . 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 to the contrary.” *1st Am. Dev. Grp.*, 55 V.I. at 337 (citing Restat. (2d) of Contract § 261).

As explained by one court, the doctrine of impracticability does not permit litigants to “simply refer to the poor economy as an excuse for a breach. If that were the case, no one could enter into contracts because of the uncertainty surrounding the future of the markets. This is precisely why other courts have refused to excuse non-performance on the general basis of a global economic slowdown or other economic misfortunes.” *Id.* at 338 (collecting cases).

Moreover, if the supervening event is temporary and does not prevent performance, then there is no commercial impracticability. See *Martin v. Banco Popular De Puerto Rico*, No. 2008–109, 2009 WL 2594542, at *3 (D.V.I. 2009).

Impossibility of Performance

Relatedly, the Virgin Islands courts recognize the defense of impossibility of performance. *1st Am. Dev. Grp.*, 55 V.I. at 335; see also *Marcano v. Cowpet Beach Resort, Inc.*, 31 V.I. 99, 104 (Terr. Ct. 1995). For a party to use this defense requires proof that it has made alternative attempts at performing. *1st Am. Dev. Grp.*, 55 V.I. at 338.

Statutory Defenses

V.I. Code Ann. tit. 11A § 2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

V.I. Code Ann. tit. 11A § 2-615 (Excuse by Failure of Presupposed Conditions)

This provision of the Virgin Islands Uniform Commercial Code also applies only to contracts for the sale of goods and excuses non-performance “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.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent it can still perform, must “allocate production and deliveries among [its] customers . . . in any manner which is fair and reasonable.” The seller must seasonably notify the buyer of any delay or non-delivery due to *force majeure*.

V.I. Code Ann. tit. 11A §§ 2A-404, 405 (Substituted Performance/Excused Performance)

These provisions apply only to a transaction that creates a lease, which “means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” *Id.* §§ 2A-102, -103(1)(j). In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for the sale of goods, identified above.

Notable US Virgin Islands Cases

- *1st Am. Dev. Grp./Carib, LLC v. WestLB AG*, 55 V.I. 316, 334 (Super. Ct. 2011) - Holding that, even assuming the global recession could excuse performance, defendant failed to show impossibility because there was no “evidence that it attempted to obtain further financing or that it was rebuffed by other lenders. Defendant did not offer any evidence regarding its financial condition to show that it lacked the funds necessary to pay the loan.”

- *1st Am. Dev. Grp./Carib, LLC v. WestLB AG*, 53 V.I. 107 (Super. Ct. 2010) - Concluding that worldwide economic crisis is not within the contemplation of the *force majeure* clause to excuse performance under mortgage agreement.
- *Martin v. Banco Popular De Puerto Rico*, No. 2008–109, 2009 WL 2594542 (D.V.I. 2009) - Rejecting bank’s reliance on inability to provide marketable title to excuse performance because intervening event no longer rendered title non-marketable.
- *Joseph v. Henry*, 958 F. Supp. 238 (D.V.I. 1997) - Opining on what the parties meant by the use of adjective “comparable” in *force majeure* clause in construction contract.
- *Marcano v. Cowpet Beach Resort, Inc.*, 31 V.I. 99 (Terr. Ct. 1995) - Partially denying motion for summary judgment because of outstanding issue of material fact whether notice requirement to terminate agreement was waived by virtue of *force majeure* clause after Hurricane Hugo disrupted performance.

Virginia

Contractual *Force Majeure*

Virginia courts generally interpret and apply *force majeure* provisions according to their specific language. See *Gordonsville Energy, L.P. v. Va. Elec. & Power Co.*, 39 Va. Cir. 292 (1996). A *force majeure* clause typically excuses a party's nonperformance if nonperformance is due to specified intervening events or circumstances beyond that party's control. *Id.*; see also *Drummond Coal Sales, Inc. v. Norfolk S. Ry. Co.*, No. 7:16CV00489, 2018 WL 4008993, at *12 (W.D. Va. 2018).

Impossibility / Frustration of Purpose

Virginia courts recognize “the principle that impossibility of performance due to the failure or nonexistence of a certain state of affairs, the continued existence of which was contemplated by both parties as the basis of their contract, but not contracted for, excuses the promisor.” *Paddock v. Mason*, 187 Va. 809, 815 (1948). In other words, Virginia courts hold that, in the absence of any express or implied warranty, a contract is subject to an implied condition that the parties shall be excused in the event that, before breach, performance becomes impossible from the perishing of the thing without default of the promisor. *Hous. Auth. of City of Bristol v. E. Tenn. Light & Power Co.*, 183 Va. 64, 73 (1944).

Commercial Impracticability

Federal courts applying Virginia law have indicated that impossibility of performance is essentially equitable in character, based on the unfairness or unreasonableness of giving the contract the absolute force when the objective of the contract is not practicable, *i.e.*, it can be done only at an excessive and unreasonable cost. *Opera Co. of Bos. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094 (4th Cir. 1987). “A requirement of absolute nonforeseeability as a condition to application of defense of impossibility or impracticability of performance would be so logically inconsistent as to nullify doctrine.” *Id.* “A party relying on the defense of impossibility of performance must establish (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable. When all those facts are established the defense is made out.” *Id.* at 1102. Virginia courts have also applied the Second Restatement of Contracts principles of the defenses of impossibility and commercial impracticability. *Stump v. Commonwealth*, No. 1902-13-3, 2015 WL 1297054, at *4 (Va. Ct. App. 2015) (“Both subsections of § 266 of the Restatement (Second) of Contracts require that the impracticability or frustration of purpose result because of a fact of which [appellant] has no reason to know.”)

Statutory Defenses

Va. Code Ann. § 8.2-614
(Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Va. Code Ann. § 8.2-615

(Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

Va. Code Ann. § 59.1-506.15

(Excuse By Failure of Presupposed Conditions for Computer Information Transactions)

This provision of Virginia’s Uniform Computer Information Transaction Acts applies to “computer information transactions,” which includes any “agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information.” Pursuant to Section 59.1-506.15, “unless a party has assumed a different obligation, delay in performance by a party, or nonperformance in whole or part by a party, other than of an obligation to make payments or to conform to contractual use terms, is not a breach of contract if the delay or nonperformance is of a performance that has been made impracticable by: (1) the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made; or (2) compliance in good faith with any foreign or domestic statute, governmental rule, regulation, or order, whether or not it later proves to be invalid.”

Notable Virginia Cases

- *Drummond Coal Sales, Inc. v. Norfolk S. Ry. Co.*, No. 7:16CV00489, 2018 WL 4008993 (W.D. Va. 2018) - Granting summary judgment in favor of defendant where plaintiff failed to provide evidence of a *force majeure* event as defined in the contract.
- *Middle E. Broad. Networks, Inc. v. MBI Glob., LLC*, No. 1:14-CV-01207-GBL, 2015 WL 4571178 (E.D. Va. 2015) - Finding *force majeure* clause inapplicable for two reasons: (1) the sole reason MBI failed to timely deliver the BRB is because it failed to pay a subcontractor, not because of any effects of a war; and (2) the *force majeure* provision was superseded by language in letter that stated that the August 3, 2014, deadline had to be met, no exceptions.

- *Stump v. Commonwealth*, No. 1902-13-3, 2015 WL 1297054 (Va. Ct. App. 2015) - Rejecting appellant's attempt to rely on § 266 of the Restatement (Second) of Contracts to relieve his obligations under the plea agreement on the basis that he had a "reason to know" that his performance under the agreement could be inhibited depending on the outcome of his unrelated charges.
- *Old Dominion Elec. Co-op. v. Ragnar Benson, Inc.*, No. CIV.A. 3:05CV34, 2006 WL 2854444 (E.D. Va. 2006) - Declining to enforce *force majeure* clause on the basis that even if lightning strikes were a *force majeure* event. RBI failed to comply with EPC Contract notice provisions and waived claim for delay.
- *Gordonsville Energy, L.P. v. Va. Elec. & Power Co.*, 39 Va. Cir. 292 (1996), *aff'd in part, rev'd in part*, 257 Va. 344 (1999) - Finding that the actions or inactions attributed by plaintiff to third persons here were not beyond plaintiff's control and therefore did not fall within the *force majeure* clause.
- *Coker Int'l, Inc. v. Burlington Indus., Inc.*, 935 F.2d 267 (4th Cir. 1991) - Finding *force majeure* clause inapplicable because the clause allowed deliveries to be suspended by either party for delineated causes preventing the manufacture, shipment, acceptance, or consumption of the goods, and plaintiff's inability to consummate a contract for resale clearly does not affect its own ability to accept shipment. Furthermore, even were the *force majeure* clause to apply, its only effect would be to suspend deliveries.
- *Opera Co. of Bos. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094 (4th Cir. 1987) - Remanding case to determine "whether the possible foreseeability of the power failure in this case was of that degree of reasonable likelihood as to make improper the assertion by Wolf Trap of the defense of impossibility of performance."
- *Kang v. Roof*, 24 Va. Cir. 193 (1991) - Excusing performance on the basis of frustration of purpose under the lease because there was no serviceable use of the premises after application of zoning regulations.

Washington

Contractual *Force Majeure*

Washington courts interpret *force majeure* clauses from a purely objective standpoint, without regard for what the parties subjectively intended at the time of contract formation. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 501 (2005); *TransAlta Centralia Generation LLC v. Sickelsteel Cranes, Inc.*, 134 Wash. App. 819, 823 (2006) (contract defined *force majeure* as “an event that (i) is not within the control of the Party relying thereon and (ii) could not have been prevented or avoided by such Party through the exercise of due diligence”). Importantly, unless there is an ambiguity in the *force majeure* clause, Washington courts refuse to accept extrinsic evidence of what the parties contemplated during contract negotiations. *Id.*

“Commercial Frustration” / Frustration of Purpose

In Washington, Section 265 of the Second Restatement of Contracts governs the frustration of purpose defense, which is also known as “commercial frustration.” “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.” *Stevedoring Servs. of Am., Inc. v. Marvin Furniture Mfg., Inc.*, 54 Wash. App. 424, 428 (1989).

Frustration of purpose is not a defense to breach of contract when one of the parties to a contract has been allocated the risk of impracticality or frustration. *Scott v. Petett*, 63 Wash. App. 50, 60 (1991) (buyer of industrial development had a contractual 90-day period to assess the feasibility of obtaining permits for development and, therefore, assumed the risk that permits would not be issued); *but see Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wash. 2d 558 (1981) (en banc) (holding that commercial frustration excused obligation to obtain sand, gravel and other aggregates where contractor was unable to obtain necessary permits for strip mining); *Glob. Chem. Sols., LLC v. Centech, LLC*, 200 Wash. App. 1055 (2017) (“If the supervening event that frustrated the purpose of the contract ‘was, or should reasonably have been, foreseen by the parties’ and there is no provision in the contract ‘then an inference that the risk was assumed by the promisor is justified.’”).

Commercial frustration is not a viable defense where the defendant fails to take reasonable steps to mitigate the damage from an intervening event. In *Stevedoring*, the Washington Court of Appeals held that commercial frustration was not a viable defense to breach of a commercial lease. After an inspection by the Seattle fire department, the lessor—a manufacturer of mattresses and furniture—was ordered to install a fire-resistant storage facility for all foam products in supply. The tenant argued that this order frustrated the principal purpose of the lease agreement. The Court of Appeals disagreed, finding that the tenant “apparently chose for its own reasons to vacate the leased property, rather than take the necessary steps to preserve its right to use the property within the limits of the fire code.” *Id.* at 48. The court held that, to prevail on its commercial frustration defense, the tenant had an obligation to attempt to

comply with the fire department's order, or to challenge the order in administrative proceedings, which it did not do. *Id.*; see also *Scott*, 63 Wash. App. at 60 (defendant could not establish frustration of purpose defense where it failed to apply for industrial construction permit).

Commercial Impracticability

In reliance on the Second Restatement of Contracts, one Washington case suggests that contractual performance *might* be excused by “extreme and unreasonable difficulty, expense or injury.” *Pub. Util. Dist. No. 1 of Lewis Cty. v. Wash. Pub. Power Supply Sys.*, 104 Wash. 2d 353, 363–64 (1985) (en banc). In rejecting the commercial impracticability defense, however, the *Public Utility* court stated: “The mere fact that a contract becomes more difficult or expensive than originally anticipated does not justify setting it aside.” *Id.* (internal citations omitted). Based on our research, no Washington case has ever held that the doctrine of commercial impracticability excused performance based on extreme hardship or expense.

Statutory Defenses

Wash Rev. Stat. Ann. § 62A.2A-404 (Substituted Performance on Lease Contracts)

This provision applies to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.”

Specifically, this provision states:

If without fault of the lessee, the lessor, and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

Under section 62A.2A-405, breach is excused “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.”

Wash. Rev. Code Ann. § 62A.2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a

commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

**Wash Rev. Code Ann. § 62A.2-615
(Excuse By Failure of Presupposed Conditions)**

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

Notable Washington Cases

- *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493 (2005) - Rejecting the argument that the cumulative economic impact of various events, including the terrorist attacks of September 11, 2001, and the resulting recession, labor unrest of Seattle dockworkers, the Boeing Company layoffs of 30,000 workers, the burst of the “dot.com” bubble, and the stock market decline of 2002, permitted nonperformance. While such events were technically *force majeure* events, they did not excuse performance of obligation to pay “agency expenses” under joint newspaper agreement.
- *Inn at Ctr., LLC v. City of Seattle*, 120 Wash. App. 1039 (2004) - Non-performance of the contract was not excusable where *force majeure* clause merely stated that “such party’s time to perform any obligation hereunder (excluding, however, monetary obligations) affected by such *Force Majeure* Event, shall be equitably adjusted and the applicable deadline or milestones shall be revised accordingly.”
- *Stevedoring Servs. of Am., Inc. v. Marvin Furniture Mfg., Inc.*, 54 Wash. App. 424 (1989) - Commercial tenant could not prevail on commercial frustration defense based on fire inspector’s order to install fire-resistant storage space where tenant failed to exhaust administrative remedies available to challenge the order.
- *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wash. 2d 558 (1981) (en banc) - Strip mining company and forest products company from which strip mining company leased property did not foresee sustained public outcry in opposition to strip mining project, and thus strip mining company was “commercially frustrated” in its purpose, under the lease, of obtaining sand, gravel and other aggregates from the leased premises.
- *Snipes Mountain Co. v. Benz Bros. & Co.*, 162 Wash. 334 (1931) - Finding that failure to deliver one hundred tons of potatoes was excused to the extent that the crop output was diminished by natural causes, but still requiring supplier to furnish the 64 tons of potatoes grown during the season.

West Virginia

Contractual *Force Majeure*

In West Virginia, courts have considered the application of the “Act of God” defense, along with other common law doctrines excusing performance of contractual obligations. In addition, parties in West Virginia are free to bargain for a *force majeure* clause. See *Caperton v. A. T. Massey Coal Co., Inc.*, 223 W. Va. 624 (2008), *rev’d & remanded on unrelated grounds*, 556 U.S. 868 (2009) (contract included *force majeure* clause and defendant argued that foreclosure of coke plant excused performance). But the vast majority of West Virginia cases apply equitable principles of excusability.

“Act of God”

The Supreme Court of West Virginia has defined an “act of God” as “an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected.” *State ex rel. Summers v. Sims*, 142 W. Va. 640, 645 (1957). Conversely, foreseeable and preventable events do not qualify as “Acts of God.” See *Atkinson v. Chesapeake & O. Ry. Co.*, 74 W. Va. 633 (1914) (“That which reasonable human foresight, pains, and care should have prevented can not [*sic*] be called an act of God”). Thus, “[f]or an act of God to constitute a valid defense and exonerate one from a claim for damages, it must have been the sole cause, and not just a contributing cause of the injuries or damages sustained.” *Adkins v. City of Hinton*, 149 W. Va. 613, 620 (1965).

Commercial Impracticability

West Virginia courts have adopted the Second Restatement of Contracts definition of impracticability, 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.”

To excuse performance under the doctrine of impracticability, the breaching party must establish: “(1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance.” *Waddy v. Riggelman*, 216 W. Va. 250, 258 (2004); see also *Gaddy Eng’g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 583–84 (2013) (“Central to the application of the doctrine of impracticability is a determination that the party who seeks to be excused from performance was not at fault or had no control as to the nonoccurrence of the presupposed event upon which the contract depended.”).

Statutory Defenses

West Virginia Commercial Code § 46-2-614 (Substituted Performance)

Under this provision of the West Virginia Commercial Code, where an agreed-upon delivery method becomes unavailable due to commercial impracticability, a commercially reasonable substitute, when available, must be used and accepted. Further, if the agreed-upon method of payment becomes impossible because of government regulation, “the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.”

West Virginia Commercial Code § 46-2-615 (Excuse By Failure of Presupposed Conditions)

This provision of the West Virginia Commercial Code applies only to contracts for the sale of “goods” (as opposed to services or construction) and excuses non-performance or delay where such performance “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 invalid.” Under the statute, a seller impacted by a *force majeure* is not excused from all performance but, to the extent he can still perform, must “allocate production and deliveries among his customers . . . in any manner which is fair and reasonable.” The seller is required to notify any buyer that there will be a delay or non-delivery due to *force majeure*.

West Virginia Commercial Code §§ 46-2A-404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable West Virginia Cases

- *Gaddy Eng’g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577 (2013) - Holding that a law firm’s payment to an engineering company under a fee-sharing joint venture agreement was rendered impracticable when the firm’s assumed work never materialized.
- *Waddy v. Riggleman*, 216 W. Va. 250 (2004) - Defendants failed to meet their burden of demonstrating performance of contract to purchase land was impracticable where transfer of property was still literally possible and deeds of trust for the property could be prepared prior to closing.

- *Riddle v. Balt. & O.R. Co.*, 137 W. Va. 733 (1952) - Upholding judgment against defendant for flood damages to plaintiff's property due to inadequacy of defendant's culvert and stating that "even if the flood ... was unprecedented and of such character as to constitute an act of God, the defendant cannot effectively defend this action on that basis, for the reason that the inadequacy of its culvert was a contributing proximate cause of plaintiff's damages."
- *Atkinson v. Chesapeake & O. Ry. Co.*, 74 W. Va. 633 (1914) - Affirming judgment against defendant for diverting water from natural course and which then caused flooding on plaintiff's land and rejecting defendant's claim that "extraordinary rain" constituted an act of God.

Wisconsin

Contractual *Force Majeure*

There are only a few cases in Wisconsin excusing performance on the basis of *force majeure*, including one case from 1925 involving a trade embargo. In *Canadian Steel Foundries v. Thomas Furnace Co.*, the Supreme Court of Wisconsin held that causes over which a party has no control can suspend operation of the contract or even excuse the nonperforming party's default. 203 N.W. 355, 357 (Wis. 1925) (holding that the existence of an embargo between the United States and Canada on steel manufacturing products was within the contract's language subjecting the purchaser to "strikes, accidents or other causes incident to manufacture or delivery beyond control of seller").

The Supreme Court of Wisconsin also recognizes that, under certain conditions, illness or health dangers may excuse nonperformance of a contract. *Handicapped Children's Educ. Bd. of Sheboygan Cty. v. Lukaszewski*, 332 N.W.2d 774, 777 (Wis. 1983). Long-held precedent in Wisconsin states that, "where the act to be performed is one which the promisor alone is competent to do, the obligation is discharged if he is prevented by sickness or death from performing it." *Id.* (citing *Jennings v. Lyons*, 39 Wis. 553, 557 (Wis. 1876)). Nonperformance of a contractual obligation will not be excused when the danger is caused by the nonperforming party (i.e., the health danger was the nonperforming party's fault), or if it was foreseeable when the contract was entered into. *Id.*

Impossibility / Frustration of Purpose

Wisconsin law states that the doctrine of impossibility or frustration of purpose is "given a narrow construction" and "applied sparingly," with the party asserting the defense bearing the burden of proof. *Convenience Store Leasing & Mgmt. v. Annapurna Mktg.*, 933 N.W.2d 110, 115 (Wis. Ct. App. 2019). Wisconsin law is aligned with the Restatement (Second) of Contracts § 265, and defines the elements of a frustration of purpose defense as: (1) the party's principal purpose in making the contract is frustrated; (2) without that party's fault; (3) by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. *Id.* Both the Restatement and Wisconsin law elaborate that this frustration must be substantial: Frustration of purpose excuses performance only where the frustration is "so severe that it is not fairly to be regarded as within the risks . . . assumed under the contract" and was not foreseeable. *Id.*

Statutory Defenses

W.S.A. § 402.614 (Substituted Performance)

In the alternative to excusing performance on contracts for sale, Wisconsin law calls for substituted delivery, where a commercially practicable substitute is available. Specifically, this provision states:

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

W.S.A. § 402.615

(Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

W.S.A. § 411.404/411.405

(Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Wisconsin Cases

- *Convenience Store Leasing & Mgmt. v. Annapurna Mktg.*, 933 N.W.2d 110 (Wis. Ct. App. 2019) - Holding that the issues between both parties did not rise to the level of severity to frustrate the purpose of the business venture.
- *Handicapped Children's Educ. Bd. of Sheboygan Cty. v. Lukaszewski*, 332 N.W.2d 774 (Wis. 1983) - Stating that a party would be allowed under Wisconsin law not to perform under a contract in the event that a health condition that was not the fault of the non-performing party prevented a party from meeting contractual obligations. The court decided that a teacher's high blood pressure was a result of her own decision to work the job with the longer commute.

- *Canadian Steel Foundries v. Thomas Furnace Co.*, 203 N.W. 355 (Wis. 1925) - Noting the fact that a government embargo on US-Canadian steel trade constituted a *force majeure* event beyond the control of either party, which excused nonperformance of the contract in that instance.

Wyoming

In Wyoming, courts are reluctant to go outside the bounds of the specific terms bargained for in the contract. *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 (5th Cir. 1990) (applying Wyoming law). When the terms of a contract are unambiguous, Wyoming courts must give effect to the intentions of the parties expressed by the language they employ. *Id.* (citing *Quin Blair Enters., Inc. v. Julien Constr. Co.*, 597 P.2d 945, 951 (Wyo. 1979)).

Wyoming has not imposed a foreseeability requirement on contracts that do not specifically call out foreseeability in the *force majeure* terms. In other words, where the terms of the agreement do not mandate that the *force majeure* event be unforeseeable or beyond the control of the party before performance is excused, the court will not read those requirements into the agreement. *Perlman*, 918 F.2d at 1248.

Impossibility / Commercial Impracticability

Considering the defense of impossibility (sometimes referred to as “impracticability”), the Wyoming Supreme Court has noted that its application to a particular set of facts is a question of law for the court to decide. *Mack Fin. Servs. v. Parco LLC*, No. 16-CV-251-SWS, 2017 WL 11448878, at *2 (D. Wyo. 2017) (citing *Mortenson v. Scheer*, 957 P.2d 1302, 1305 (Wyo. 1998)). Relying on Section 261 of the Second Restatement of Contracts, the Wyoming Supreme Court has stated:

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.

Mortensen, 957 P.2d at 1306. The impossibility/impracticability defense is not available if a promisor was aware of a potential risk that could interfere with its performance and assumed that risk by not explicitly addressing it in the contract. *Mack Fin. Servs.*, 2017 WL 11448878, at *2 (citations omitted).

Commercial Frustration

The requirements for commercial frustration under Wyoming law are: 1. The contract is at least partially executory; 2. a supervening event occurred after the contract was made; 3. the non-occurrence of such event was a basic assumption on which the contract was made; 4. such occurrence frustrated the party's principal purpose for the contract; 5. the frustration was substantial; and 6. the party has not agreed, expressly or impliedly, to perform in spite of the occurrence of the event. *Wallace v. Pinnacle Bank-Wyoming*, 275 P.3d 1250, 1255 (Wyo. 2012) (quoting *Downing v. Stiles*, 635 P.2d 808, 815 (Wyo. 1981)). Whether the doctrine of commercial frustration applies in a given case is a question of law for the court to decide. *Mack Fin. Servs.*, 2017 WL 11448878, at *3 (citations omitted).

Statutory Defenses

Wyo. Stat. § 34.1-2-614 (Substituted Performance)

This provision applies to contracts for the sale of goods and permits a seller to substitute performance where the agreed-upon method of delivering the goods is unavailable, rendering performance commercially impracticable. Specifically, the statute provides: “(a) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.”

Wyo. Stat. § 34.1-2-615 (Excuse By Failure of Presupposed Conditions)

This provision applies to “contracts for sale” which include only those contracts for the present or future sale of goods. Under this provision, a duty to deliver goods is not a breach of contract where “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 an applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

Wyo. Stat. §§ 34.1-2.A-404/405 (Substituted Performance/Excused Performance on Lease Contracts)

These provisions apply to the performance of “lease contracts,” which include contracts involving “a transfer of the right to possession and use of goods for a term in return for consideration”; however, “a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” In application, these provisions mimic the substituted performance and excusability provisions applicable to contracts for sale, identified above.

Notable Wyoming Cases

- *Wallace v. Pinnacle Bank-Wyoming*, 275 P.3d 1250 (Wyo. 2012) - 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 “[p]erformance 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.”
- *Mortenson v. Scheer*, 957 P.2d 1302 (Wyo. 1998) - Impracticability of performance did not excuse landowners’ inability to obtain requisite government permit; landowners were expected to provide for

foreseeable contingency that government would not issue permit, assumed risk that permit would not issue, and were chargeable with consequences.

- *Unicover World Trade Corp. v. Tri-State Mint, Inc.*, No. 91-CV-0255-B, 1994 WL 383244 (D. Wyo. 1993), *aff'd*, 24 F.3d 1219 (10th Cir. 1994) - A “*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.”
- *Downing v. Stiles*, 635 P.2d 808 (Wyo. 1981) - Doctrine of commercial frustration did not apply to relieve buyer of restaurant from obligations under contract of purchase when bar, from which restaurant derived most of its business, closed since principal purpose of purchase was to carry on restaurant business and not to continue operation of bar, and thus frustration if any was not substantial.

Index of Authorities by Topic

Acts of God

- *Whole Foods Mkt. Grp., Inc. v. Wical Ltd. P'ship*, 2019 WL 5395739 (D.D.C. 2019) - Where a rodent infestation caused a grocery store to close for more than 60 days and the landlord issued a notice of default of the lease agreement to tenant store due to the closing, the court denied summary judgment, finding that the rodent infestation could be considered an Act of God under the force majeure clause, provided the tenant store could not have prevented it.
- *City of Moorhead v. Bridge Co.*, 867 N.W.2d 339 (N.D. 2015) - Holding that city's delay in exercising options clause was excused by *force majeure* where building was flooded.
- *Entzel v. Moritz Sport & Marine*, 841 N.W.2d 774 (N.D. 2014) - Recognizing that, while flooding was the type of event excusable under *force majeure* clause, clause was exclusively for landlord's benefit and could not excuse tenant's non-performance.
- *Sun Pac. Mktg. Co-op., Inc. v. DiMare Fresh, Inc.*, No. CIV-F-06-1404 AWI, 2010 WL 3220301 (E.D. Cal. 2010) - Material dispute of fact existed as to whether extreme heat wave in the San Joaquin Valley qualified as an "act of God" or "natural disaster" excusing performance of a contract to supply tomatoes.
- *Ass. Acquisitions, L.L.C. v. Carbone Props. of Audubon, L.L.C.*, 962 So. 2d 1102 (La. Ct. App. 2007) - Increased cost of construction and financing associated with damage to property caused by Hurricane Katrina did not excuse payments on promissory note, despite repayment being more difficult.
- *Lesser ex rel. Lesser v. Camp Wildwood*, 282 F. Supp. 2d 139 (S.D.N.Y. 2003) - Stating that an injury is only caused by an "act of God" where the "event happens by direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man."
- *McBee v. Gustaff Vandecnocke Revocable Trust*, 989 S.W.2d 170 (Mo. 1999) (en banc) - Destruction of farmhouse by fire did not excuse performance because farmhouse "did not constitute so large a part of the total value of the estate."
- *Woodbine Auto, Inc. v. Se. Penn. Transp. Auth.*, 8 F. Supp. 2d 475 (E.D. Pa. 1998) - Denying summary judgment based on a genuine issue of disputed fact as to whether storms were so extraordinary as to constitute a "force of nature" excusing performance.
- *Red River Commodities, Inc. v. Eidsness*, 459 N.W.2d 805 (N.D. 1990) - Holding that drought depleting sunflowers was a *force majeure* event but remanding for trial court to assess whether agent had actual notice of defense, which would supersede requirement of written notice.

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- *Devco Dev. Corp. v. Hooker Homes, Inc.*, 518 So. 2d 922 (Fla. 2d Dist. Ct. App 1987) - Excessive rain falls were within “any other condition” and excused performance of contractual obligations.
 - *New Pueblo Constructors, Inc. v. State*, 696 P.2d 185 (Ariz. 1985) - Finding that unusually severe storms and flooding excused delays to highway project, but remanding for determination whether contractor complied with contractual notice requirements.
 - *Bailey and Shearer Bros., Inc. v. Reash Bros., Inc.*, No. 82-C-38, 1983 WL 6712 (Ohio Ct. App. 1983) (unreported decision) - Upholding trial court’s dismissal of complaint for money damages for supplier’s failure to provide an agreed quantity of merchantable potatoes for resale by purchaser to potato chipping plants, forcing purchaser to secure potatoes from alternative source at substantially greater cost. Court held that performance was excused because of an excessive amount of rainfall caused rotting of available crop making performance by supplier impossible.
 - *Uniroyal, Inc. v. Hood*, 588 F.2d 454 (5th Cir. 1979) - Dispute of material fact existed as to whether storm and consequent flooding of warehouse constituted an “act of God” excusing performance.
 - *Olin Corp. v. Cent. Indus., Inc.*, 576 F.2d 642 (5th Cir. 1978) - Where contract between fertilizer manufacturer and warehouseman contained broad *force majeure* provision excusing either party for nonperformance caused by acts of God, and where evidence revealed that flood on Mississippi River interfered with warehouseman's operations for three months during critical season, trial court, applying Mississippi law to manufacturer's suit against warehouseman for alleged breach of warehousing contract, correctly submitted to jury fact question as to whether guaranteed annual payment due under contract should be reduced by reason of flood.
 - *Poughkeepsie Sav. Bank v. Highland Terrace Apartments*, 352 So. 2d 1108 (Ala. 1977) - Repayment of promissory note was note excused by the doctrine of impossibility where rainfall delayed completion of construction.
 - *Holly Hill Fruit Prods. Co., Inc. v. Bob Staton, Inc.*, 275 So. 2d 583 (Fla. Dist. Ct. App. 1973) - Finding that performance was legally impossible where freezing weather conditions prevented grower from delivering oranges from various groves specified in contract.
 - *Schenk v. Capri Constr. Co.*, 194 So. 2d 378 (La. Ct. App. 1967) - Where homeowners brought an action to cancel a contract for construction of an addition to their home and to return the deposit due to hurricane flooding, the fact that performance by homeowners became more burdensome because of need of repairing their home did not release them from duty to perform.
 - *Goldberg v. R. Grier Miller & Sons, Inc.*, 408 Pa. 1 (1962) - “[T]he judge is to direct the jury to decide whether that phenomenon of weather was so unpredictable, so extensive, and so unprecedented in vehemence and destructive fury, that the defendant could not have made preparations to prevent or mitigate the catastrophic effects.”
 - *Peters v. Machiaroli*, 243 P.2d 777 (Ariz. 1952) - Excusing buyer’s obligation to pay for fruit damaged by frost where contract expressly stated that it was null and void to the extent goods were damaged by weather.

- *Snipes Mountain Co. v. Benz Bros. & Co.*, 162 Wash. 334 (1931) - Finding that failure to deliver one hundred tons of potatoes was excused to the extent that the crop output was diminished by natural causes, but still requiring supplier to furnish the 64 tons of potatoes grown during the season.
- *Matousek v. Galligan*, 104 Neb. 731 (1920) - Declining to disturb jury finding that, although contract included no *force majeure* clause, seller of hay excused by “act of God” because of torrential rain that inhibited delivery.
- *Mitchell v. Hancock Cty.*, 91 Miss. 414 (1908) - Bridge constructor provided a statutory bond to public owner that stipulated if the bridge “shall be removed from any cause, fire excepted” for 5 years. The bridge was destroyed by an unprecedented flood. The court rejected the contractor’s *force majeure* defense and found that the contractor was liable for rebuilding the bridge because the parties’ contract did not except a casualty such as a flood.

Causation and Control

- *Bancredito Int’l Bank Corp. v. Data Hardware Supply, Inc.*, No. 18-1005, 2019 WL 4458839 (D.P.R. 2019) - Denying defense of *force majeure* where a third party failed to pay defendant due to the crisis in Venezuela, because defendant’s contractual obligations did not depend on defendant’s receipt of payment from the third party. The Court recognized that the crisis in Venezuela may give rise to *force majeure*, but such crisis was not relevant to defendant’s contract with plaintiff.
- *H. Daya Int’l Co. v. Arazi*, 348 F. Supp. 3d 304 (S.D.N.Y. 2018) - Placement of contested orders of clothing apparel from seller at the behest of third party, and cancellation of orders and refusal to provide payment by third party, did not excuse completion of contract by buyer under doctrine of impossibility, as buyer produced no evidence to suggest that it could not have guarded against the risk of third party’s cancellation.
- *In re Sears*, 536 B.R. 286 (Bankr. D. Neb. 2015) - Rejecting debtor’s defense of frustration hinged on inability to pay for contract as a result of bankruptcy.
- *Middle E. Broad. Net., Inc. v. MBI Glob., LLC*, No. 1:14-CV-01207-GBL, 2015 WL 4571178, at *5 (E.D. Va. 2015) - Finding *force majeure* clause inapplicable for two reasons: (1) the sole reason MBI failed to timely deliver the BRB is because it failed to pay a subcontractor, not because of any effects of a war; and (2) the *force majeure* provision was superseded by language in letter that stated that the August 3, 2014, deadline had to be met, no exceptions.
- *Allegheny Energy Supply Co., LLC v. Wolf Run Min. Co.*, 53 A.3d 53 (Pa. Super. 2012) - Holding that the “trial court did not err in determining that [breaching party’s] underperformance was not excused by the terms of the *force majeure* clause” when breaching party was on notice of problem and chose to take less aggressive action in response.
- *V.E. Amick & Assoc., LLC v. Palmetto Env’tl Grp., Inc.*, 716 S.E.2d 295 (S. Car. Ct. App. 2011) - Describing defendant Palmetto’s claim for excused performance, due to plaintiff’s not having hired an

engineer to properly certify Palmetto's work, as an inconvenience instead of an impossibility that frustrated the purpose of the contracts between the parties.

- *Toll Bros., Inc. v. Sienna Corp.*, No. 06–4378 (DSD/JJG), 2009 WL 961379 (D. Minn. 2009) - Ruling that a developer failed to prove a *force majeure* defense when the alleged intervening circumstances were within the developer's control to avoid, such as conducting a feasibility study, submitting a draft of an environmental report, and applying for a watershed permit; and further finding that the developer neglected to provide advanced notice of defense.
- *City of Flint v. Chrisdom Properties, Ltd.*, 283 Mich. App. 494 (2009) - Concluding that plaintiff delayed defendant developer's receipt of construction permit, thereby frustrating purpose of contract.
- *Rio Properties v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 F. App'x 519 (9th Cir. 2004) - Material dispute of fact existed as to whether Rod Stewart was permitted to re-schedule a concert due to illness where contract generally excused performance based on "any cause beyond such party's reasonable control."
- *Gen. Linen Servs., Inc. v. Smirnioudis*, 153 N.H. 441 (2006) - Doctrine of commercial frustration did not apply to contract in which company leased linens to owner of restaurants, although one restaurant was destroyed by fire; owner breached contract prior to fire).
- *1st Data Res., Inc. v. Int'l Gateway Exch., LLC*, No. 8:03CV137, 2004 WL 2187566 (D. Neb. 2004) - Concluding that, in light of the "very broad scope" of the *force majeure* clause, detrimental actions of affiliate of non-breaching party excused performance of breaching party that depended on affiliate.
- *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626 (N.M. 2003) - Lessee of oil and gas lease brought action against former lessees to declare that the original lease had terminated for lack of production because original lessees failed to tender shut-in royalty payments when the well stopped producing. Original lessees asserted that the *force majeure* clause excused their performance because the wells lack of production was beyond their control. The court analyzed the clause and found that the original lessees failed to present any evidence establishing that the cessation of production was the result of an external cause beyond their control.
- *Mueller v. Cedar Shore Resort, Inc.*, 643 N.W.2d 56 (S.D. 2002) - Explaining that the inability to pay promissory note was fairly regarded within the risks that the parties assumed under the promissory note contract.
- *In re Mr. Movies, Inc.*, 287 B.R. 178 (Bankr. D. Minn. 2002) - Denying debtor's argument that the bankruptcy made it impossible to comply with contract because the decision to file for bankruptcy was a self-inflicted wound.
- *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738 (2000) - Developer of hydroelectric facility's failure to post security required by development agreement was not excusable *force majeure* where public utility allegedly revoked the project's certificate from Idaho Department of Environmental Quality because the "obligation to pay the security was not directly affected by the renovation and

suspension of the required permits and certificates since Cogeneration and its financial partner Calpine could have posted the security but chose not to.”

- *Gordonsville Energy, L.P. v. Va. Elec. & Power Co.*, 39 Va. Cir. 292 (1996) - Finding that the actions or inactions attributed by plaintiff to third persons here were not beyond plaintiff's control and therefore did not fall within the *force majeure* clause.
- *Strategis Asset Value & Mgmt., Inc. v. Pac. Mut. Life Ins. Co.*, 805 F. Supp. 1544 - D. excuse non-payment to tax consultant who had stake in building that foreclosed due to defendant's failure to pay mortgage because: “The frustration of purpose doctrine is not available to a party whose own fault caused the event defeating the purpose of the contract.”
- *Connell v. Parlavecchio*, 255 N.J. Super. 45 (App. Div. 1992) - Court emphasized that impossibility or impracticability of performance are complete defenses where a fact essential to performance is assumed by the parties but does not exist at the time of performance; personal inability to perform because of financial condition is not a defense.
- *Erikson v. Dart Oil & Gas Corp.*, 189 Mich. App. 679 (1991) - Holding that failure to acquire permit in time did not qualify as a *force majeure* circumstance to permit extension of lease.
- *Water Power Co. v. PacifiCorp*, 99 Or. App. 125 (1989) - Affirming trial court's refusal to issue jury instruction on *force majeure* based on defendant's failure to timely enter into a transmission agreement prior to closing purchase agreement with power producer because such a failure was not “beyond the reasonable control” of the defendant.
- *Dorn v. Stanhope Steel, Inc.*, 368 Pa. Super. 557 (1987) - Stating that, where a corporation voluntarily dissolves itself, the contract remains responsible for contractual obligations because performance was rendered impossible by its own doing.
- *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254 (1985) - Excusing termination of manager's overseas assignment after illness caused manager's prolonged absence.
- *Edington v. Creek Oil Co.*, 213 Mont. 112 (1984) - *Force majeure* clause stated that failure to perform under oil and gas lease was excused where compliance with obligations was “hindered, delayed, prevented, or interrupted.” Appellate court affirmed finding Montana Oil and Gas Commission order to shut down facility was not a *force majeure* because order was based on defendant's failure to seal a saltwater pit.
- *Handicapped Children's Ed. Bd. of Sheboygan Cty. v. Lukaszewski*, 332 N.W.2d 774 (Wis. 1983) - Stating that a party would be allowed under Wisconsin law to not perform under a contract in the event that a health condition that was not the fault of the non-performing party and prevented a party from meeting their contractual obligations. The court decided that a teacher's high blood pressure was a result of her own decision to work the job with the longer commute.

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- *Molnar v. Molnar*, 110 Mich. App. 622 (1981) - Unexpected death of son before his eighteenth birthday frustrated purpose of divorce settlement that obligated ex-husband to pay partial mortgage payments for the home where ex-wife and son resided.
 - *City of Newark v. NVF Co., No. Civil Action 5176*, 1980 WL 6367 (Del. Ch. 1980) - County's attempt to rely upon its own voluntary act occurring between its negotiations with NVF and NVF's 1951 letter of intent, and its 1952 agreement with NVF, as excusing it from its performance of what it promised NVF, fails as a matter of law.
 - *St. Joe Paper Co. v. State Dep't of Env'tl. Regulation*, 371 So. 2d 178 (Fla. 1st Dist. Ct. App 1979) - Design error was *force majeure* event within clause that excused delays for "any cause ... not within the reasonable control of the company" and triggered contract extension.
 - *Camacho Enterprises, Inc. v. Better Constr., Inc.*, 343 So. 2d 1296 (Fla. 3d Dist. Ct. App 1977) - Interpreting the contract's *force majeure* clause as excusing delay because its president's heart attack was a circumstance "beyond the control" of the development company.
 - *Williams v. Carter*, 129 Vt. 619 (1971) - Subcontractor's failure to obtain sub-subcontractor to clear areas for roads and lift lines was not "impossible" because "impossibility of performance is recognized in our law only in the nature of the thing to be done, and not in the inability of the party to do it."
 - *Cushman v. Outwater*, 121 Vt. 426 (1960) - Declining to excuse performance based on impossibility. Because the "defendants elected to terminate the situation by their own act when it became 'impossible' as to them, it is difficult to see where they could sustain any claim for damages at law."
 - *Perry v. Champlain Oil Co.*, 101 N.H. 97 (1957) - In an action by lessor to rescind lease of gasoline filling-station distributor whose franchise had been canceled after execution of lease, evidence was sufficient to support finding that subsequent substitution of franchise did not frustrate main purpose to material degree sufficient to justify rescission, even though substitution resulted in decreased rent due to decreased sales.
 - *Martin v. Star Pub. Co.*, 50 Del. 181 (1956) - Finding that a corporation is not excused from performance of an agreement to pay money because it voluntarily dissolves or discontinues its business. Because defendant voluntarily chose to discontinue its business, presumably for financial reasons, impossibility originating in financial incapacity is no excuse.
 - *Riddle v. Baltimore & O.R. Co.*, 137 W.Va. 733 (1952) - Upholding judgment against defendant for flood damages to plaintiff's property due to inadequacy of defendant's culvert and stating that "even if the flood ... was unprecedented and of such character as to constitute an act of God, the defendant cannot effectively defend this action on that basis, for the reason that the inadequacy of its culvert was a contributing proximate cause of plaintiff's damages."
 - *Dixie Portland Flour Co. v. Kelsay-Burns Milling Co.*, 155 N.E. 526 (Ind. Ct. App. 1927) - Burning of flour mill held to excuse further performance of contract for sale of flour containing dispensation clause exonerating seller for causes beyond his control.

- *Cohen v. Morneault*, 120 Me. 358 (1921) - Where agreement was not to sell or convey a particular car of potatoes, but a car of any potatoes answering a certain description, containing no condition, expressed or implied, destruction of a car of potatoes in shipment did not excuse nondelivery, and seller was liable for damages.
- *Atkinson v. Chesapeake & O. Ry. Co.*, 74 W.Va. 633 (1914) - Affirming judgment against defendant for diverting water from natural course and which then caused flooding on plaintiff's land and rejecting defendant's claim that "extraordinary rain" constituted an act of God.
- *Fleishman v. Meyer*, 46 Or. 267 (1905) - Holding that, where contract did not specify whether delivery of goods was to be made by land or by sea vessel, storms closing down port of entry did not excuse performance under impossibility doctrine).

Completed Contract

- *Turbines Ltd. v. Transupport, Inc.*, 285 Neb. 129 (2013) - Declining to apply common law excusability defenses after contract for sale of a helicopter had been fully performed.

Disruption to Inputs and Financing

- *Roost Project, LLC v. Andersen Constr. Co.*, No. 1:18-CV-00238-CWD, 2020 WL 560574 (D. Idaho 2020) - Dispute of material fact existed as to whether winter weather conditions and concomitant labor shortages excused delays in performance of construction contract under *force majeure* provision.
- *Nantasket Beachfront Condominiums, LLC v. Hull Redev. Auth.*, 87 Mass. App. Ct. 455 (2015) - Party's inability to obtain financing did not constitute a *force majeure* event excusing its performance.
- *Welsch v. Trivestco Energy Co.*, 43 Kan. App. 2d 16 (2009) - Recognizing that financial issues could not alone trigger *force majeure* clause.
- *Hutton Contracting Co., Inc. v. City of Coffeyville*, 487 F.3d 772 (10th Cir. 2007) - Holding that delay by supplier did not grant right to contractor to invoke *force majeure* clause.
- *Lambert v. City of Columbus*, 424 Neb. 778 (1993) - Finding that failure of source to deliver is unavailing for defense of impracticability.
- *Cove Creek Dev. Corp. v. APAC-Ala., Inc.*, 588 So. 2d 458 (Ala. 1991) - Subcontractor delays in completing construction were not excused by difficulty in obtain certain materials.
- *Dills v. Enfield*, 210 Conn. 705 (1989) - Developer's duty to provide construction plans to a vendor was not discharged by the fact that the developer was unable to obtain mortgage financing.

- *Groseth Int'l, Inc. v. Tenneco, Inc.*, 410 N.W.2d 159 (S.D. 1987) - Denying claim for frustration of purpose but remanding the claim for commercial impracticability because of the uncertainty of plaintiff's financial condition at the moment of breach of contract.
- *Selland Pontiac-GMC, Inc. v. King*, 384 N.W.2d 490 (Minn. App. 1986) - Recognizing commercial impracticability where contract explicitly identified the supplier and supplier then ceased business.
- *Dep't of Admin. Servs. v. Serv. Supply, Ltd.*, No. 82AP-74, 1982 WL 4351 (Ohio Ct. App. 1982) - Seller's failure to deliver 584 picnic tables was excused by the defense of impracticability where specified wood was unavailable and seller promptly notified buyer that such wood was not available and that the agreement was impossible to perform.
- *Mo. Pub. Serv. Co. v. Peabody Cole Co.*, 583 S.W.2d 721 (Mo. App. 1979) - Finding that rising costs borne by coal company did not qualify as an event to trigger doctrine of commercial impracticability.

Epidemics and Pandemics

- *Sandry v. Brooklyn School Dist. No. 78 of Williams Cty.*, 182 N.W. 689 (N.D. 1921) - Relying in part on *Lakeman v. Pollard*, 43 Me. 463 (1857), which excused lumberjack from performing because of a cholera epidemic, to excuse schools on basis of commercial impossibility from paying drivers tasked with transporting teachers and students during 13-weeks closure as a result of an influenza epidemic.
- *Lakeman v. Pollard*, 43 Me. 463 (1857) - Holding that a cholera epidemic in the vicinity of a saw mill was a *force majeure* event that rendered performance by a contractor impossible by disease or disability, and which entitled him to recover in quantum meruit for the work he did perform.

Failure to Mitigate

- *Gen. Dynamics Info. Tech., Inc. v. Wireless Properties, LLC*, 714 F. Supp. 2d 211 (D. Mass. 2020) - Where contract contains notice and mitigation obligations on the impacted party, in the event of a *force majeure*, party must comply with such requirements.
- *Pennington v. Cont'l Res., Inc.*, 932 N.W.2d 897 (N.D. 2019) - Finding a genuine issue of material fact regarding whether party, after claiming its inability to obtain drilling permit was a *force majeure* event, used its good faith and diligence in seeking the permit.
- *Downing v. Stiles*, 635 P.2d 808 (Wyo. 1981) - Doctrine of commercial frustration did not apply to relieve buyer of restaurant from obligations under contract of purchase when bar, from which restaurant derived most of its business, closed since principal purpose of purchase was to carry on restaurant business and not to continue operation of bar, and thus frustration if any was not substantial.
- *Freter v. Embassy Moving & Storage Co., Inc.*, 218 Md. 12 (1958) - Holding that "act of God" defense did not exonerate warehouseman from liability where he let goods stay wet after a hurricane and took no further action to mitigate additional damage to goods.

Government Action

- *Pennington v. Cont'l Res., Inc.*, 932 N.W.2d 897 (N.D. 2019) - Finding a genuine issue of material fact regarding whether party, after claiming its inability to obtain drilling permit was a force majeure event, used its good faith and diligence in seeking the permit.
- *Burns Concrete, Inc. v. Teton Cty.*, 161 Idaho 117 (2016) - Holding that a developer's inability to obtain a zoning approval to construct a cement plant excused performance of its contract under the catch-all language in force majeure clause, which did not limit excusable causes to those enumerated.
- *Karaa v. Kuk Yim*, 86 Mass. App. Ct. 714 (2014) - Where residential tenant knew or should have known of possibility that her family's visa status might change and voluntarily undertook that risk, doctrine of frustration of purpose did not excuse the tenant's obligations to pay rent under lease, notwithstanding tenant's claim that her principal purpose in leasing property was to send her daughter to school locally.
- *Castor Petroleum v. Petroterminal De Panama*, 968 N.Y.S.2d 435 (2013) - Holding that Panamanian judicial ruling attaching plaintiff's oil on the grounds that it was not licensed to do business in Panama was a "government embargo or interventions" that excused non-performance under contractual *force majeure* provision.
- *Alaskan Crude Corp. v. State, Dep't of Nat. Res., Div. of Oil & Gas*, 261 P.3d 412 (Alaska 2011) - Performance of operator of oil and gas unit was not excused by dispute with Alaska Oil and Gas Conservation where contract stated that force majeure was limited to events that were "beyond the unit operator's reasonable ability to foresee or control." Contractor was not excused because the government order to prepare a contingency plan pre-dated the execution of its lease—a fact of which the contractor was fully aware).
- *Smith v. Decatur Sch. Dist.*, 2011 Ark. App. 126 (2011) - Stating that prevention of performance by a government order or regulation may qualify as an impracticability of performance defense.
- *Sociedad Aeronautica De Santander S.A. v. Weber*, No. CV 09-103-M-DWM-JCL, 2010 WL 2803044 (D. Mont. 2010) - Government's wrongful seizure of bank deposit made for purchase of helicopter did not qualify as a "circumstance outside the reasonable control of either party," excusing performance where contract provided for non-refundable deposit and parties agreed to extended closing date on helicopter in consideration of the deposit.
- *Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8 (2009) - Holding that a temporary restraining order qualified as a "governmental prohibition" that required extension of rent abatement period under *force majeure* provision.
- *Miami Sand & Gravel, LLC v. Nance*, 849 N.E.2d 671 (Ind. Ct. App. 2006) - Gravel-pit owners' failure to comply with permanent injunction requiring removal of equipment did not constitute "*force*

majeure,” for purposes mineral lease’s force majeure clause where mining company was able in past to conduct mining operations with equipment sitting in same location.

- *M.W. Johnson Constr., Inc. v. Progress Land Co.*, No. A04–2303, 2005 WL 1869679 (Minn. Ct. App. 2005) - Concluding that the delay in receiving city approval is a condition beyond land developer’s control and, therefore, performance was excused by *force majeure* clause.
- *Athens Bone & Joint Surgery, Inc. v. Mgmt. Consulting Grp., Inc.*, 2003-Ohio-2599 (unreported decision) - Seller’s performance of contract to sell x-ray machine was not rendered impracticable by compliance in good faith with governmental regulation; thus, seller breached contract by failing to timely deliver machine. Compliance with governmental regulations was not a term or condition of contract, other commercial suppliers sold x-ray machines without requiring buyer to provide safety specifications for room in which machine was to be installed, seller’s nonperformance was due to refurbisher’s failure to deliver x-ray machine to seller, and seller did not give seasonable notice of non-delivery to buyer.
- *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099 (C.D. Cal. 2001) - *Force majeure* clause disclaiming risk for “regulatory, governmental, or military action” was deemed vague and unenforceable and did not include an FDA shut-down of subsidiary manufacturer’s pharmaceutical plant.
- *Cape-France Enterprises v. Estate of Peed*, 305 Mont. 513 (2001) - Excusing performance of land sale contract under doctrine of commercial impracticability where regulatory agency determined that land was located on contaminated groundwater site, which would have resulted in extreme environmental damage and wasted remediation costs.
- *Bradford Dyeing Ass’n, Inc. v. J. Stog Tech GmbH*, 765 A.2d 1226 (R.I. 2001) - Buyer was not relieved of its obligations under a purchase contract by claiming impossibility due to a delay in government approval that it created by its own inactions.
- *Mortenson v. Scheer*, 957 P.2d 1302 (Wyo. 1998) - Impracticability of performance did not excuse landowners’ inability to obtain requisite government permit; landowners were expected to provide for foreseeable contingency that government would not issue permit, assumed risk that permit would not issue, and were chargeable with consequences.
- *Mel Frank Tool & Supply, Inc. v. Di-Chem. Co.*, 580 N.W.2d 802 (Iowa 1998) - Holding that lessee did not make an adequate showing of frustration of purpose as reason for abandonment of lease because lessee did not show how new government ordinance forbidding storage of chemicals would have affected lessee’s inventory, profits, or how much of the now-forbidden chemicals were stored on the property.
- *Peppertree Apartments, Ltd. v. Peppertree Apartments*, 631 So. 2d 873 (Ala. 1993) - Defendants did not present substantial evidence of impossibility in opposition to the summary judgment motion where they failed to establish that financing was unavailable due to Housing and Urban Development debarment action.

- *Power Eng'g & Mfg., Ltd. v. Krug Int'l*, 501 N.W.2d 490 (Iowa 1993) - Holding that a UN embargo on shipment of goods to Iraq did not excuse defendant from performing its contractual obligations under the contract because the defendant could have purchased the parts required for shipment from a domestic (Iraqi) manufacturer.
- *Erikson v. Dart Oil & Gas Corp.*, 189 Mich. App. 679 (1991) - Holding that failure to acquire permit in time did not qualify as a *force majeure* circumstance to permit extension of lease.
- *Kang v. Roof*, 24 Va. Cir. 193 (1991) - Excusing performance on the basis of frustration of purpose under the lease because there was no serviceable use of the premises after application of zoning regulations.
- *Bouchard v. Blunt*, 579 A. 2d 261 (Me. 1990) - Imposition by planning board of requirement for public sewerage after developer had sold lot did not trigger the doctrine of impracticability of performance, as the requirement was not so onerous as to require abandonment of the subdivision, but did represent a change in the contract which, if found to be material and substantial, could relieve the vendor and the purchasers of their contractual obligations.
- *Stevedoring Servs. of Am., Inc. v. Marvin Furniture Mfg., Inc.*, 54 Wash. App. 424 (1989) - Commercial tenant could not prevail on commercial frustration defense based on fire inspector's order to install fire-resistant storage space where tenant failed to exhaust administrative remedies available to challenge the order.
- *Kuykendall v. Helmerich & Payne, Inc.*, 741 P.2d 869 (Okla. 1987) - A *force majeure* clause may apply where an order of the Oklahoma Corporation Commission or other applicable law prevents the lessee from producing on the premises.
- *Wien Air Alaska v. Bubbel*, 723 P.2d 627 (Alaska 1986) - Doctrine of commercial impracticability did not relieve airline of its contractual duties to pay temporary airline pilot where government advisory board merely advised, but did not order, airline to settle a labor strike.
- *Matheny v. Gila Cty.*, 147 Ariz. 359 (App. 1985) - Municipality was excused and ambulance service contract was rescinded under the doctrine of commercial frustration where there were no available persons who could comply with new Arizona legislation regulating profession.
- *Itek Corp. v. First Nat. Bank of Boston*, 730 F.2d 19 (1st Cir. 1984) - *Force majeure* provision in contract between American manufacturer and Iranian government, permitting cancellation of the contract should United States government cancel manufacturer's necessary export licenses, was triggered when the license was suspended and not renewed, there being virtually no probability of renewal, due to intervention of Iranian revolution; such circumstances showed cancellation.
- *City of Warwick v. Boeng Corp.*, 472 A.2d 1214 (R.I. 1984) - Purpose of contract not frustrated by elimination of statutory requirement that municipal approval be sought before property could be sold.

- *Gordon v Crown Cent. Petroleum Co.*, 679 S.W. 2d 192 (Ark. 1984) - Where *force majeure* clause provided that covenants in lease were subject to all state and federal laws and regulations, Arkansas Oil and Gas Commission regulations were within the scope of the clause.
- *N. Ill. Gas Co. v. Energy Co-op., Inc.*, 461 N.E. 2d 1049 (Ill. 3rd Dist. 1984) - General government action generally cannot serve as a *force majeure* event, but an order that clearly directs or prohibits an act that proximately causes the nonperformance or breach of a contract may constitute *force majeure*.
- *Paramount Supply Co. v. Sherlin Corp.*, 16 Ohio App. 3d 176 (1984) - Federal customs agents' seizure of truck turbochargers to be delivered from seller as result of possible illegal exportation into Iran prevented seller from accomplishing delivery aboard ship if seller had such contractual duty, thus discharging any further delivery obligation on part of seller under doctrine of impossibility of performance.
- *Murray E. Gildersleeve Logging Co. v. N. Timber Corp.*, 670 P.2d 372 (Alaska 1983) - Timber company was not excused from its contractual obligations to deliver wood to logging company where United States Forest Service failed to approve logging on a parcel of land on which the parties intended to log.
- *Mat-Su/Blackard/Stephan & Sons v. State*, 647 P.2d 1101 (Alaska 1982) - Contract to pave state roads was not rendered impracticable by community opposition to use of fill pit and subsequent zoning ordinance precluding extraction of fill from specific pit.
- *Beals v. Tri-B Associates*, 644 P.2d 78 (Colo. App. 1982) - Rescission of contract was not warranted by alleged frustration of purpose based solely on change in economic conditions and governmental restrictions that merely impair the profitability of a real estate development.
- *Helms Constr. & Dev. Co. v. State, ex rel. Dep't of Highways*, 634 P.2d 1224 (Nev. 1981) - Rejecting the impossibility and commercial impracticability defenses based on increased petroleum costs resulting from Arab oil embargo.
- *Mohave Cty. v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417 (1978) - Holding that changes to existing ordinances did not render purpose of land purchase agreement frustrated under the doctrine of impossibility.
- *Kan. City, Mo. v. Kan. City, Kan.*, 393 F. Supp. 1 (W.D. Mo. 1975) - Holding that an intervening law—the Federal Water Pollution Control Act Amendments of 1972—excused the plaintiff from accepting the defendant's sewage. The federal law imposed treatment of sewage discharged into the Missouri River, leading to unforeseen additional expenses. As a consequence, the court found that the added expense of such treatment would impose a significant, unreasonable burden on the plaintiff.
- *Levine v. Rendler*, 272 Md. 1 (1974) - Rejecting developer's legal impossibility argument premised on county's revised regulation that rendered performance more expensive therefore changing the original obligation substantially.

- *Sec. Sewage Equip. Co., d.b.a. Sec. Septic Tank Co. v. McFerren*, 14 Ohio St. 2d 251 (1968) - Risk that department of health would reject plans for central sewage treatment plant for residential subdivision fell on construction contractor who had agreed to install and make plant ready for use and operation, and lack of approval did not constitute a breach of construction contract for which subdivision developers would be liable to contractor.
- *Essex-Lincoln Garage, Inc. v. City of Boston*, 342 Mass. 719 (1961) - Lease of parking facility would not be rescinded due to city's change in traffic pattern resulting in diminution of business at parking facility, since this was risk assumed by lessee.
- *Hein v. Fox*, 126 Mont. 514 (1953) - Abandonment of contract to drill a well was not excused by government refusal to permit drilling where evidence suggested that the parties agreed to waive the requirement of government approval in exchange for monetary consideration.
- *Sheldon-Seatz, Inc. v. Coles*, 319 Mich. 401 (1947) - Finding that lack of profit as a result of government ceiling on price of scooter bikes did not excuse performance.
- *Canadian Steel Foundries v. Thomas Furnace Co.*, 203 N.W. 355 (Wis. 1925) - Noting the fact that a government embargo on US-Canadian steel trade constituted a force majeure event beyond the control of either party, which excused nonperformance of the contract in that instance.

Labor Strikes

- *Hong Kong Islands Line Am., S.A. v. Distrib. Servs. Ltd.*, 795 F. Supp. 983 (C.D. Cal. 1991) - *Force majeure* clause did not excuse non-performance of contract for transportation of cargo where defendant failed to meet the contractual requirement to demonstrate that its performance was rendered "impossible" or "unprofitable" by labor strikes and riots.
- *Christianson Constr. Co. v. Isaacson Structural Steel Co.*, 648 P.2d 601 (Alaska 1982) - Remanding to trial court for determination whether force majeure clause, which disclaimed performance in the event of a labor strikes and events "beyond the reasonable control of the seller," was incorporated into the parties' agreement for delivery of steel.

Market Fluctuation

- *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*, 360 F. Supp. 3d 817 (S.D. Ind. 2018) (applying Iowa law) - Interpreting Iowa law and holding that changes in market conditions alone, without some precipitous cause, were insufficient to fall under a *force majeure* clause.
- *Emerald Int'l Corp. v. WWMV, LLC*, CV 15-179-WOB-JGW, 2016 WL 4433357 (E.D. Ky. 2016) - Finding that a change in the market does not amount to a *force majeure* event where the parties have agreed to price terms that assume the market risks.

- *City of Harwood v. City of Reiles Acres*, 859 N.W.2d 13 (N.D. 2015) - Relying on Restat. (2d) of Contract § 265 to hold that expansion of city population outgrowing capacity of facility frustrated the parties' agreement to share common expenses to maintain facility.
- *SKI, Ltd. v. Mountainside Prop., Inc.*, 198 Vt. 384 (2015) - Noting that the impossibility defense is fact-intensive and requires evidence of the financial impact on the party raising the defense.
- *Kyocera Corp. v. Hemlock Semiconductor, LLC*, 313 Mich. 437 (2015) - Holding that economic hardships caused by market shifts could not trigger *force majeure* clause to excuse obligation to purchase polysilicon.
- *La Carpa Corp. v. Am. Spaceframe Fabricators, LLC*, No. CV 09-2014 (DRD/BJM), 2014 WL 12889278 (D.P.R. 2014) - Concluding that neither the increase in steel prices which began prior to the contract being executed nor the economic recession of 2008 was a *force majeure* or the basis for applying *rebus sic stantibus*, because these events were not unforeseeable.
- *Elavon, Inc. v. Wachovia Bank, NA*, 841 F. Supp. 2d 1298 (N.D. Ga. 2011) - Economic downturn was not an "act of God" rendering bank's performance impossible under alliance agreement because banks could still comply with merchant referral requirements of the agreement.
- *1st Am. Dev. Grp./Carib, LLC v. WestLB AG*, 53 V.I. 107, 124 (Super. Ct. 2010) - Concluding that worldwide economic crisis is not within the contemplation of the *force majeure* clause to excuse performance under mortgage agreement.
- *In re Clearwater Nat. Res., LP*, 421 B.R. 392 (Bankr. E.D. Ky. 2009) - Holding that the *force majeure* provision in a mining agreement does not protect the party when market forces, and not superior forces, make the arrangement unprofitable for that party.
- *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, No. 06-CV-6155-CJS-MWP, 2009 WL 368508 (W.D.N.Y. 2009) - Under New York UCC principles, increase in the market price of steel needed to build transformers did not excuse non-performance of contract with utility because mere increase in price of inputs does not constitute *force majeure* event under the statute.
- *Chang v. Pacificorp*, 212 Or. App. 14 (2007) - Defendant argued that fluctuations in the electricity market due to regulatory changes and sham Enron transactions allowed it to rescind contract to purchase electricity, which was a market-based price contract. Overturning the trial court, the appellate court held that, despite evidence of manipulative practices in the energy market, defendant had assumed the risk of fluctuations in the price of electricity.
- *Gurwitz v. Mercantile/Image Press, Inc.*, 2006 WL 1646144 (Mass. Super. 2006) - Massachusetts courts have held that economic downturns and other market shifts making performance more difficult do not constitute unanticipated circumstances that excuse performance.
- *Resolution Trust Corp. v. Gosbee*, 536 N.W.2d 698 (N.D. 1995) - Finding that "temporary economic adversity" is not an "irresistible superhuman cause" amounting to an act of God excusing payment by mortgagor.

- *Iodice v. Bradco Cleaners, Inc.*, 1993 Mass. App. Div. 54, 1993 WL 71040 (1993) - Retail lessee in shopping center was not excused from obligations under lease after unexpected departure of center's anchor stores and consequent reduction of consumer traffic and business opportunity in center, since risk of economic downturn in center was imposed exclusively on lessee.
- *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563 (10th Cir. 1989) (applying Oklahoma law) - The inability to sell gas at a profit due to market conditions was not sufficient to invoke a *force majeure* clause.
- *Benson Mineral Grp., Inc. v. N. Nat. Gas Co., Div. of Enron Corp.*, No. 86–1903, 1988 WL 404348 (D. Kan. 1988) - Holding that collapse of the natural gas market was not a contingency contemplated by *force majeure* clause to excuse performance.
- *Medina & Medina v. Country Pride Foods Ltd.*, 631 F. Supp. 293 (D.P.R. 1986) - Denying the request to apply the *rebus sic stantibus* doctrine where there was insufficient evidence to establish defendant's inability to perform under a supply agreement based on economic grounds and where alleged circumstances prompting price increases were foreseeable.
- *Lawrance v. Elmore Bean Warehouse, Inc.*, 108 Idaho 892 (Ct. App. 1985) - Extreme fluctuations in the market price of pinto beans did not render payment of fixed-price under supply contract commercially impracticable such as to excuse performance.
- *Wilson & Co., Inc. v. Fremont Cake & Meal Co.*, 153 Neb. 160 (1950) - Finding that an unusual rise in the price of goods was not within *force majeure* clause and therefore cannot excuse performance.

Notice of *Force Majeure* Event

- *State v. Int'l Bus. Machines Corp.*, 51 N.E.3d 150 (Ind. 2016) - Where a *force majeure* provision requires notice, the failure to provide notice will prevent a party from using the *force majeure* event as an excuse for its nonperformance.
- *VICI Racing, LLC v. T-Mobile USA, Inc.*, 921 F. Supp. 2d 317 (D. Del. 2013) - Racecar owner's failure to participate in four sports car races was not a breach of sponsorship contract, since owner had adhered to *force majeure* procedures outlined in agreement.
- *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258 (10th Cir. 2008) - Holding that geological problems were not a *force majeure* event excusing performance where coal company failed to provide notice and instead relied on unproven labor shortage as reason for excuse.
- *Old Dominion Elec. Co-op. v. Ragnar Benson*, No. CIV.A. 3:05CV34, 2006 WL 2854444, at *47 (E.D. Va. 2006) - Declining to enforce *force majeure* clause on the basis that even if lightning strikes were a *force majeure* event. RBI failed to comply with EPC Contract notice provisions and waived claim for delay.
- *Milford Power Co., LLC v. Alstom Power, Inc.*, 2001 WL 822488 (Super. Ct. Conn. 2001) (Unpublished Decision) - Compliance with strict notice and claim provisions of contract is condition

precedent to right to recovery for a *force majeure* event where terms of agreement are clear and unambiguous).

- *Marcano v. Cowpet Beach Resort, Inc.*, 31 V.I. 99, 104 (Terr. Ct. 1995) - Partially denying motion for summary judgment because of outstanding issue of material fact whether notice requirement to terminate agreement was waived by virtue of *force majeure* clause after Hurricane Hugo disrupted performance.
- *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157 (W.D. Okla. 1989) - The failure to give proper notice is fatal to a defense based upon a *force majeure* clause requiring notice.
- *Martin v. Com., Dep't of Env'tl. Res.*, 548 A.2d 675 (Pa. 1988) - Holding that a *force majeure* clause was null and void where defendant failed to timely notify the opposing party of the *force majeure* event in the time prescribed by contract.
- *Res. Inv. Corp. v. Enron Corp.*, 669 F. Supp. 1038 (D. Colo. 1987) - Although contract contemplated likelihood of changes in economic conditions, including alterations in fuel price levels, *force majeure* defense could not relieve defendant of its contractual duty to pay where defendant failed to comply with contractual requirement to notify the other party of a *force majeure* event.

Principal Purpose (Frustration)

- *Unicover World Trade Corp. v. Tri-State Mint, Inc.*, No. 91-CV-0255-B, 1994 WL 383244, at *10 (D. Wyo. 1993), *aff'd*, 24 F.3d 1219 (10th Cir. 1994) - A *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.

Reasonable Foreseeability / Allocated Risk

- *Watkins Dev., LLC v. Jackson Redevelopment Auth.*, 283 So. 3d 170 (Miss. 2019) - Discovery that building had construction flaw which would cost \$1.5 million to remedy did not excuse tenant's nonperformance of construction deadlines imposed as lease obligations because structural faults were within realm of foreseeability and could have been, and indeed was, dealt with by contract).
- *United Gulf Marine, LLC v. Cont'l. Refining Co., LLC*, 2018 WL 10036528 (Ohio Com. Pl. 2018) - Where contract listed fire as a *force majeure* event, and a fire occurred, the party invoking the provision was not released from liability where another provision of the contract made the party 100% liable for the product made available to it by the seller under the agreement since the fire made it difficult, but not impossible, for the receiving party to process the product it was contractually obligated to take from the seller.
- *101 Geneva, LLC v. Elephant*, No. 135, 2016 WL 327383 (Md. Ct. Spec. App. 2016) - Holding that frustration of commercial purpose three-pronged test was not satisfied where a year-long delay in ratification of a foreclosure sale was reasonably foreseeable, thus failing the first prong of the test.

- *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn., LLC*, 871 F. Supp. 2d 843 (D. Minn. 2012) - Interpreting Michigan law to conclude that the 2008 financial crisis is insufficient to trigger *force majeure* clause because failure to obtain financing is a foreseeable event.
- *United Arab Shipping Co. v. PB Express, Inc.*, 2011 WL 3860639 (Ohio Ct. App. 2011) - Where parties specify *force majeure* events in their contract and the specified event occurs, the impacted party is normally excused from performance since the parties intended to allocate the risk of such specified events to the non-impacted party.
- *McReynolds v. Trilantic Capital Partners IV L.P.*, No. C.A. 5025-VCL, 2010 WL 3721865 (Del. Ch. 2010) - Limited partners in an investment fund failed to state supervening frustration claim against the fund arising out of the bankruptcy of the fund's general partner. The doctrine of supervening frustration did not apply to the partner's limited partnership agreement with the fund because the agreement addressed the possibility that the general partner would disassociate from the fund. The agreement provided that if the general partner declared bankruptcy, a majority of the limited partners could opt to continue the fund with a successor general partner.
- *1st Am. Dev. Grp./Carib, LLC v. WestLBAG*, 53 V.I. 107 (Super. Ct. 2010) - Concluding that worldwide economic crisis is not within the contemplation of the *force majeure* clause to excuse performance under mortgage agreement.
- *Clean Unif. Co. St. Louis v. Magic Touch Cleaning, Inc.*, 300 S.W.3d 602 (Mo. App. 2009) - Concluding that *force majeure* clause did not excuse contractor's contract with a subcontractor where prime contract's non-renewal was foreseeable.
- *Am. Nat. Red Cross v. Vinton Roofing Co.*, 629 F. Supp. 2d 5 (D.D.C. 2009) - Where building owner brought suit against roofing contractor alleging that the contractor failed to leave the building's roof watertight during construction, the court held that the *force majeure* defense was not available to the contractor because the contractor was on notice of the weather forecasting rain and the contractor left the work site prior to establishing that roof was watertight.
- *Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C.*, 276 Mich. App. 146 (2007) - Holding that former employees could not rely on obligation to relocate after office closure to excuse nonperformance of client solicitation clause because this circumstance was foreseeable.
- *Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1154 (D. Haw. 2007) - Under Hawaii's frustration of purpose doctrine, tenant's obligation to comply with environmental standards was foreseeable to the parties at the time that they entered into lease, and thus, compliance with those standards did not excuse tenant's obligation under the lease, which explicitly required tenant to comply with all present and future laws.
- *Facto v. Pantagis*, 390 N.J. Super. 227 (N.J. App. Div. 2007) - Fact that a power failure is not absolutely unforeseeable during the hot summer months does not preclude relief from the obligation to perform under the contract or under the Restatement and holding that "even in the absence of a *force majeure* clause, absolute unforeseeability of a condition is not a prerequisite to the defense of impracticability [in New Jersey]."

- *Stroud v. Forest Gate Dev. Corp.*, No. Civ.A 20063-NC, 2004 WL 1087373 (Del. Ch. 2004) - Holding that *force majeure* clause, which included the catch-all phrase “any reason whatsoever beyond the control of [defendant],” included “delays” even though only “fire, strikes, and acts God” were listed. However, the court held that these delays did not excuse defendant’s performance because they were foreseeable.
- *Fuller Ford, Inc. v. Ford Motor Co.*, No. CIV. 00-530-B, 2001 WL 920035 (D.N.H. 2001) - Promisor’s defense of impossibility of performance based on an obstacle presented by a state law could be negated if it reasonably should have foreseen that legal obstacle.
- *Clark v. Wallace Cty. Co-op. Equity Exch.*, 26 Kan. App. 2d 463 (1999) - Finding that farmer failed to identify commercial impracticability and was not excused for failing to deliver corn when late September freezes were foreseeable.
- *Mortenson v. Scheer*, 957 P.2d 1302 (Wyo. 1998) - Impracticability of performance did not excuse landowners’ inability to obtain requisite government permit; landowners were expected to provide for foreseeable contingency that government would not issue permit, assumed risk that permit would not issue, and were chargeable with consequences.
- *Conlon Grp, Inc. v. City of St. Louis*, 980 S.W.2d 37 (Mo. App. 1998) - Rejecting argument that structural problems commercially frustrated contract when problems were foreseeable for 100-year-old building.
- *Iannuccillo v. Material Sand & Stone Corp.*, 713 A.2d 1234 (1998) - Discovery of ledge so increased burden on contractor that further performance pursuant to terms of excavation contract was rendered impracticable, even though existence of ledge was not completely beyond realm of foreseeable consequences; ledge was not exposed or anticipated at time that parties entered into contract which limited contractor’s obligation to removal of “existing rock now exposed,” and discovery of ledge substantially altered complexity, difficulty, and expense necessary to achieve desired result.
- *ConAgra, Inc. v. Bartlett P’ship*, 248 Neb. 933 (1995) - Holding that, where contract did not identify source of crops with particularity, farmer cannot invoke defense of impracticability in light of alternative sources available.
- *Kent. Util. Co. v. S.E. Coal Co.*, 836 S.W.2d 392 (Ky. 1992) - Noting that the definition of *force majeure* set forth in the contract was much broader than that commonly seen in case law, but that parties are free to set forth terms they desire and the court will review the claims to see if there is an event that meets the contractual definition.
- *City of Savage v. Formanek*, 459 N.W.2d 173 (Minn. App. 1990) - Holding that, because the parties assumed at the time of contract no further permitting was necessary for development which proved incorrect later, the contract was frustrated.
- *Opera Co. of Bos. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094 (4th Cir. 1987) - Remanding case to determine “whether the possible foreseeability of the power failure in this case

was of that degree of reasonable likelihood as to make improper the assertion by Wolf Trap of the defense of impossibility of performance.”

- *Opera Co. of Bos. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094 (4th Cir. 1987) (applying Minnesota law) - Remanding case to determine “whether the possible foreseeability of the power failure in this case was of that degree of reasonable likelihood as to make improper the assertion by Wolf Trap of the defense of impossibility of performance.”
- *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900 (1987) - Inability to obtain insurance coverage due to a liability crisis in the insurance industry was foreseeable and, therefore, was not excused under *force majeure* provision in lease agreement disclaiming breach for “other similar causes beyond the control of such party.”
- *United States v. City of Fort Smith*, 760 F.2d 231 (8th Cir. 1985) (applying Arkansas law) - Holding that where *force majeure* clause expressly ruled out as a basis for change the kind of problems alleged, trial court did not err in denying excusability defense.
- *Wickliffe Farms, Inc. v. Owensboro Grain Co.*, 684 S.W.2d 17 (Ky. 1984) - Finding that a one-sided *force majeure* provision does not render the provision unconscionable and that there is no impossibility of performance where a contract does not specify any specific acreage upon which a crop is to be grown but only specifies the amount of crop to be bought and sold.
- *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wash. 2d 558 (1981) - Strip mining company and forest products company from which strip mining company leased property did not foresee sustained public outcry in opposition to strip mining project, and thus strip mining company was “commercially frustrated” in its purpose, under the lease, of obtaining sand, gravel and other aggregates from the leased premises.
- *Casera Foods, Inc. v. Estado Libre Asociado de P.R.*, 108 D.P.R. 850 (P.R. 1979) - Holding that the availability of natural papayas on a commercial scale was not unforeseeable to a manufacturer specialized in the industry.
- *Howard v. Nicholson*, 556 S.W.2d 477 (Mo. App. 1977) - Excusing contractor from building bridal salon when intended tenant declared bankruptcy, an unforeseen event rendering performance of the contract valueless.
- *Nebaco, Inc. v. Riverview Realty Co.*, 482 P.2d 305 (Nev. 1971) - Clause mandating that defendant conduct reasonable diligence to obtain financing for a lease contract did not excuse its ultimate inability to obtain financing.
- *Savage v. Peter Kiewit Sons' Co.*, 249 Or. 147 (1967) - Where a neighboring property to a construction project obtained a judicial injunction against sand-blasting operation, sand-blasting subcontractor was not excused from performance under doctrine of frustration of purpose or commercial impracticability because injunction was foreseeable at the time of contracting.

Temporary Interruption

- *Martin v. Banco Popular De Puerto Rico*, No. 2008–109, 2009 WL 2594542 (D.V.I. 2009) - Rejecting bank's reliance on inability to provide marketable title to excuse performance because intervening event no longer rendered title non-marketable.
- *Payne v. Hurwitz*, 978 So. 2d 1000 (La. Ct. App. 2008) - Disruption to contract to purchase real property was only temporary and, therefore, did not excuse performance because it was not literally impossible.
- *Coker Int'l, Inc. v. Burlington Indus., Inc.*, 935 F.2d 267 (4th Cir. 1991) - Finding *force majeure* clause inapplicable because the clause allowed deliveries to be suspended by either party for delineated causes preventing the manufacture, shipment, acceptance, or consumption of the goods, and plaintiff's inability to consummate a contract for resale clearly does not affect its own ability to accept shipment. Furthermore, even were the *force majeure* clause to apply, its only effect would be to suspend deliveries.

War/Terrorism

- *OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F. Supp. 2d 1214 (D. Haw. 2003) - Fulfillment of obligations to hold group gathering at hotel resort was not excused by September 11 terrorist attacks, which did not render travel to the event (to be held 5 months later) inadvisable.
- *7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc.*, 909 P.2d 408 (Ariz. Ct. App. 1995) - Neither frustration of purpose nor commercial impracticability excused organizer's performance of its obligations to hold a convention at a resort facility based on outbreak of the Gulf War and Saddam Hussein's general threats of global terrorism. Court emphasized that the actual objective risk of threats to air travel were only slight.
- *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985) - Contractor was entitled to recover cost of relocating employees under *force majeure* clause of operations support contract, where Iran Hostage Crisis prevented it from completing contract and forced demobilization.
- *Village of Minneota v. Fairbanks, Morse & Co.*, 226 Minn. 1 (1948) - Holding that, while "inconvenience or increased costs of compliance ordinarily will not excuse a defendant from performance," the bombing of Pearl Harbor was a "unique situation" that prohibited company from constructing for five years, thereby rendering completion impossible, if only temporarily.
- *Baetjer v. New England Alcohol Co.*, 319 Mass. 592 (1946) - Buyer of Puerto Rican molasses assumed known risk of inability to obtain shipping because of war conditions.
- *Berline v. Waldschmidt*, 159 Kan. 585 (1945) - Declining to find commercial frustration on the basis that a wartime regulations suspending oil drilling excused performance under contract because, at the time the parties entered into contract, it was foreseeable that country would engage in war.

- *Chase v. Clinton Cty.*, 241 Mich. 478 (1928) - Denying excuse of economic hardship brought by World War I.