MISSION IMPOSSIBLE? – WHEN CORONAVIRUS THREATENS PERFORMANCE

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INTRODUCTION

In just a few short months, much of the nation's construction shifted from the critical path to a veritable *mission impossible*. The COVID-19 pandemic is impacting construction projects of all shapes and sizes in historically unprecedented and unanticipated ways. Public and private owners are postponing or canceling construction starts due to economic uncertainty and decreases in funding for public projects that rely on tax revenues. Construction workforces already woefully deficient have been paralyzed by stay-at-home shutdown orders and quarantines of ill or exposed persons. Projects are slowed by new, unforeseen and cumbersome new safety protocols. Supply chains have been disrupted on a global scale. No construction project is immune from these widespread business interruptions. Contractors must now accept the mission – seeking to excuse contractual nonperformance either through force majeure provisions or common law defenses – a task that is not as impossible as it may seem.

Whether totally shut-down or only delayed and disrupted, those in the construction industry must contend with and develop a sustainable plan to survive the impacts of the pandemic. While these issues arise in a unique context, certain mainstay contract and legal principles can help assess risk and serve as a guide to best prepare to advocate for additional time and compensation. This article outlines the primary legal tools available for excusing nonperformance, a checklist for mitigating damages and preparing defenses to nonperformance and a review of court decisions in those states experiencing COVID-19 spikes which are most at risk for construction delays and damages. In addition, it will take a look at a few recent decisions where COVID-19 issues have already received judicial review. While it may not be possible to secure relief on all projects or in all circumstances, a COVID-19 mitigation plan should not only incorporate recommended or required safety protocols but also measures to maximize available defenses for each unanticipated delay and disruption as they occur.

LEGAL TOOLS FOR EXCUSING NONPERFORMANCE

Force Majeure or "Act of God" Clauses

Force majeure or "Act of God" clauses are contract provisions providing one or both parties with justification for suspending performance of contractual obligations. The purpose of such clauses is to allocate risk between the parties usually for only truly unanticipated events which render performance impossible or impracticable. In general, force majeure becomes relevant when an "act of God" or other extraordinary event prevents performance. Courts tend to find that an "act of God" arises exclusively from natural forces, events, or causes without human intervention. The burden of demonstrating force majeure is on the party seeking to have its performance excused. It is an affirmative defense which is waived if not pled. The enforceability and interpretation of such

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clauses depends on the specific contract language, governing law and the causal connection between the parties' inability to perform and the unforeseen event.

While state law varies, courts primarily consider the following factors in considering the enforceability of force majeure clauses: (1) whether the event qualifies as a force majeure as defined by the contract; (2) whether the risk of nonperformance was foreseeable; (3) whether or not the risk could be mitigated; and, (4) whether or not performance was truly impossible. Typically, performance will be excused only during the period of delay caused by the force majeure event. Once the event ends, or the party is able to find a solution to the delay, the excuse ends and performance must continue. Courts rarely completely excuse all performance under force majeure provisions, which would effectively terminate the contract.

Below is an example of an express force majeure contract provision and definition:

> Force Majeure Event means, and is restricted to, any the following: (1) Acts of God; (2) terrorism or other acts of public enemy; (3) ***acts or omissions of a Governmental Agency beyond the reasonable foreseeability and control of Contractor***, including but not limited to, conduct, actions, omissions and delays by the authority having jurisdiction over the Project; (4) ***epidemics or quarantine restrictions***; (5) strikes, other than those resulting from a violation by Contractor or any of its Agents of Laws or applicable collective bargaining agreements, resulting in the unavailability of workers or replacement workers; or (6) ***unusual shortages in materials***.

In the cases cited herein, courts have historically construed force majeure clauses very narrowly, largely requiring them to be specifically enumerated. Where the contract provisions specifically identify pandemics, epidemics or quarantines (*e.g.*, Item #4 above), courts are more likely to determine that the parties have allocated the risk of a pandemic to the owner by excusing a contractor's nonperformance. However, where the force majeure provision does not specifically name such events, many contracts contain other language which may excuse performance when nonperformance results from actions of governing bodies (*e.g.*, Item #3 above), unanticipated material shortages (e.g., Item #6 above) or other unforeseeable events beyond the control of the contractor. Even when specifically enumerated, most courts require mitigation of any foreseeable risk of nonperformance.

If there is no force majeure clause in a contract or it may not extend to the effects of the coronavirus pandemic, contractors performing work on commercial projects may instead be able to utilize other provisions to excuse nonperformance such as those regarding excusable delays or allowing for time extensions. For example, while the AIA A201-2017 General Conditions does not reference "force majeure," section 8.3.1 states that the "Contract Time shall be extended for such reasonable time as the Architect may determine" if a contractor is delayed by "unusual delays in deliveries, unavoidable casualties, or other clauses beyond the Contractor's control." Federal procurement contracts do not use the term force majeure but, instead, provide for time extensions for delays outside of the contractor's control (e.g., FAR 52.249-14 which lists specific examples of excusable events of delay, including "epidemics" and "quarantine restrictions").

In addition to specifically enumerated force majeure events, many contracts include a "catchall" provision intended to capture other unspecified events. These provisions generally contain language such as "other events beyond a party's reasonable control" or "any other similar cause" following the specific list of force majeure triggers. If there is a general or catch-all statement, a court may require that the event at issue be closely related to those specifically included in the force majeure clause in accordance with the doctrine of *ejusdem generis* (*i.e.*, "the latter must be limited to things like the former"). In other words, the catchall cannot extend to events that are significantly dissimilar or greatly beyond the scope of the enumerated events. Further, catchall provisions are usually subject to the requirement that the event be unforeseeable, while specifically enumerated events might not be similarly restricted.

As in any contract matter, strict compliance with the technical requirements of the contract may be necessary for a party to invoke a force majeure clause. Typically, a contract requires prompt notice of a claim of force majeure. For example, Section 8.3.2 of the AIA standard form construction contract requires those requesting an extension do so within 21 days of the event giving rise to the delay or within 21 days after the contractor first recognizes the condition causing the delay, whichever is later, and provide an estimate of the cost and probable effect of the delay on the progress of the work. Courts in most jurisdictions routinely refuse force majeure or delay claims when adequate notice was not provided as required by the contract.

Impossibility/Impracticability/Frustration of Purpose

If the contract does not include a force majeure or other exculpatory provision, or if the force majeure provision is inapplicable under present circumstances, there may yet be relief available under common law contractual concepts that excuse performance. Contractors may assert a defense in accordance with the impossibility or impracticability doctrine. Impossibility of performance is an affirmative defense that can excuse contractual performance. This defense is based in law rather than on the terms of a contract. These doctrines may excuse nonperformance where a party establishes: (a) an unexpected intervening event occurred; (b) the parties' agreement assumed such an event would not occur; and (c) the unexpected event made contractual performance impossible or impracticable. The burden is always on the party seeking to avoid the contractual obligation.

The nature and extent of these defenses vary by state. See the state-by-state summaries below. For example, a court applying New York law may require a demonstration that the performance is objectively impossible and the event was unforeseeable. In other states, the impossibility defense is often available as an excuse to nonperformance even if performance is just "impractical" rather than absolutely impossible. The Texas Supreme Court has explained that supervening impracticability excuses performance when 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. However, an argument that performance was simply more expensive or difficult than anticipated usually will not prevail. Impossibility of performance is generally not available as a defense to a party by which its voluntary act created the impossibility.

Another common law defense in the absence of a force majeure clause is the doctrine of frustration of purpose. Like the defenses of impossibility and impracticability, a party must show

the supervening event was outside of the party's control and that the occurrence or non-occurrence of the event was a basic assumption on which the contract was made. It occurs when the event at issue has obviated the purpose of the contract, rather than whether it has made a party's contractual performance impracticable. The overarching question with respect to frustration of purpose is whether the unforeseeable event has significantly altered the circumstances of an agreement such that performance would no longer fulfill any aspect of its original purpose. The frustration must be near total. In this instance, a supervening event must have destroyed or frustrated a party's main purpose for entering into the transaction.

The success of these defenses in the context of the coronavirus will likely depend on the specific circumstances involved such as whether a pandemic of this sort was "reasonably foreseeable" when the contract was executed and whether any voluntary actions by a party contributed to the impossibility. Although these defenses are usually narrowly construed, state courts have indicated a willingness more recently to expand the applicability of these doctrines by limiting the importance of the foreseeability analysis.

PROACTIVE WAYS TO PREPARE DEFENSES TO NONPERFORMANCE

The COVID-19 pandemic has created a virtual time warp with a simultaneous glut and dearth of relevant information at any one time. What is foreseeable, impossible and/or capable of being mitigated is not static but highly dependent on the events of the day, week or month at issue. New events every day affect a party's ability to perform potentially giving rise to new and different excuses for nonperformance. Because construction takes the work and coordination of contractors, architects, engineers and many subtrades, the causes of delays and other forms of nonperformance may be isolated incidents but are more likely to be complex, interrelated and overlapping. Without documenting real-time impacts and responses, tracing the cause, effect and responsibility for pandemic-related damages may be nearly impossible in retrospect if and when litigation ensues.

To assist clients in preparing for and mitigating against the risks posed by the pandemic, the following is a guide to preparing contractors to assert force majeure and related defenses to nonperformance under construction contracts.

- **Proactive Checklist before COVID-19 Impact**
    - Conduct a project-by-project risk assessment of force majeure and related provisions including their application, breadth, and effect in the face of potential impacts caused by a pandemic.
    - Discuss with clients the status and issues on individual projects to help identify at-risk projects.
    - Identify and rank projects from low to high risk based on contractual review and field conditions.
    - Recommend clients prepare mitigation plans for high risk projects.
    - If no broad form or enumerated force majeure provisions apply, research and assess other applicable defenses to nonperformance.
    - Review other upstream and downstream construction contracts to further assess and allocate risk.

- Outline project-by-project requirements for providing timely and adequate notice of delays and other matters impacting full performance.
- Educate clients on the critical need to keep detailed records and train them how to document delays and other impacts (*e.g*., the dates, reasons, costs and impacts of delays, materials shortages, shutdowns, quarantines, etc.).
- Outline project-by-project requirements for providing timely and adequate notice of delays and other matters impacting full performance.
- Help clients identify the specific impacts on each project (e.g., anticipated delays, impact on downstream subcontractors and suppliers, schedule impacts, etc.).
- Monitor legislation and other governmental orders for further impacts.

- **Responsive Checklist after COVID-19 Impact**

  - Assess the facts of the event giving rise to nonperformance in conjunction with the contract review analysis above to determine the nature and scope of what specific action may be excused.
  - Send written notice of the event as required by the contract.
  - If contractual provisions do not provide protection, draft communication to the owner/upstream project participant that can later serve as evidence to support an impossibility and/or waiver defense.
  - Prepare a response plan to mitigate the COVID-19 impacts which may include shifting to the performance of other scopes of work.
  - Communicate regularly with all project participants. Formal notices and other written and verbal communications among the parties should be timely, factual and professional. The point is to inform, mitigate damages and satisfy contractual notice requirements.
  - Assist in providing timely and adequate notice of delays and other matters impacting full performance.
  - Assist in drafting Change Orders and related documents seeking time extensions and additional compensation.
  - Negotiate resolution, if necessary, of interim issues and document agreements reached on how to proceed.
  - Review other provisions regarding damage waivers, waiver generally, escalation clauses to see if other requirements or restrictions apply.
  - Consider vetting and recommending retention of project delay experts to document, track and quantify delays and damages especially if litigation is anticipated and/or disputes arise over whether or not delays occurred pre-pandemic or as a result of the pandemic.

STATE-BY-STATE ANALYSIS OF DEFENSES TO NONPERFORMANCE: FORCE MAJEURE, IMPOSSIBILITY AND IMPRACTICABILITY

ARIZONA

Force Majeure Clauses

Arizona has little case law interpreting force majeure clauses. Instead, contract disputes typically rely on common law defenses of impracticability, impossibility, and frustration of purpose. Arizona generally applies the Restatement (Second) of Contracts when interpreting these doctrine. *See 7200 Scottsdale Road General Partners v. Kuhn Farm Machinery, Inc.*, 184 Ariz. 341 (App. 1995) (using the Restatement to distinguish between impracticability and frustration). In the absence of law to the contrary, Arizona follows the Restatement. *City of Phoenix v. Bellamy*, 153 Ariz. 363, 366 (App. 1987). Additionally, Arizona has numerous federal projects and follows the federal court of claims and federal board of contract appeals in the absence of state law. *New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 101 (1985, en banc).

Frustration

Frustration of purpose is similar to a doctrine of equitable relief in Arizona. The doctrine of frustration is limited to those very rare cases of extreme hardship. For example, the enactment of legislation can serve as the basis for frustration of purpose when the legislation is not foreseeable. *Matheny v. Gila Cty*, 147 Ariz. 359, 362 (App. 1985). However, a sunset of a law permitting the operation payday loans was considered foreseeable and could not be the basis for frustration. *Next Gen Capital, L.L.C. v Consumer lending Associates, L.L.C.*, 234 Ariz, 9, 12 (App. 2013). Additionally, a claim of frustration in Arizona must have a "principle purpose" that both parties are mutually aware of. As an example, a sudden change in international travel demand due to the threat of terrorism or the perception of travel risk was not sufficient for a claim of frustration for an organizer when the convention center was not aware of the international participation as part of the principle purpose of the convention. *7200 Scottsdale Road General Partners v. Kuhn Farm Machinery, Inc*., 184 Ariz. 341 (App. 1995).

Impracticability

Arizona takes a rigid stance toward impracticability and adopts the position of Restatement (Second) of Contracts § 261 that performance is impracticable when it is subject to "extreme and unreasonable difficulty, expense, injury, or loss to one of the parties." *Rock and Stone Mfg, Inc. v. Allied Stone System, Inc.*, No. 1 CA-CV 07-0514, 2008 WL 4329922 at *2 (Ariz. App. Sep. 18, 2008). For example, the theft of stone from a jobsite does not rise to the level of impracticability for a mason—it is merely a delay. *Id*.

Additionally, Arizona recognizes a claim for "commercial impracticability." It is also referred to as "commercial impossibility" or "commercial senselessness." This claim argues that "performance was objectively unreasonable." *Willamette Crushing Co. v. State By and Through Dept. of Transp.*, 188 Ariz. 79, 83 (App. 1997). A claim of "commercial impracticability" will look at the industry standard to determine reasonableness. *Oak Adec, Inc. v. U.S.*, 24 Fed. Cl. Ct.

502 (1991). Significant costs overruns were not unreasonable in a construction contract with a poor design when the costs overruns were similar to the higher bids on the project. *Willamette Crushing Co. v. State By and Through Dept. of Transp.*, 188 Ariz. 79, 80 (App. 1997).

Impossibility

Arizona also recognizes a claim for impossibility. It is largely limited to extreme cases of death or destruction of property. *Rock and Stone Mfg., Inc. v. Allied Stone System, Inc.*, No. 1 CA-CV 07-0514, 2008 WL 4329922 at *2 (Ariz. Ct. App. Sep. 18, 2008). However, a contract will be interpreted broadly if one party assumes the risks. For example, an Arizona court rejected a claim of impossibility when the owner of a building that was destroyed by a storm expressly agreed to "maintain" the building. *Rose v. Freeway Aviation, Inc.*, 120 Ariz 298, 299 (App. 1978). The court interpreted the language of "maintain" in the contract as the owner assuming the risk to the building.

CALIFORNIA

Force Majeure Clauses

No California case law has yet addressed the issue of *force majeure* clauses with respect to COVID-19. However, California courts can take judicial notice of a regulatory body's determinations of force majeure claims. *See Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 435 (9th Cir.1992) (taking notice of the existence of decisions of the California Public Utility Commission on force majeure claims). Therefore, in the future a California regulatory body like its legislature could specify that COVID-19 qualifies as a force majeure event. Until that happens, parties wishing to invoke a force majeure clause must use the concepts discussed below to argue that COVID-19 qualifies as force majeure.

Enforceability Concepts

Unless an event is explicitly identified in the clause, it must be unforeseeable at the time of contracting to qualify as a force majeure. *See Free Range Content, Inc. v. Google Inc.*, 2016 WL 2902332, at *6 (N.D. Cal., May 13, 2016) (citing *Watson Labs. Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1111 (C.D. Cal. 2001).

Even if an event is explicitly identified, California law only recognizes it as force majeure if its occurrence was beyond a party's reasonable control**.** *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1109 (C.D. Cal. 2001) citing *Nissho-Iwai Co. v. Occidental Crude Sales*, 729 F.2d 1530, 1540-41 (5th Cir. 1984) ("the California law of force majeure requires us to apply a reasonable control limitation to each specified event, regardless of what generalized contract interpretation rules would suggest"). As a result, even if an event is explicitly identified in a force majeure clause, it will not qualify if it could have been prevented by foresight and sufficient expenditure or by the exercise of reasonable diligence in taking steps to ensure performance and prevent an event from occurring. *Mobil Oil Corp. v. S. California Edison Co.*, B145834, 2003 WL 147770, at *8 (Cal. Ct. App. Jan. 21, 2003). As such, California courts require

a party invoking a force majeure clause to show "that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive."*Jin Rui Group, Inc. v. Societe Kamel Bekdache & Fils S.A.L.*, 621 Fed. Appx. 511 (9th Cir. 2015); *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.*, 4 Cal. App. 4th 1538, 1565, 6 Cal. Rptr. 2d 698, 714 (1992); *Butler v. Nepple*, 54 Cal. 2d 589, 6 Cal. Rptr. 767, 354 P.2d 239 (1960) (holding that the fact that compliance with the contract would involve greater expense than anticipated, due to a steel strike, did not excuse performance).

California courts prohibit parties from invoking a force majeure clause and continuing normal performance obligations. *See e.g. Distribution Servs. Ltd. v. Hong Kong Islands Line Am. S.A.*, 963 F.2d 378 (9th Cir. 1992) (when a party invoked a force majeure clause and continued rather than ceased its shipment obligations under an agreement, the court rejected its force majeure defense as being inconsistent with the continued shipments under the agreement).

To constitute force majeure, an event must be the proximate cause of nonperformance of the contract. *See Hong Kong Islands Line Am. S.A. v. Distribution Servs. Ltd.*, 795 F. Supp. 983, 989 (C.D. Cal. 1991)(finding that a party failed to prove that claimed events (strikes, riots, civil commotion, loss or partial loss of market, changing markets, and business declines) made shipments "impossible" or "unprofitable" under a service contract because the party always had the ability to ship cargo with the original party, but chose to ship with other carriers instead, so the named events did not proximately cause the shortfall).

Interpretation Concepts

Broad form force majeure provisions are enforceable. *Rio Properties v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 F. App'x 519, 521 (9th Cir. 2004)(where force majeure excused performance for any cause beyond a party's reasonable control, the illness of a party qualified as force majeure).

California courts narrowly construe the effect of force majeure clauses on related contract clauses. For example, in *San Mateo Cmty. Coll. Dist. v. Half Moon Bay Ltd. P'ship*, 65 Cal. App. 4th 401, 412-13 (1998), the Court found that a force majeure clause in an oil and gas lease did not excuse failure of a condition precedent for extension of the lease term and the lease had terminated because: (1) the force majeure clause referred only to excusing the lessee's covenants under the lease and not to excusing a condition precedent in the term clause and (2) the term clause did not incorporate the force majeure clause by reference or state that the specified force majeure events may excuse failure of the condition precedent.

Catch-all language following listed events is interpreted narrowly. California courts apply the rule of *ejusdem generis*–where general catch-all phrases follow the recitation of specific items, the catch-all language is construed as applying to similar items rather than having a truly general meaning. *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 25 Cal. 3d 317, 331 n.10 (1979).

Concepts related to Government Action

California courts generally construe force majeure language narrowly, including when considering when a government action amounts to a force majeure event. *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1113 (C.D. Cal. 2001) (force majeure clause including "regulatory, governmental…action" did not include shutdown of plan because of zoning issues). In fact, a force majeure clause may need to actually specify the degree to which government action impacts a party's performance (such as whether changing market conditions caused by government action qualifies as a force majeure event). *Id*. at 1111 (a force majeure clause covering "regulatory, governmental, or military action" was not specific enough to cover the forced zoning shutdown of a plant).

Impossibility/Impracticability

At common law, a finding that a contract was impossible to perform required literal or physical impossibility. *Kennedy v. Reece*, 225 Cal.App.2d 717, 724 (1964). Modern cases, however, recognize that performance is legally impossible when it is impracticable. *Id*.; *Habitat Tr. for Wildlife, Inc. v. City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1336, 96 Cal. Rptr. 3d 813, 843 (2009)("A thing is impossible in legal contemplation when it is not practicable"). "Facts which may make performance more difficult or costly than contemplated when the agreement was executed do not constitute impossibility or impracticability." *Kashmiri v. Regents of Univ. of California*, 156 Cal. App. 4th 809, 839, 67 Cal. Rptr. 3d 635, 658 (2007). Instead, impracticability only applies when performance would require *excessive* and *unreasonable* expense. *Habitat Tr. for Wildlife, Inc. v. City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1336, 96 Cal. Rptr. 3d 813, 843 (2009); *see e.g. In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1175 (C.D. Cal. 2011) (impossibly excused car manufacturer's repair duties when the plaintiff totaled the vehicle making it impossible to repair the vehicle); *City of Palm Springs v. Living Desert Reserve*, 70 Cal. App. 4th 613, 626, 82 Cal. Rptr. 2d 859, 869 (1999) (holding that performance of a condition in deed was made impossible by operation of law)."A party invoking the impossibility defense must show that he used reasonable efforts to surmount the obstacles which prevented performance." *McCalden v. California Library Assn.*, 955 F.2d 1214, 1219 (9th Cir. 1990), superceded by statute on other grounds as recognized in *Harmston v. City and County of San Francisco*, 627 F.3d 1273, 1280 (9th Cir. 2010).

It is important to note that under California law, a "[t]emporary impossibility usually *suspends* the obligation to perform during the time it exists" but the obligation to perform is not excused or discharged by a temporary impossibility unless the delayed performance becomes materially more burdensome or the temporary impossibility becomes permanent. *Maudlin v. Pac. Decision Scis. Corp.*, 137 Cal. App. 4th 1001, 1017, 40 Cal. Rptr. 3d 724, 735 (2006); *G.W. Andersen Construction Co. v. Mars Sales* (1985) 164 Cal.App.3d 326, 334–337, 210 Cal.Rptr. 409 (governmentally imposed construction moratorium did not discharge obligation of general contractor affected by moratorium, but merely suspended its duty where delayed performance would not have been materially more burdensome). As a result, even if COVID-19 makes performing unreasonably expensive, it will likely just suspend performance obligations rather than discharge them altogether.

Frustration of Purpose

Unlike impossibility which requires actual or virtual impossibility of performance, this defense relieves a party from performance where the "principal purpose is substantially frustrated without fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made ... unless the language or circumstances [of the contract] indicate the contrary." *In re KP3 Endeavors, Inc.*, BR 18-00007-MM7, 2018 WL 2117242, at *10 (Bankr. S.D. Cal. Apr. 30, 2018). In other words, "[t]he doctrine operates when a not reasonably foreseeable supervening event totally or nearly totally destroys the value of counter performance in a contract or lease." *Id.*

However, it applies in only very limited circumstances and in cases of extreme hardship. Decreased profitability to one party, even to the point of a negative return, is not sufficient to establish frustration of purpose. *Lauter v. Rosenblatt*, CV1508481DDPKSX, 2020 WL 3545733, at *4 (C.D. Cal. June 30, 2020). Further, if the parties have contemplated the risks arising from the frustrating event, the doctrine may not be invoked. *Id*. (contract terms evidenced that the parties contemplated the possibility that the frustrating event would occur). Finally, before the doctrine will apply, the contract purposes by *both parties* must be frustrated. *Dorn v. Goetz*, 85 Cal.App.2d 407, 411, 193 P.2d 121, 123 (1st Dist.1948) ("the basic reason for entering into the contract, which it is claimed has been destroyed by the supervening event, must be recognized by *both* parties").

Given this limitation, the defense of frustration is very rarely successful. *E.g.*, Weiskop, Frustration of Contractual Purpose—Doctrine or Myth?, 70 St. John's L. Rev. 239, 247–48 (1996) (a 1953 study found no case; a 1960 study found only 29). This is especially true considering the high hurdle a party must prove in order to be entitled to this defense. A party must show (1) the basic purpose of the contract, which has been destroyed by the supervening event, must be recognized by both parties to the contract; (2) the event must be of a nature not reasonably to have been foreseen, and the frustration must be so severe that it is not fairly to be regarded as within the risks that were assumed under the contract; and (3) the value of counter performance to the promisor seeking to be excused must be substantially or totally destroyed. *Peoplesoft U.S.A., Inc. v. Softeck, Inc.*, 227 F. Supp. 2d 1116, 1119–20 (N.D. Cal. 2002).

FLORIDA

Force Majeure Clauses

No Florida case law has yet addressed the issue of force majeure clauses with respect to COVID-19. Instead, parties wishing to invoke a force majeure clause must use the concepts discussed below to argue that COVID-19 qualifies as force majeure.

Enforceability Concepts

There is little case law regarding the enforceability of force majeure clauses in Florida. *ARHC NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC*, 18-80712, 2019 WL

4694146, at *3 (S.D. Fla. Feb. 5, 2019) ("Precedent on the enforcement of force majeure clauses is limited in Florida").

Unlike many other venues, a force majeure clause in Florida can cover both foreseeable and enforceable events, the focus is on the language used in the clause. *In re Mona Lisa at Celebration, LLC*, 436 B.R. 179, 194 (Bankr. M.D. Fla. 2010).

Florida courts also recognize that parties can agree to a broader force majeure clause than what would be available to them under the law of impossibility and/or adopt a lower standard for nonperformance (*e.g*., an event that would frustrate performance, rather than render it impossible) that would otherwise be allowable under alternative legal remedies). *See Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 857 n.6 (11th Cir. 2009).

However, like many other venues, any force majeure event must be beyond the control of the impacted parties and cannot be due to a party's fault or negligence. *Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1332 (11th Cir. 2010); *see e.g. Devco Dev. Corp. v. Hooker Homes, Inc.*, 518 So. 2d 922, 923 (Fla. 2d DCA 1987) (holding that excessive rain excused delay under the contract's force majeure clause as a condition outside of the seller's control); *St. Joe Paper Co. v. State Dep't of Envtl. Regulation*, 371 So.2d 178, 180 (Fla. 1st DCA 1979) (implicitly recognizing that a force majeure clause excusing delays for any cause not within the reasonable control of the company was enforceable);*Camacho Enters., Inc. v. Better Const. Co.*, 343 So. 2d 1296, 1297 (Fla. 3d DCA 1977) (enforcing the contract's force majeure clause to excuse delay based on the president of a development company's heart attack as a circumstance beyond the control of the developer).

Interpretation Concepts

In Florida, force majeure clauses are typically narrowly construed and only excuse a party's nonperformance if the event causing the nonperformance is specifically identified. *ARHC NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC*, 18-80712, 2019 WL 4694146, at *3 (S.D. Fla. Feb. 5, 2019); see e.g. *Cartan Tours, Inc. v. ESA Services, Inc.*, 833 So. 2d 873, 874 (Fla. Dist. Ct. App. 2003)(Court refused to enforce a force majeure clause because the phrase "affecting the ability of the Olympic Games to be held" in the clause was ambiguous as it related to September 11 terrorist attack and the phrase could reasonably mean preventing the games altogether or simply affecting them).

Catch-all language does not normally encompass foreseeable events as courts expect parties to expressly set those out to excuse performance. *See e.g. In re Flying Cow Ranch HC, LLC*, 2018 WL 7500475, at *3 (Bankr. S.D. Fla. June 22, 2018) (failure to obtain zoning approvals or permits does not qualify as a force majeure event unless specifically included in the contractual provision at issue).

Acts of God are interpreted narrowly. If parties include "acts of God" in their force majeure clause, it must be an (1) act or occurrence so extraordinary and unprecedented that human foresight could not foresee or guard against it;(2) unpreventable or unavoidable by the exercise of reasonable prudence, diligence, and care or the use of those means which the situation of the party renders it

reasonable that the party should employ; and (3) the sole proximate cause of the nonperformance, without the participation of man, whether by active intervention or negligence or failure to act. *Florida Power Corp. v. City of Tallahassee*, 18 So. 2d 671, 675 (Fla. 1944) (a hurricane preventing a company's delivery of electricity to a city was an "act of God" that justified nonperformance).

Catch-all language following listed events is interpreted narrowly. Florida courts apply the rule of *ejusdem generis*–they interpret force majeure clauses with catch-all language to capture only unlisted events that are similar to the listed events. *Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718, 723 (Fla. Dist. Ct. App. 2010).

Concepts related to Government Action

Florida courts generally construe force majeure language narrowly, including when considering when a government action amounts to a force majeure event. Courts generally do not consider government policies that affect the profitability of a contract but do not preclude performance as "acts of government" for force majeure clause purposes. *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1293 (Fed. Cir. 2002) (new monetary control procedures and deregulation of savings which led to a weakness in the timber market did not qualify as "acts of government" in the force majeure clause). Further parties may need to actually specify the government action and/or the degree to which government action impacts a party's performance. *See e.g. ARHC NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC*, 18-80712, 2019 WL 4694146, at *4 (S.D. Fla. Feb. 5, 2019); *Broward County v. Brooks Builders, Inc.*, 908 So. 2d 536, 539 (Fla. Dist. Ct. App. 2005) (refusing to award damages for delays due to 9/11 event).

Impossibility/Impracticability

Impossibility "refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform." *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.*, 174 So.2d 614, 617 (Fla. 2d DCA 1965). However, the same relief applies if it can be shown that performance is impracticable. *CNA Intern. Reinsurance Co., Ltd. v. Phoenix*, 678 So. 2d 378 (Fla. 1st DCA 1996). "The important question in an impossibility inquiry 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." *LSREF2 Baron, LLC v. Beemer & Associates XLVII, L.L.C.*, 3:10-CV-576-J-32JBT, 2011 WL 6838047, at *3 (M.D. Fla. Dec. 29, 2011).

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 other party. *Valencia Center, Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1267 (Fla. 3d DCA 1985); *Ferguson*, 54 So.3d at 556 ("Economic downturns and other market shifts do not truly constitute unanticipated circumstances in a market-based economy."); *Flathead–Michigan I, LLC v. Peninsula Development, LLC*, No. 09–14043, 2011 WL 940048 (E.D.Mich. March 16, 2011) ("[T]he continuation of existing market and of the financial situation of the parties are not ordinarily such [basic] assumptions, so that mere market shifts or financial ability do not usually effect discharge.").

The doctrine of impossibility also will not apply if a party itself creates the impossible condition or if the facts making performance impossible were known at the time the contract was made. *Am. Aviation, Inc. v. Aero-Flight Serv., Inc.*, 712 So. 2d 809, 810 (Fla. Dist. Ct. App. 1998). Further, it is unlikely to apply if the difficulties that occur could reasonably have been foreseen at the time of the creation of the contract. *Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354 (M.D. Fla. 2008)(developer could not claim impossibility defense because the risk of a delayed permit for an access road was foreseeable at time of inception of contract and could have been subject to an express provision in the agreement).

One case that could be helpful in the COVID context is *Leon County v. Gluesenkamp*, 873 So. 2d 460, 464 (Fla. Dist. Ct. App. 2004), in which the Court held that an injunction against the performance of a contract provision rendered performance impossible and provision unenforceable. This would provide support for an argument that governmental actions related COVID-19 could, in some circumstances, support an impossibility defense.

Frustration of Purpose

"Frustration of purpose" is the converse of impossibility of performance. Frustration arises when "one of the parties finds that the purpose for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party." *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.*, 174 So.2d 614, 617 (Fla. 2d DCA 1965); *In re Maxko Petroleum, LLC*, 425 B.R. 852 (Bankr. S.D. Fla. 2010), aff'd, 2010 WL 5418995 (S.D. Fla. 2010).Three elements are normally necessary for application of the doctrine of frustration or commercial impracticability: first, the event giving rise to the claim must be totally unexpected and unforeseeable; second, the risk of the event must not be provided for, either by the language of the charter party or by custom; and third, the performance of the contract must be impossible or commercially impracticable. *Hilton Oil Transport v. Oil Transport Co., S.A.*, 659 So. 2d 1141, 1147, 1996 A.M.C. 113 (Fla. 3d DCA 1995).

GEORGIA

Force Majeure Clauses

Georgia strictly interprets force majeure clauses to the enumerated events; an event outside one contemplated in the force majeure clause will not be excused. *Holder Cont. Grp. v. Georgia Tech. Facilities, Inc.*, 282 Ga. App. 796, 798 (2006). And if enumerated, the force majeure clause will be rigidly interpreted. In the context of COVID-19, Georgia courts will likely look for explicit language excusing the event. At the turn of the twentieth century, a force majeure clause explicitly excusing performance during an "epidemic" was sufficient to excuse delays for an epidemic of yellow fever. *Florida N.R. Co. v. Southern Supply Co.*, 37 S.E. 130, 131 (Ga. 1900). Likewise, when the force majeure clause merely stated the agreement was "contingent upon . . . other delays beyond our control," the clause was not sufficient to excuse delays due to an epidemic of measles and mumps when the contract required the production of cloth on a strict timeline such that time was of the essence. *Augusta Factory v. Mente & Co*, 64 S.E. 553, 555 (Ga. 1909). More recently,

a Georgia court strictly interpreted a force majeure clause when a catastrophic flood rendered a water plant permanently inoperable and the force majeure clause only excused performance for the duration of the flood. *Macon Water Authority v. City of Forsyth*, 262 Ga. App. 224, (2003). The court found the public water authority breached its obligations for not operating the water plant outside the duration of the flood. *Id*. Likewise, the court strictly interpreted a force majeure provision and excused performance when the provision stated that "allows termination after the cessation of business operations 'for any reason whatsoever'". *Lodgenet Entertainment Corp. v. Heritage Inn Associates, L.P.*, 261 Ga. App. 557, 559 (2003). The court determined the clause "for any reason whatsoever" was "clear and unambiguous" to excuse performance.

Catch-all phrases

When drafting force majeure clauses in Georgia, the court will interpret any list of force majeure events through the doctrine of *ejusdem generis*; the court will limit a general phrase that is followed by a list of specific events to those listed events. *See Montgomery Cty. v. Hamilton*, 337 Ga. App. 500, 506-07 (2016). However, any language that expressly authorizes similar events will broaden the general catch-all phrase. *See generally Long v. Development Auth. of Fulton Cty.*, 352 Ga. App. 815, 821 (2019).

Acts of God and Impossibility Defense

Georgia statutorily provides for an impossibility defense "as a result of an act of God," except where "prudence" would have avoided it. Ga. Code Ann., § 13-4-21 (2020). An "act of God" is statutorily defined to include "illness," and it expressly "excludes all idea of human agency." Ga. Code Ann. § 1-3-3(3) (2020). Any inclusion of an "act of God" in a force majeure clause will be interpreted through the statutory language. Georgia case law dictates that an "act of God" must be "so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." *Sampson v. General Elec. Supply Corp.*, 78 Ga. App. 2, 8 (1948). And it is "an occurrence that is 'totally unexpected in the natural world,' such as lightning strike in a location where a strike does not occur, an earthquake, a meteor, or a tidal wave." *Head v. De Souse*, 353 Ga. App., 309, 315 (2019) (internal citations omitted). Therefore, any future Georgia court decision determining whether an COVID-19 as an act of God will likely turn on the foreseeability of the pandemic and whether it was totally unexpected.

In addition to foreseeability, an "act of God" excludes human agency. For example, a sudden illness that incapacitated a driver was considered an act of God to excuse liability because the sudden illness was not foreseeable and could not be controlled. *Lewis v. Smith*, 238 Ga. App. 6, 7 (1999). But an economic downturn was not considered an act of God because it was subject to human agency. *Elavon, Inc. v. Wachovia Bank, Nat. Ass'n*, 841 F. Supp. 2d 1298, 1306 (N.D. Ga. 2011). And any contributory negligence will negate invoking an act of God defense. *Halligan v. Broun*, 645 S.E. 2d 581, 582-83 (Ga. App. 2007).

Impracticability

Georgia statutorily provides a defense of impracticability for sellers of commercial goods under the UCC, but it is subject to a requirement of good faith and the presence of a contingency

that was a basic assumption of the contract. Ga. Code Ann. § 11-2-615 (2020). Impracticability of performance can be asserted, but appears disfavored by the courts. As one court noted: "the fact that one is unable to perform a contract because of his inability to obtain money, whether due to his poverty, a financial panic, or failure of a third party on whom he relies for furnishing the money, will not ordinarily excuse nonperformance, in the absence of a contract provision in that regard." *Bright v. Stubbs Properties, Inc.*, 133 Ga. App. 166, 167 (1974).

ILLINOIS

Force Majeure Clauses

Only one Illinois case has addressed the issue of *force majeure* clauses with respect to restrictions imposed by COVID-19. The United States Bankruptcy Court for the Northern District of Illinois, Eastern Division recently decided *In re Hitz Rest. Grp.*, No. BR 20 B 05012, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020). The *Hitz* case involves a restaurant group in bankruptcy, in which the landlord sought unpaid rent by Hitz. Hitz argued that government restrictions enacted due to COVID-19 constituted a *force majeure* event and excused performance under the contract. The *force majeure* clause at issue stated that "Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by ... laws, governmental action or inaction, orders of government.... Lack of money shall not be grounds for *Force Majeure*." *Id.* at *2. The *Hitz* court held that the governor's executive order imposing restrictions due to COVID-19 met the language of the *force majeure* clause in that it constituted "government action" and the issuance of an "order" that "hindered" Hitz ability to perform its contractual obligations. *Id.* The *Hitz* court held that Hitz' "obligation to pay rent is reduced in proportion to its reduced ability to generate revenue due to the executive order." *Id.* at 3. The *Hitz* court determined that Hitz still owed 25% of its rent, based on the fact that 25% of the restaurant's square footage was still useable and that the restaurant still could have offered carry-out, curbside pick-up and delivery. *Id.* at 4.

The general principles below offer guidance to how Illinois courts may interpret a party's failure to perform its contractual obligations under a *force majeure* clause or through other defenses. Generally, clauses which specifically list pandemics, epidemics or government actions are much more likely to apply to COVID-19 related restrictions.

General Principles

A *force majeure* clause is used to excuse performance obligations of the "parties if performance becomes impossible or impractical as a result of some event that the parties did not anticipate or otherwise could not have controlled." *Ner Tamid Congregation of N. Town v. Krivoruchko*, 638 F. Supp. 2d 913, 931 (N.D. Ill. 2009), as amended (July 9, 2009). Illinois courts apply the Black's Law Dictionary definition of *force majeure*, that it is an "[a]n event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars)." *Stepnicka v. Grant Park 2 LLC*, 2013 IL App (1st) 113229-U. ¶ n.2, citing Black's Law Dictionary (9th ed.2009) at 718.

A *force majeure* clause will supersede common-law defenses of impossibility and impracticability. "Ordinarily when performance of a contract would be illegal because of a statute, regulation, or other official action that has occurred since the contract was signed, the promisor is discharged without liability, pursuant to the common law doctrine of impossibility (today often called "impracticability"). *407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 296 N.Y.S.2d 338, 244 N.E.2d 37 (1968); Restatement of Contracts (Second), § 264 (1981). If, however, the parties include a *force majeure* clause in the contract, the clause supersedes the doctrine. *Northern Indiana Public Service Co. v. Carbon County Coal Corp.*, 799 F.2d 265, 276 (7th Cir.1986); *Wiggins v. Warrior River Coal Co.*, 696 F.2d 1356, 1359 (11th Cir.1983). For, like most contract doctrines, 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." *Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850, 855 (N.D. Ill. 1990).

Illinois courts have held that parties must attempt to resolve the *force majeure* event before invoking the clause. Federal courts have noted the "duty of a party to a contract that contains a *force majeure* clause to take reasonable measures to prevent conditions constituting *force majeure* from arising, and to cure them if they do arise." *Heritage Commons Partners v. Vill. of Summit*, 730 F. Supp. 821, 824 (N.D. Ill. 1990). They have also noted that "apart from any specifically negotiated duty of due diligence, there is a general requirement, related to the duty of good faith that is read into all express contracts unless waived, that the promisor make a bona fide effort to dissolve the restraint that is preventing him from carrying out his promise. *Dezsofi v. Jacoby*, 178 Misc. 851, 853, 36 N.Y.S.2d 672, 674 (S.Ct.1942); cf. *Kiyoichi Fujikawa v. Sunrise Soda Water Works Co.*, 158 F.2d 490, 492–93 (9th Cir.1946)." *Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850, 859 (N.D. Ill. 1990).

Catchall Clauses

In interpreting catchall clauses, Illinois courts apply the principle of e*jusdem generis*. "The doctrine of *ejusdem generis* is that where a statute or document specifically enumerates several classes of persons or things and immediately following, and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that the persons or things therein comprised may be read as *ejusdem generis* 'with,' and not of a quality superior to or different from, those specifically enumerated." *Farley v. Marion Power Shovel Co.*, 60 Ill. 2d 432, 436, 328 N.E.2d 318, 320 (1975). However, this doctrine "is not a rule of mandatory application, but a rule of construction which should not be applied to defeat the unambiguous intent of the… parties to an agreement." *Stepnicka v. Grant Park 2 LLC*, 2013 IL App (1st) 113229-U, ¶ 71.

Government Orders and Restrictions

As noted above, Illinois courts have held that in certain circumstances, government restrictions due to COVID-19 may apply to *force majeure* clauses.

Other Illinois case law addresses *force majeure* clauses and other defenses to contract performance related to government action. The federal court in *Glen Hollow P'ship v. Wal-Mart*

Stores, Inc., 139 F.3d 901 (7th Cir. 1998), held that delays due to zoning regulations counted as "government regulations" within the meaning of a *force majeure* clause and excused delayed contract performance while the regulations were in place and a reasonable time thereafter. The Supreme Court of Illinois, in *Phelps v. Sch. Dist. No. 109, Wayne Cty.*, 302 Ill. 193, 194, 134 N.E. 312, 312 (1922), held that state closure of schools due to an influenza outbreak did not relieve the school district from the obligation to pay its teacher who was ready and willing to continue their duties under the contract. Other government action was addressed in *Patch v. Solar Corp.*, 149 F.2d 558, 559 (7th Cir. 1945), in which the court held that performance of a contract was frustrated by the wartime ban on the manufacturing of washing machines and excused performance of the parties.

Impossibility/Impracticability

"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. *See Blue Cross Blue Shield of Tenn. v. BCS Ins. Co.*, 517 F.Supp.2d 1050, 1056 (N.D.Ill.2007); *Illinois–Am. Water Co. v. City of Peoria*, 332 Ill.App.3d 1098, 1106, 266 Ill.Dec. 277, 774 N.E.2d 383, 391 (Ill.App.Ct.2002). The rationale for the defense of commercial impracticability is that the circumstance causing the breach has rendered performance so vitally different from what was anticipated that the contract cannot be reasonably thought to govern. *Waldinger Corp. v. CRS Group Eng'rs, Inc*., 775 F.2d 781, 786 (7th Cir.1985) (internal quotation omitted)." *Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc.*, 732 F. Supp. 2d 809, 827 (N.D. Ill. 2010).

"Impossibility of performance as a ground for rescission of a contract refers to those factual situations where the purposes for which the contract was made have, on one side, become impossible to perform… The doctrine excuses performance where performance is rendered objectively impossible due to destruction of the subject matter of the contract or by operation of law… The party advancing the doctrine must show that the events or circumstances which he claims rendered his performance impossible were not reasonably foreseeable at the time of contracting. Where a contingency that causes the impossibility might have been anticipated or guarded against in the contract, it must be provided for by the terms of the contract or else impossibility does not excuse performance." *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 6–7, 933 N.E.2d 860, 864–65 (2010).

A "requirement of the impossibility/impracticability defense is the defendant must demonstrate that he has tried all practical, available alternatives to permit performance. *Illinois–American Water Co. v. City of Peoria*, 332 Ill.App.3d 1098, 1106, 266 Ill.Dec. 277, 774 N.E.2d 383, 391 (3rd Dist.2002); *Blue Cross Blue Shield of Tennessee v. BCS Ins. Co.*, 517 F.Supp.2d 1050, 1056 (N.D.Ill.2007)." *Ner Tamid Congregation of N. Town v. Krivoruchko*, 638 F. Supp. 2d 913, 933 (N.D. Ill. 2009), as amended (July 9, 2009)

Frustration of Purpose

Frustration of purpose is applied narrowly by Illinois courts. "Frustration of purpose or commercial frustration as the doctrine has been called in Illinois, is a viable defense but is not to

be applied liberally. (*Smith v. Roberts* (1977), 54 Ill.App.3d 910, 12 Ill.Dec. 648, 370 N.E.2d 271.) The Smith decision sets out a rigorous two-part test which requires a party to show that: (1) the frustrating event was not reasonably foreseeable; and (2) the value of counter-performance has been totally or nearly totally destroyed by the frustrating event." *N. Illinois Gas Co. v. Energy Co-op., Inc.*, 122 Ill. App. 3d 940, 952, 461 N.E.2d 1049, 1059 (1984). Frustration of purpose applies "to cases where the cessation or nonexistence of some particular condition or state of things has rendered performance impossible and the object of the contract frustrated. It 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." *Ner Tamid Congregation of N. Town v. Krivoruchko*, 638 F. Supp. 2d 913, 924–25 (N.D. Ill. 2009), as amended (July 9, 2009).

NEW YORK

Force Majeure Clauses

No New York case law has yet addressed the issue of *Force Majeure* clauses with respect to restrictions imposed by COVID-19. The general principles below offer guidance to how New York courts may interpret a party's failure to perform its contractual obligations under a *force majeure* clause or through other defenses. Generally, clauses which specifically list pandemics, epidemics or government actions are much more likely to apply to COVID-19 related restrictions.

General Principles

New York courts narrowly construe *force majeure* clauses to apply to events that are listed in the clause. "Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused." *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902–03, 519 N.E.2d 295, 296 (1987).

"*Force majeure* clauses are to be interpreted in accord with their function, which is to relieve a party of liability when the parties' expectations are frustrated due to an event that is "an extreme and unforeseeable occurrence," that "was beyond [the party's] control and without its fault or negligence" (30 Lord, Williston on Contracts §§ 77:31 [4th ed.]; see 8–31 Corbin on Contracts §§ 31.4 [2006]; United Equities Co. v. First Natl. City Bank, 41 N.Y.2d 1032, 395 N.Y.S.2d 640, 363 N.E.2d 1385 [1977] affg. on op. below 52 A.D.2d 154, 157, 383 N.Y.S.2d 6 [1976]; Macalloy Corp. v. Metallurg, Inc., 284 A.D.2d 227, 227, 728 N.Y.S.2d 14 [2001])." *Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942–43, 839 N.Y.S.2d 242, 246 (2007).

Not all New York courts have held that unforeseeability is a requirement for *force majeure* clauses to apply. The USDC for the Eastern District of New York, held that a *force majeure* clause applied even for foreseeable events and disagreed that the "court must read an unforeseeability

requirement into contract provisions" where none existed. *Starke v. United Parcel Serv., Inc.*, 898 F. Supp. 2d 560, 569 (E.D.N.Y. 2012), aff'd, 513 F. App'x 87 (2d Cir. 2013).

Catchall Clauses

In interpreting catchall clauses, New York courts apply the principle of e*jusdem generis*. "When the event that prevents performance is not enumerated, but the clause contains an expansive catchall phrase in addition to specific events, the precept of *ejusdem generis* as a construction guide is appropriate—that is, words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned." *Team Mktg. USA Corp. v. Power Pact, LLC,* 41 A.D.3d 939, 942–43, 839 N.Y.S.2d 242, 246 (2007).

Government Orders and Restrictions

Although no case law has addressed the specific government restrictions imposed in relation to COVID-19, New York courts may interpret government action to be a *force majeure* event. Whether the *force majeure* clause applies to government restrictions will depend heavily on the language of the clause. Examples in which *force majeure* clauses have applied to government action have included the restriction of the sale of goods to a foreign country (*Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993)), issuance of an temporary restraining order which prevented performance restraining *(Reade v. Stoneybrook Realty,* LLC, 63 A.D.3d 433, 434, 882 N.Y.S.2d 8 (2009) and the government's failure to issue a necessary building permit (*Trump on Ocean, LLC v. Ash*, 24 Misc. 3d 1241(A), 899 N.Y.S.2d 63 (Sup. Ct. 2009), aff'd as modified sub nom. Trump on the Ocean, LLC v. Ash, 81 A.D.3d 713, 916 N.Y.S.2d 177 (2011)).

Impossibility

Impossibility excuses performance where it is impossible, rather than impractical. "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. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902, 519 N.E.2d 295, 296 (1987).

"Generally… the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, *vis major*, or by law (*International Paper Co. v. Rockefeller*, 161 App. Div; 180, 184; 6 Williston, Contracts [Rev. ed.], § 1935; 10 N. Y. Jur., Contracts, § 357; Restatement, Contracts, § 457). Thus, where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused (*Central Trust Co. v. Chicago Auditorium*, 240 U. S. 581; *Cameron-Hawn Realty Co. v. City of Albany*, 207 N. Y. 377, 380-381; *Updike v. Oakland Motor Car Co.*, 229 App. Div; 632, 635; *Downey v. Shipston*, 206 App. Div; 55, 58; *International Paper Co. v. Rockefeller*, 161 App. Div; 180, 185, supra.; *Stannard v. Reid & Co*., 114 App. Div; 135, 136; 6 Williston, Contracts [Rev. ed.], § 1963; see, generally, 10 N. Y.

Jur., Contracts, §§ 356, 357, 359, 372; Ann.: Contract-Performance-Impossibility, 84 A L R 2d 12, esp. pp. 21-24, 28-29 and 52-55; Restatement, Contracts, §§ 454, 455, 457, 467)." *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281–82, 244 N.E.2d 37 (1968).

Impracticability

New York courts do not recognize impracticability as a defense, rather performance must be made impossible for a party to be excused from performance. "Mere impracticality or unanticipated difficulty is not enough to excuse performance. *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 1984 WL 677 (S.D.N.Y. Aug. 2, 1984)." *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

Frustration of Purpose

Frustration of purpose is applied narrowly by New York courts. "This doctrine is a narrow one which does not apply "unless the frustration is substantial" (*Rockland Development Assocs. v. Richlou Auto Body, Inc.*, 173 A.D.2d 690, 691, 570 N.Y.S.2d 343 [1991]). In order to invoke this defense, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265, 782 N.Y.S.2d 708, 711 (2004).

NORTH CAROLINA

Force Majeure Clauses

North Carolina interprets force majeure clauses strictly. For example, a law school was still required to pay rent even after the law school lost its license to operate and the force majeure clause explicitly defined an excusable event as the inability to obtain government permits, because the force majeure clause also made an explicit exception for payment deadlines from what was considered excusable. *South College Street, LLC v. Charlotte School of Law, LLC*, 169 N.C. App. 825, 829 (2005). As a result of the poor drafting of the force majeure clause, the law school could not excuse rent payments under a strict reading of the clause. Additionally, any force majeure clause will be interpreted so it is in harmony with other contract provisions. *See Certainteed Gypsum NC, Inc. v. Duke Energy Progress, LLC*, 17 CVS 395, 2018 WL 4199077 at *24 (Sup. Ct. N.C. 2018).

Acts of God

An act of God remains an affirmative defense outside of the term's use in force majeure clauses and an act of God must be specifically pleaded. *See Olan Mills, Inc. of Tenn. v. Cannon Aircraft Executive Terminal, Inc.*, 273 N.C. 519, 525 (1968). The North Carolina scope for an act of God is slightly broader than many states. The North Carolina Supreme Court defines an act of God according the Black's Law Dictionary, 31 (rev. 5th ed. 1979), which emphasizes the lack of human agency, but permits an act of God to be minimally foreseeable. *Lea Co. v. North Carolina Bd. of Transp.*, 308 N.C. 603, 615-16 (1983). For example, a hundred-year-flood was considered

an act of God because the flood was exclusively a natural occurrence, even though the plaintiff argued it was foreseeable—the flood was expected to occur once every one hundred years. *Id*. Additionally, North Carolina requires that ordinary care could not have protected against the event for the event to be an act of God. *Olan Mills, Inc. of Tenn. v. Cannon Aircraft Executive Terminal, Inc.*, 273 N.C. 519, 526 (1968).

Frustration

North Carolina has a common law defense for frustration of purpose. The doctrine requires "(1) there was an implied condition in the contract that a changed condition would excuse performance; (2) the changed condition results in a failure of consideration or the expected value of the performance; and (3) the changed condition was not reasonably foreseeable." *Fairfield Harbour Property Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 79 (2011). The North Carolina Supreme Court has stated frustration of purpose arises when an "event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance." *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 211 (1981). A contract that allocates the risks associated with the frustrating event will overcome a defense relying on frustration of purpose. *Id*. For example, a parent was still required to pay a student's tuition regardless of attendance because the contract expressly provided that the tuition is non-refundable, and that clause was interpreted to allocate the risk of non-attendance. *Id*. at 212. Similarly, a sharp decline in business is inapplicable to frustration of purpose because it is reasonably foreseeable. *Faulconer v. Wysong and Miles Co.*, 155 N.C. App. 598, 603 (2002).

Impossibility

North Carolina recognizes the affirmative defense of impossibility in the event of death or destruction of property when the contract would be impossible for anyone to fulfill. For example, destroyed property subject to a lease is effective to end the lease. *Barnes v. Ford Motor Co.*, 95 N.C. App. 367, 373 (1989). Government action may be the basis for an impossibility defense when it is not foreseeable and the promisor has not expressly assumed the risk of impossibility. *UNCC Properties, Inc. v. Green*, 111 N.C. App. 391, 397 (1993). As an example, government condemnation of property was sufficient for a defense of impossibility. *Id*. But an express guaranty that water and sewer facilities would be provided was not sufficient to overcome an impossibility defense because it expressly assumed the risk of governmental interference. *Helms v. B & L Inv. Co., Inc.*, 19 N.C. App. 5, 8 (1973).

OHIO

Force Majeure Clauses

No Ohio case law has yet addressed the issue of *Force Majeure* clauses with respect to restrictions imposed by COVID-19. The general principles below offer guidance to how Ohio courts may interpret a party's failure to perform its contractual obligations under a *force majeure* clause or through other defenses. Generally, clauses which specifically list pandemics, epidemics or government actions are much more likely to apply to COVID-19 related restrictions.

General Principles

"A *force majeure* clause in a contract defines the scope of unforeseeable events that might excuse nonperformance by a party. *See United States v. Brooks–Callaway Co.* (1943), 318 U.S. 120, 63 S.Ct. 474, 87 L.Ed. 653. 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." *Stand Energy Corp. v. Cinergy Servs., Inc.*, 144 Ohio App. 3d 410, 416, 760 N.E.2d 453, 457 (2001).

"*Force majeure* has been characterized by courts as a defense that has some overlap with the common law defenses of impossibility or impracticability. However, ultimately 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.*, 2016-Ohio-8030, ¶ 26, 67 N.E.3d 845, 850.

Ohio courts note that parties to a contract have a duty to prevent events listed in a *force majeure* clause and are "under a duty to exercise a reasonable amount of care to prevent the happening of the contingency named." *Beth Hachneseth Yad Charutzim Congregation v. Kesmo Del*, 82 Ohio App. 282, 284, 81 N.E.2d 543, 543 (1948).

Catchall Clauses

Ohio courts apply the principle of *ejusdem generis* to interpret statutes. *See Moulton Gas Serv., Inc. v. Zaino*, 2002-Ohio-5309, ¶ 14, 97 Ohio St. 3d 48, 50, 776 N.E.2d 72, 75; *State v. Aspell*, 10 Ohio St. 2d 1, 4, 225 N.E.2d 226, 228 (1967). Likewise, in interpreting catchall contractual clauses, Ohio courts apply the same principle. *See United Arab Shipping Co. v. PB Express, Inc.*, 2011-Ohio-4416, ¶ 21 (holding that independent contractors' refusal to work excused performance under the language of a contract's *force majeure* clause, listing strikes or any like causes).

Government Orders and Restrictions

Although Ohio courts have not yet addressed the issue of COVID-19 with respect to *force majeure* and non-performance of contractual obligations, Ohio courts have held that government activity may excuse performance under a contract. "Absent contrary contractual terms, either party can often avoid an agreement when governmental activity renders its performance impossible or illegal. *See* Restatement of the Law 2d (1981), Contracts, Sections 264–268, 272… Since the courts will not enforce an agreement to perform an illegal act, the parties presumably condition their contract on the legality of its performance. *See* Restatement of Contracts 2d, supra, at Chapter 11, Introductory Note, and Section 264; 6 Corbin, Contracts (1962 and 1984 Supp.), Section 1346; cf. R.C. 1302.73, Official Comment 10 (comparable rule under commercial code for failure of presupposed conditions)." *Glickman v. Coakley*, 22 Ohio App. 3d 49, 52, 488 N.E.2d 906, 911 (1984).

Impossibility

"Impossibility of performance occurs where after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties." *See Calamari and Perillo, Contracts* (1977), 476, Section 13. However, a contracting party will not be excused from performance merely because performance may prove difficult, dangerous or burdensome. *State ex rel. Jewett v. Sayre* (1914), 91 Ohio St. 85 [109 N.E. 636]." *See, also, Encore Mgt., Inc. v. Lakeview Realty, Inc.* (Mar. 31, 1994), Cuyahoga App. No. 64784, 65284, unreported, at 12, 1994 WL 110979." *Truetried Serv. Co. v. Hager*, 118 Ohio App. 3d 78, 87, 691 N.E.2d 1112, 1118 (1997).

The Ohio Supreme Court in *London & Lancashire Indemn. Co. of Am. v. Bd. of Comm. of Columbiana Cty.* (1923), 107 Ohio State 51, 64, 140 N.E. 672, 676, also held:

> "While in certain instances, legal impossibility of performance is a defense to the performance of a contract, and while a condition may be implied by which the promisor may be relieved from his unqualified obligation to perform, such condition is implied only in those cases where performance has been rendered impossible without his fault and when the difficulties could not have reasonably been foreseen."

Truetried Serv. Co. v. Hager, 118 Ohio App. 3d 78, 87, 691 N.E.2d 1112, 1118 (1997).

Impracticability

Under certain circumstances, the defense of impracticability may be available. The defense of impracticability is codified under Ohio Revised Code (O.R.C.) Section 1302.73, (Ohio's equivalent to UCC Section 2-615), which states:

> "(A) Delay in delivery or non-delivery in whole or in part by a seller who complies with divisions (B) and (C) of this section is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."

Ohio Rev. Code Ann. § 1302.73 (West). *See Bruno v. Piedmont Plant Co.*, No. C.A. 3992, 1986 WL 8537, at *2 (Ohio Ct. App. July 30, 1986).

Frustration of Purpose

Ohio courts recognize frustration of purpose as a defense to contract performance in limited circumstances. However, "the doctrine of frustration of purpose is not widely accepted in Ohio." *Donald Harris Law Firm v. Dwight-Killian*, 2006-Ohio-2347, ¶ 16, 166 Ohio App. 3d 786, 790–91, 853 N.E.2d 364, 368. *See Also, Am. Premier Underwriters, Inc. v. Marathon Pipe Line Co.*, 3d Dist. No. 10–2001–08, 2002-Ohio-1299, 2002 WL 437998 (frustration of purpose not widely accepted in Ohio); *Mahoning Natl. Bank of Youngstown v. State* (May 27, 1976), 10th Dist. No.

75AP–532, 1976 WL 189757 (finding that frustration of purpose was not a defense to a contract between the State of Ohio and a private party). *Donald Harris Law Firm v. Dwight-Killian*, 2006-Ohio-2347, ¶ 16, 166 Ohio App. 3d 786, 790–91, 853 N.E.2d 364, 368.

Ohio courts applying frustration of purpose as a defense note that "[f]rustration of purpose occurs when one of the two parties to a contract creates a situation where the basis of the parties' contract essentially becomes moot. The doctrine is defined in the Restatement of the Law 2d, Contracts (1981) 334, Section 265, 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."

Am.'s Floor Source, L.L.C. v. Joshua Homes, 2010-Ohio-6296, ¶ 37, 191 Ohio App. 3d 493, 504, 946 N.E.2d 799, 808

"It is not enough that [the defendant] had in mind a specific object without which he 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. *Karl Wendt Farm Equip. Co.*, 931 F.2d 1112, at 1119 (6th Cir.1991) (quotation and citation omitted)." *LNB Bancorp, Inc. v. Osborne*, No. 1:09-CV-00643, 2009 WL 936957, at *3 (N.D. Ohio Apr. 3, 2009).

OKLAHOMA

Force Majeure Clauses

No Oklahoma case law has yet addressed the issue of *Force Majeure* clauses with respect to COVID-19. As a result, parties wishing to invoke a force majeure clause must use the concepts discussed below to argue that COVID-19 qualifies as force majeure.

Enforceability Concepts

Unlike many venues, Oklahoma courts do require that a listed force majeure event must be unforeseeable (unless this is required by the contract). *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1170 (W.D. Okla. 1989) ("nowhere does the force majeure clause specify that an event or cause must be an unforeseeable to be a force majeure event. The focus on the clause is upon a party's ability to control rather than its ability to foresee the alleged cause"). However, a force majeure event must be beyond the control of the impacted party. *See e.g. Grindstaff v. Oaks Owners' Ass'n, Inc.*, 2016 OK CIV APP 73, ¶ 40, 386 P.3d 1035, 1045

Economic conditions or financial hardship rarely qualify as force majeure. *Golsen v. ONG W., Inc.*, 1988 OK 26, 756 P.2d 1209, 1212 (an oil producer's inability to sell gas at a price equal to or greater than specified in its take-or-pay contract did not constitute "failure of market" within the meaning of force majeure clause); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d

563, 566 (10th Cir. 1989) (a decline in demand or an inability to sell gas at or above the contract price did not qualify as force majeure for a clause that read "partial or entire failure of gas supply or demand over which neither Seller nor Buyer have control"); *Kennedy & Mitchell, Inc. v. Internorth, Inc.*, 86-C-404-C, 1989 WL 433016, at *10 (N.D. Okla. Apr. 10, 1989)("market collapse" did not qualify as force majeure event where a force majeure clause read "any cause not within the control of the party ... and which by the exercise of due diligence such party is unable to prevent or overcome.").

Failure to provide proper notice can be fatal to a defense based on a force majeure clause in Oklahoma. *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1168 (W.D. Okla. 1989);*Three RP Ltd. P'ship v. Dick's Sporting Goods*, Inc., 2019 WL 573413, at *5 (Feb. 12, 2019) (notice was four month after the force majeure event, a tornado, and did not provide the required information).

Concepts related to Government Action

Oklahoma courts narrowly interpret force majeure clauses regarding government action. The leading case in Oklahoma is *Golsen v. ONG Western, Inc.*, 756 P.2d 1209 (Okla.1988). In *Golsen*, the Oklahoma Supreme Court ruled against a defendant that raised a force majeure defense based on government action. Its decision was premised, in part, on its determination that conservation laws that prevented an oil producer from producing gas which could not be marketed without waste, did not impact the producer's obligation to pay for annual minimum quantities of gas. 756 P.2d at 1212-20.; *see also Sabine Corp. v. ONG W., Inc*., 725 F. Supp. 1157, 1170 (W.D. Okla. 1989) (finding commission rule permits rather than requires a purchaser to reduce its takes when permitted production from all wells in a common source of supply from which a purchaser is required to take exceeds that purchaser's market demand); *also Manchester Pipeline Corp. v. Peoples Nat. Gas. Co., a Div. of Internorth*, 862 F.2d 1439, 1441 n.2 (10th Cir. 1988) and *RJB Gas Pipeline Co. v. Colo. Interstate Gas Co*., 813 P.2d 1, 10 (Okla. Civ. App. 1989) (both rejecting force majeure defense based on decision in *Golsen*). These cases show that a clause needs to specify the degree to which government action impacts a party's performance because: (1) Government action generally cannot serve as a force majeure event unless an action or order clearly directs or prohibits an act that proximately causes the nonperformance or breach of a contract; and (2) Oklahoma courts do not want to interpret a force majeure clause to excuse a party from the consequences of the risks (for example, decline in market demand and price) it expressly assumed unless the parties clearly contemplated the type of government action alleged to have interfered with the performance. Courts assume these risks are foreseeable.

Impossibility/Impracticability

Oklahoma adopt the standard of proof for impossibility outlined by the Second Restatement of Contracts adopted by many jurisdictions: a party is relieved from the duty to perform a contract if: it has become impossible to perform because of an occurrence that was beyond the control of the parties; and neither of the parties could reasonably foresee the occurrence when they made the contract. However, in *Oklahoma Gas & Elec. Co. v. Pinkerton's Inc.*, 742 P.2d 546, 548 (Okla. 1986), the Oklahoma Supreme Court ruled that this defense also requires that it is impossible for anyone to perform (objective impossibility), rather than merely that it is

impossible for the promisor to perform (subjective impossibility) and that unless the contract provides otherwise, the risk of subjective impossibility is on the promisor.

It should also be noted that "impossibility of performing part of a promise rarely discharges a promisor beyond the extent of the impossibility" unless the remainder of the performance is made materially more difficult or disadvantageous than it would have been if there had been no impossibility. *Amundsen v. Wright*, OK CIV APP 75, 15, 240 P.3d 16, 23 (Okla. 2010) (although enforcement of arbitration clause was impossible, this did not excuse enforcement of other contractual obligations).

Impracticality exists when the cost of performing the contract has become totally unreasonable or impracticable because of an occurrence that was beyond the control of the parties; and neither of the parties could reasonably foresee the occurrence when they made the contract. In K*ansas, O. & G. Ry. v. Grand Lake Grain Co.*, 434 P.2d 153 (Okla. 1967), construction of a dam caused approximately 19 miles of the railroad's tracks to be flooded and because relocation of the tracks would cost over $3 million, the railroad ceased its operations, and the grain company sued for breach of the shipping contract. On appeal, the Oklahoma Supreme Court reversed, holding that "the more modern rule of supervening impossibility means not only actual strict impossibility, but impracticability arising from extreme and unreasonable difficulty, loss injury or expense ….").

However, increased cost or a rise or collapse in the market does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. *Golsen v. ONG Western, Inc*., 756 P.2d 1209, 1213 (Okla. 1988). Finally, Oklahoma law imposes an objective standard on the duty to perform for those seeking to invoke the defense of impracticability. In other words, a party to a contract is not discharged from a duty to perform merely by demonstrating that a supervening event prevented performance; the party must also demonstrate that similarly situated parties were also deprived of the ability to perform. *Oklahoma Gas & Elec. Co. v. Pinkerton's Inc.*, 742 P.2d 546, 548 (Okla. 1986).

Frustration of Purpose

The essential elements of frustration of purpose are 1) frustration of the principal purpose of the contract; 2) that the frustration is substantial; and 3) that the non-occurrence of the frustrating event or occurrence was a basic assumption on which the contract was made. *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1178 (W.D. Okla. 1989). However, Oklahoma state courts have not recognized a frustration of purpose defense as distinct from a commercial impracticability defense discussed above. *See e.g. RJB Gas Pipeline Co. v. Colorado Interstate Gas Co.,* OK CIV APP 100, 813 P.2d 1, 10 (1989).

PENNSYLVANIA

Force Majeure Clauses

The Supreme Court of Pennsylvania recently decided, *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020), a case involving COVID-19, outside the context of a *force majeure*

clause. While not dealing directly with the implications of COVID-19 on contracts, the Supreme Court qualified the COVID-19 pandemic as a "natural disaster" under §7102 of the Pennsylvania Emergency Management Services Code. The Supreme Court reasoned that COVID-19, like the events specifically enumerated in the definition of "disaster" under the statute, involves substantial damage to property, hardship, suffering or possible loss of life and that COVID-19 is of the same general nature or class as those specifically enumerated. *Id.* at 888-89. Courts addressing issues of whether COVID-19 and related government actions constitute *force majeure* and other defenses to contract performance may look to the *Friends of Danny DeVito* decision for guidance.

The general principles below offer guidance to how Pennsylvania courts may interpret a party's failure to perform its contractual obligations under a *force majeure* clause or through other defenses. Generally, clauses which specifically list pandemics, epidemics or government actions are much more likely to apply to COVID-19 related restrictions.

General Principles

With respect to whether a *force majeure* clause excuses performance, Pennsylvania courts look to the language of the agreement. "To determine whether a certain event excuses performance, a court should look to the language that the parties specifically bargained for in the contract to determinate the parties' intent. *R. & H. Falcon Drilling Co. v. American Exploration Co.*, 154 F.Supp.2d 969, 973 (S.D.Tex.2000). When the parties have themselves defined the contours of *force majeure* in their agreement, those contours dictate the application, effect, and scope of *force majeure*. *Id*. Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused." *Morgantown Crossing, L.P. v. Manufacturers & Traders Tr. Co.*, No. CIV.A. 03-CV-4707, 2004 WL 2579613, at *5 (E.D. Pa. Nov. 10, 2004). A *force majeure* event must make performance under the contract impossible. *Sunseri v. Garcia & Maggini Co.*, 298 Pa. 249, 256, 148 A. 81, 83 (1929)

"[I]n order to use a *force majeure* clause as an excuse for non-performance, the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party. *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, 706 F.2d 444 (3d Cir.1983), cert. denied, 464 U.S. 1038, 104 S.Ct. 698, 79 L.Ed.2d 164 (1984). 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. *Id." Morgantown Crossing, L.P. v. Manufacturers & Traders Tr. Co.*, No. CIV.A. 03-CV-4707, 2004 WL 2579613, at *6 (E.D. Pa. Nov. 10, 2004).

"Acts of a third party making performance impossible do not excuse failure to perform if such acts were foreseeable. *Yoffe v. Keller Industries, Inc.*, 297 Pa.Superior Ct. 178, 443 A.2d 358 (1982)." *Martin v. Com., Dep't of Envtl. Res.*, 120 Pa. Cmwlth. 269, 273–74, 548 A.2d 675, 678 (1988).

Catchall Clauses

In interpreting catchall clauses, Pennsylvania courts apply the principle of e*jusdem generis*. "A "catchall" provision in a *force majeure* clause is limited to things of the same kind and nature

as the particular events mentioned." *Morgantown Crossing, L.P. v. Manufacturers & Traders Tr. Co.*, No. CIV.A. 03-CV-4707, 2004 WL 2579613, at *5 (E.D. Pa. Nov. 10, 2004). "[A]n event covered by the catchall provision must also be unforeseeable." *Id.*

Government Orders and Restrictions

As discussed above, the Supreme Court of Pennsylvania has recently held that COVID-19 is a natural disaster.

The Supreme Court of Pennsylvania has excused contractual performance due to judicial orders, stating that "[i]t is a fundamental principle that, where the performance of a contract is prevented, without fault on the part of the promisor, by a proper judicial order, the obligation to perform is discharged." *Sch. Dist. of Borough of Olyphant v. Am. Sur. Co. of New York*, 322 Pa. 22, 29, 184 A. 758, 761 (1936).

Pennsylvania courts regularly employ the Restatement (Second) of Contracts when resolving contract disputes. *Hart v. Arnold*, 2005 PA Super 328, ¶ 30, 884 A.2d 316, 333 (2005). The Restatement (Second) of Contracts addresses excusing contractual performance due to government action. For example, Section 261, Discharge By Supervening Impracticability, of the Restatement (Second) of Contracts states: "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." Further, Section 264, Prevention By Governmental Regulation Or Order, of the Restatement (Second) of Contracts states: "If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." *Id.* at 335.

Impossibility/Impracticability

Pennsylvania courts apply the defense of impossibility/impracticability under certain circumstances. The Supreme Court of Pennsylvania has recognized the overlap in these defenses. *See West v. Peoples First Nat. Bank & Tr. Co.*, 378 Pa. 275, 282, 106 A.2d 427, 432 (1954) (noting that "impossibility… means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, or loss involved.") Pennsylvania courts reference the Restatement (Second) of Contracts with respect to impracticability. "Under 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." Restatement (Second) of Contracts § 261. Comment d to § 261 defines "impracticable:"

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." *Dorn v. Stanhope Steel, Inc.*, 368 Pa. Super. 557, 584–85, 534 A.2d 798, 811–12 (1987).

Frustration of Purpose

Pennsylvania courts also recognize frustration of purpose as a defense to non-performance of contractual obligations. Courts, as with other defenses for non-performance, look to the Restatement (Second) of Contracts for guidance. "The doctrine of supervening frustration is set forth in § 265 of the Restatement. That section 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."

Dorn v. Stanhope Steel, Inc., 368 Pa. Super. 557, 585, 534 A.2d 798, 812 (1987).

"The Comment to Section 265 of the Restatement (Second) of Contracts explains:

> a. Rationale. This Section deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract. It is distinct from the problem of impracticability dealt with in the four preceding sections because there is no impediment to performance by either party. Although there has been no true failure of performance ..., the impact on the party adversely affected will be similar. The rule stated in this Section sets out the requirements for the discharge of that party's duty. First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he had in mind some specific object without which he 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. Second, the frustration must be substantial. 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 he assumed under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. This involves essentially the same sorts of determinations that are involved under the general rule on impracticability...." *Step Plan Servs., Inc. v. Koresko*, 12 A.3d 401, 413 (Pa. Super. Ct. 2010)

TEXAS

Force Majeure Clauses

No Texas case law has yet addressed the issue of *Force Majeure* clauses with respect to COVID-19. Instead, parties wishing to invoke a force majeure clause must use the concepts discussed below to argue that COVID-19 qualifies as force majeure.

Enforceability Concepts

Texas courts generally enforce force majeure clauses. *GT & MC, Inc. v. Texas City Ref., Inc.*, 822 S.W.2d 252, 259 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Force majeure events do not have to be unforeseeable. *Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715 (Tex. App.—San Antonio 1987) (stating "the requirement of unforeseeability has not been approved by any Texas court, state or federal"); *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 183 (Tex. App.—Houston [1st Dist.] 2018) (discussing consistent holdings).

Likewise, unlike many jurisdictions, an event need not be beyond the parties' reasonable control to be covered by the clause. Instead, the terms of the contract force majeure clause dictate the standard of control by which the performance of the contractual obligation is to be measured. *PPG Indus., Inc. v. Shell Oil Co.*, 919 F.2d 17, 19 (5th Cir. 1990)(stating reasonable control requirement is supplied by the terms of the contracts rather than the dictates of the law and holding that where a clause excused performance in the event of an explosion, that clause excused performance regardless of whether the explosion was beyond the party's reasonable control).

However, catch-all phrases normally do not encompass foreseeable events. In *Valero Transmission Co. v. Mitchell Energy Co.*, a court refused to recognize an economic downturn in the market for a product as a force majeure event under catch-all language reading "due to causes beyond its reasonable control" (743 S.W.2d 658, 660-63 (Tex. App.—Houston [1st Dist.] 1987, no writ)). In *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 183 (Tex. App.—Houston [1st Dist.] 2018), a downturn in the market was also at issue. The court rejected the argument that although it was not listed in the clause, it was applicable by using the catch-all "any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected." The court reasoned that to dispense with the foreseeability requirement in the context of a catch-all phrase would render the clause meaningless. Otherwise, any event outside the control of the nonperforming party could excuse performance, even if it were an event that the parties were aware of and took into consideration in drafting the agreement.

Parties must comply with notice requirements. Texas courts have stressed the importance of abiding by notice requirements in a force majeure clause see, for example, *Advanced Seismic Tech., Inc. v. M/V Fortitude*, 326 F. Supp.3d 330, 335-37 (S.D. Tex. 2018) (failure to follow notice requirements precludes reliance on force majeure clause). However, a party must make notice an express condition precedent to obtaining force majeure relief or a court may not allow that as a defense, particularly where the other party was aware of the event causing the failure of

performance. *See Rowan Cos., Inc. v. Transco Expl. Co., Inc.*, 679 S.W.2d 660, 66 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Texas courts do not require due diligence under force majeure clauses unless stated in the contract. *Moore v. Jet Stream Invs., Ltd.*, 261 S.W.3d 412, 422 (Tex. App.—Texarkana 2008, pet. denied). Even where parties use efforts or diligence language, there are limits to which Texas courts require a party to adhere to performance. Courts analyze this on a case-by-case basis. *See El Paso Field Services, L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 880 (Tex. 2012) (discussing reasonable diligence and defining it as "such diligence that an ordinarily prudent and diligent person would exercise under similar circumstances").For example, courts may find the placement of mitigation language important in terms of what the diligent efforts portion modifies (see *Ergon*, 706 F.3d at 425-26). Parties may also impose additional requirements to mitigate the effects of a force majeure event. For example, a buyer of gas relying on a seller to source the gas may want to require the seller as a contingency to source the gas on the spot market if a certain field designated as the source cannot do so due to a force majeure event. *See Tejas Power Corp. v. Amerada Hess Corp.*, 1999 WL 605550, at *3 (Tex. App. Aug. 12, 1999).

Interpretation Concepts

The scope and effect of a force majeure clause depends on the specific contract language and not on any traditional definition of the term. *Va. Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 402 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *see also Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc.*, 157 S.W.3d 462, 466 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (stating "[r]egardless of its historical underpinnings, the scope and application of a force majeure clause depend on the terms of the contract").

Where the parties have defined the contours of force majeure, those contours dictate the clause's application, effect, and scope. *Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied); *see also Allegiance Hillview, L.P. v. Range Texas Prod., LLC*, 347 S.W.3d 855, 865 (Tex. App.—Fort Worth 2011, no pet.);*Virginia Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 403 (Tex. App.—Houston [14th Dist.] 2009, pet. denied)(court recognized a party properly invoked a force majeure clause listing hurricanes as a force majeure event in a natural-gas supply contract when gas-production platforms and pipelines were destroyed by hurricanes Katrina and Rita).

Texas courts may consider the common law or UCC to "fill in gaps" when interpreting force majeure clauses. *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 181 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). However, they do not use: (1) traditional definition of the term force majeure to supersede the specific terms the parties bargained for in the contract (*R & B Falcon Corp. v. Am. Expl. Co.*, 154 F. Supp. 2d 969, 973 (S.D. Tex. 2001)) or the UCC to vary the terms of an express agreement (*Va. Power*, 297 S.W.3d at 404). For example, courts have refused to use the UCC to fill in gaps in an agreement to require an alternate delivery where a force majeure provision excused performance (*Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1415-16 (5th Cir. 1983)). This means that if parties want to rely on UCC gap-filling provisions, they should specify that they do not intend the force majeure clause to relieve either party of its obligations under the UCC.

Catch-all language does not normally encompass foreseeable events as courts expect parties to expressly set those out to excuse performance. *See TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 185 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).*

Acts of God are interpreted narrowly. In Texas, the phrase "acts of God," refers to an act both: occasioned exclusively by forces of nature and that could not have been prevented or escaped from by any amount or foresight, prudence, reasonable degree of care or diligence, or by the aid of any appliances that the situation of the party might reasonably require the party to use. *R & B Falcon Corp. v. Amer. Expl. Co*., 154 F. Supp. 2d 969, 974 (S.D. Tex. 2001) (finding a seabed anomaly causing an accident is not an act of God because there is no act, like a storm or earthquake); *see also Tejas Power Corp*., 1999 WL 605550, at *3 (finding freezing weather was an act of God). Acts of God must generally be the sole cause for the event giving rise to the force majeure defense (see *Kleinman v. City of Austin*, 310 F. Supp. 3d 770, 779 (W.D. Tex. 2018) (holding force majeure defense only excuses performance caused solely by acts of God where channel erosion contributed to flooding); *see also Texas & Gulf S.S. Co. v. Parker*, 263 F. 864, 865-66 (5th Cir. 1920) (acts of God did not cover hurricane where carrier knew one was approaching and was negligent to leave port).

Concepts related to Government Action

The general rule is that a force majeure event may take the form of any unforeseen, intervening act of a competent government agency. *See Frost Nat. Bank v. Matthews*, 713 S.W.2d 365, 368 (Tex. App.—Texarkana 1986, writ ref'd n. r. e.) (holding that shut-in of gas wells by order of the Texas Railroad Commission constituted force majeure). However, a clause may need to specify the degree to which government action impacts a party's performance (such as whether changing market conditions precipitated by government action qualifies as a force majeure event). Further, courts presume the parties understand the law when they contract and a party cannot use the force majeure clause to excuse performance if their actions bring on the occurrence. *See Atkinson Gas Co*, 878 S.W.2d at 241 (finding oil and gas lease force majeure clause was not triggered when the railroad commission ordered a well shut-in due to the lessee's failure to comply with its regulations, at least when compliance with the regulation is within the reasonable control of the lessee). The impact of government regulations also must be more than just speculation (*Perlman*, 918 F.2d at 1248-49; see also *Anadarko Petroleum Corp. v. Noble Drilling (U.S.)*, 2012 WL 13040279, at *18 (S.D. Tex. May 3, 2012) (discussing whether compliance with the government's moratorium in the Gulf of Mexico made continuance of operations impossible).

Impossibility/Impracticability/Frustration of Purpose

Texas courts have referred to the impossibility defense as impossibility of performance, commercial impracticability, and frustration of purpose since they find no functional difference between the theories (*Key Energy Services, Inc. v. Eustace*, 290 S.W.3d 332, 339-40 (Tex. App.—Eastland 2009, no pet.) (citing *Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co*., 118 S.W.3d 60, 64 n. 6 (Tex. App. —Houston [14th Dist.] 2003, pet. denied)).

The Texas Supreme Court has explained that supervening impossibility/impracticability excuses performance when, "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." *Samson Expl., LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 766, 775 (Tex. 2017). Although this appears quite broad, in practice courts have generally only applied it in three situations: (1) the death or incapacity of a person necessary for performance; (2) the destruction or deterioration of a thing necessary for performance; and (3) prevention by governmental regulation. *Key Energy Services, Inc. v. Eustace*, 290 S.W.3d 332, 340 (Tex. App.—Eastland 2009, no pet.). Parties should consider using the governmental regulation situation to argue that their performance was thwarted by governmental orders related to the coronavirus (such as person-to-person distance requirements) and that they could not perform contractual duties without endangering employees and the public welfare. *Merry Homes, Inc. v. Chi Hung Luu*, 312 S.W.3d 938, 950 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (excusing nonperformance when performance would "violate an ordnance directed toward protecting the public health and welfare").

Note, however, that an argument that performance was simply more expensive than anticipated after the coronavirus is unlikely to prevail. *Philips v. McNease*, 467 S.W.3d 688, 696 (Tex. App.—Houston [14th Dist.] 2015, no pet.) Also, Texas courts have held that impossibility of performance is not an excuse if a party might have reasonably anticipated and guarded against the event in the contract or if the party was at fault. *Metrocon Const. Co., Inc. v. Gregory Const. Co., Inc.*, 663 S.W.2d 460, 462 (Tex.App.—Dallas 1983, writ ref'd n.r.e.);*Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 537–38 (Tex. App.—Dallas 2007, pet. denied). Also, in cases of commercial impracticability, a party blaming government regulations for nonperformance must pursue all remedies reasonably available to avoid them (*Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W.3d 60, 69 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

How successful this defense will be in the context of the coronavirus remains to be seen and will likely depend on the specific circumstances involved given that a jury usually decides whether impossibility/impracticability exists. *FP Stores, Inc. v. Tramontina US, Inc.*, 513 S.W.3d 684, 693 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (unless the facts are uncontested, whether the performance of a contractual duty has been rendered impossible or impracticable is generally a question for the jury).

WASHINGTON

Force Majeure Clauses

The state of Washington often interprets *force majeure* clauses broadly or will leave the interpretation of the clause to the jury if not facially apparent or apparent from extrinsic evidence. For example, a court has permitted an illness of a singer as a sufficient reason to invoke a force majeure clause that excused performance for "any [] cause beyond such party's control." *Rio Properties v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 F. App'x 519, 521 (9th Cir. 2004). The court concluded the illness was a reasonable force majeure event to deny summary judgment and send to the jury to decide. *Id.* Similarly, a Washington court broadly interpreted a force majeure clause to prevent relief when the force majeure clause "exclude[ed] any monetary obligations." *Inn at Center, LLC v. City of Seattle*, 2004 WL 418021, at *5 (Wash. Ct. App. Mar.

8, 2004). The court concluded the language of the contract expressly excepted monetary payments from excusable performance. *Id*. Generally, the broad interpretations from the Washington courts are because "Washington courts use the context rule for contract interpretation. Under this rule, the intent of the parties is discerned by 'viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'" *Go2Net, Inc. v. C I Host Inc.*, 115 Wash. App. 73, 84 (2003).

Federal Government Contracts

The Federal Acquisition Regulations (FAR) has force majeure language that government contractors can use to excuse COVID-19 delays. The FAR explicitly provides that in a fixed-price construction contract, the contractor will not be liable for damages and the contract cannot be terminated for default for the contractor's failure to perform due to "acts of the Government," "epidemics," "quarantine restrictions," or even "delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers" FAR 52.249-10(b)(1). This means that if a contractor can demonstrate a delay was caused by COVID-19 or a government action, it cannot be liable for associated damages from the delay. It is critical the contractor notifies the federal Contracting Officer within 10 days of event to excuse the delay. FAR 52.249-10(b)(2). In addition to excusing damages, "acts of the Government," "epidemics," and "quarantine restrictions" are all listed as excusable delays to avoid defaulting on a contract. FAR. 52.249-14(a). And a subcontractor's delay due to COVID-19 is likely excusable to avoid the prime contractor defaulting, unless the prime contractor could obtain the subcontractor's supply or service elsewhere, the contracting officer order the prime contractor to secure the alternative subcontract, and the prime contractor failed to do so. FAR 52.249-14(c).

Government caused delays

Additionally, the contractor may be able to recover costs as an "equitable adjustment" if the delay was the result of government conduct that could constitute a constructive change in the contract—a constructive change stopping work is a constructive suspension. *See* FAR 52.243-7. A constructive suspension occurs when the government effectively delays performance without a stop-work order from the contracting officer. *Beauchamp Const. Co., Inc. v. U.S.*, 14 Cl. Ct. 430, 436 (1988). A constructive suspension is a significant possibility for contractors as government contracting offices attempt to manage multiple projects impacted by COVID-19. A constructive suspension is different from a formal suspension where the contracting officer suspends the work or issues the stop-work order under FAR 52.242-14 or FAR 52.242-15. Then, the contactor is also entitled to seek an equitable adjustment. To recover an equitable adjustment, the contractor must notify the contracting officer of the change in accordance with the time limit and manner specified in the contract. *See* FAR. 52.243-7. However, if the contractor missed the deadline to notify the contracting officer of the constructive change, the contractor can still recover an equitable adjustment if the government did not suffer any harm from the delayed notice. *Northrup Grumman Corp. v. United States*, 47 Fed. Cl. 20, 63 (2000).

It is important to note that if the government causes the delay as an exercise of the government's sovereign power rather than its contracting power, the contractor is not entitled to costs under the Sovereign Acts Doctrine. For example, a contractor could not recover damages because they were denied access to the worksite after the 9/11 attacks when the government was acting in its sovereign power for national security considerations that were part of a broader governmental objective. *Conner Bros. Constr. Co., Inc. v. Green*, 550 F.3d 1368, 1373 (Fed. Cir. 2008). In that case, the contractor was only entitled to additional time to complete the project. *Id*. at 1371. The Sovereign Acts Doctrine is sure to be an issue in light of government mandated shutdowns.

Above all, the contractor must absolutely document everything because it will need to demonstrate any costs or delays incurred from COVID-19. For example, during a flu epidemic, a contractor was denied relief because the contractor could not present evidence "when the flu epidemic occurred or its precise duration, what personnel were affected and the periods during which they were absent for that reason, whether such absences in fact caused delay in its [performance] and if so the extent of such delay, and what efforts were made during such absences by the use of overtime or other measures to keep the work going." *Appeal of Ace Electronics Associates, Inc.,* ASBCA No. DSA 9-22327, 67-2 BCA P 6456. Therefore, it is imperative that contractors are keeping records of the delays and costs suffered if they intend to bring a claim for an equitable adjustment or an excusable delay.