Navigating contractual nonperformance
Guide to U.S. force majeure

September 2020
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The information in this guide is accurate as of August 2020.
Examining the law

Disputes regarding whether a party’s contractual obligations are effectively excused are inevitable given the COVID-19 pandemic’s ongoing disruptions to commerce. When is contractual performance excused?

We have attempted to review all U.S. cases involving force majeure disputes and similar common law defenses to nonperformance. This guide cites to more than 1,000 decisions and aggregates the governing caselaw within each U.S. state, the District of Columbia, and Puerto Rico. We focus on cases involving:

1. the enforceability of contractual force majeure provisions including a focus on causation, mitigation, and foreseeability requirements;
2. common law concepts such as impossibility where no contractual force majeure provisions exist; and
3. application to the sale of goods context, including demands for adequate assurances, commercial impracticability, and substitute performance.

Should you need to discuss any issue in more detail please feel free to contact us.
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Alabama

Alabama common law recognizes force majeure, though the case law interpreting force majeure disputes is limited. Disputes are unlikely to be resolved via summary judgment. Alabama courts recognize only a limited impossibility argument and rarely apply the defense of frustration of purpose.

The key cases are broken down as follows:

I. Force majeure
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

I. Force majeure

A. General requirements

When force majeure is disputed, courts will rarely grant summary judgment, particularly when the force majeure provision is ambiguous. See Breland v. Levada EF Five, LLC, No. CV 14-00158-CG-C, 2015 WL 7572339, at *6 (S.D. Ala. Nov. 24, 2015). For example, in Breland, the U.S. District Court for the Southern District of Alabama held that where the force majeure clause excused performance if the six-month moving average price of natural gas fell below a certain dollar amount but failed to identify the controlling price index for natural gas, the court could not grant summary judgment on the applicability of the force majeure clause. Id.; see also Monsanto Co. v. Tenn. Valley Auth., 616 F.2d 887, 888 (5th Cir. 1980) (finding summary judgment precluded where the force majeure clause was ambiguous as to whether negligence constituted a force majeure event).

B. Causation
To be considered an “act of God,” the force majeure event causing the injury must have been the proximate cause of the injury, such that no other act could have prevented the result. See Ala. Dep’t of Pub. Health, 236 So. 3d at 869.

In Alabama Department of Public Health v. Lee, the Alabama Court of Civil Appeals affirmed the finding of an administrative agency that declined to apply a force majeure defense after a flood destroyed the records of one of the contracting parties. Id. The agency found that because the party had misplaced her records before the flood, her negligence—and not the flood—was the proximate cause of her injury. Id.

Where a party’s business decision not to perform is the reason for nonperformance, the party’s force majeure argument likely will not be successful. See Drummond Coal Sales, 2017 WL 3149442, at *9–10 (finding the party “seeks to be excused from its contractual duties due, at least in part, to financial considerations caused by environmental regulations”) (relying on Macalloy Corp. v. Metallurg., Inc., 728 N.Y.S.2d 14, 14–15 (N.Y. App. Div. 2001)).
C. Mitigation/beyond a party’s control

In Alabama, a party seeking to rely on a force majeure provision must act in good faith to mitigate the effects of the force majeure event. See Corona Coal Co. v. Robert P. Hyams Coal Co., 9 F.2d 361, 361–62 (5th Cir. 1925).

In Corona Coal, the Fifth Circuit held that a party could not rely on labor strikes and car shortages as a defense against delivering goods under a contract where the evidence showed that the party could have delivered some of the goods under the contract and postponed the time for delivery of the other goods. Id. at 362. Further, the court found that the counterparty was excused from its performance under the contract after the party seeking to invoke force majeure informed it that the party would not be making shipments due to the alleged strikes and shortages. Id.

In a similar case regarding a contract for the sale of coal, the Supreme Court of Alabama considered Section 7–2–306(1), part of Alabama’s Uniform Commercial Code, which states:

A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of any stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded. Simcala, Inc. v. Am. Coal Trade, Inc., 821 So. 2d 197, 200 (Ala. 2001). The specific question before the court was whether the statute “permits a buyer purchasing pursuant to a requirements contract to reduce its requirements to a level unreasonably disproportionate to an agreed-upon estimate so long as it is acting in good faith.” Id.

The court held that the plain language of the statute prohibited both unreasonably disproportionate increases and reductions in estimates, regardless of the good faith of the party. Id. at 202.

D. Foreseeability

Most contractual force majeure provisions will require a force majeure event to be unforeseeable at the time of contracting, as is the case to invoke common law force majeure. See, e.g., Ala. Dep’t of Pub. Health, 236 So. 3d at 869 (finding no force majeure event where the party should have foreseen and accounted for the possibility that her physical records could have been destroyed or lost).

In Drummond Coal Sales, the US District Court for the Northern District of Alabama considered whether environmental regulatory changes could excuse a coal supplier’s nonperformance. Although the court examined the parties’ contract under New York law, the court surveyed cases across the country to conclude that regulatory changes were foreseeable as a matter of law, which precluded the company’s defenses for nonperformance based on impossibility and frustration of purpose. 2017 WL 3149442, at *5 (collecting cases and citing Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1177 (W.D. Okla. 1989)).

Because, however, the parties’ force majeure provision did not require unforeseeability, the foreseeability of the regulatory changes did not preclude the force majeure defense. See id. at *8 (citing Starke v. United Parcel Serv., Inc., 898 F. Supp. 2d 560, 568–69 (E.D.N.Y. 2012), aff’d, 513 Fed. App’x 87 (2d Cir. 2013) (refusing to read unforeseeability requirement into force majeure clause that was silent as to foreseeability of triggering events)).

Nonetheless, the court rejected the coal company’s force majeure argument because environmental regulations did not constitute force majeure events under the circumstances presented. Id. at *9 (applying doctrine of ejusdem generis to find that the general terms “intervention” and “interference” were preceded by more specific events, including embargoes and blockades, and followed by the phrase “or other civil unrest,” such that the clause’s inclusion of “intervention” and “interference” was qualified by the surrounding terms and required a context of civil unrest or military conflicts).

II. Common law remedies

A. Impossibility

Alabama does not recognize the common law remedy of impossibility, unless performance becomes impossible by law or some other act of government. Madison Cty. v. Evanston Ins. Co., 340 F. Supp. 3d 1232, 1277 (N.D. Ala. 2018), as amended (Nov. 2, 2018) (collecting cases); see also Silverman v. Charmac, Inc., 414 So. 2d 892, 894 (Ala. 1982) (“this Court has not recognized the defense of impossibility or impracticability”).

Accordingly, Alabama applies the remedy of impossibility only where performance becomes “impossible by law, either by reason of a change in law, or by some action or authority of the government.” Greil Bros. Co. v. Mabson, 60 So. 876, 878 (Ala. 1912) (finding impossibility where the state enacted a prohibition law and the parties had entered a contract to construct a tavern). Thus, “where the performance depends upon the continued existence of a thing which is assumed as a basis of the agreement, the destruction of the thing by the enactment of a law terminates the obligation.” Id.
However, illegality created by change in the law subsequent to the contract, which serves as an excuse for nonperformance is distinguishable from illegality “due to an unfavorable exercise of discretion by governmental officials acting under existing law, which is no excuse.” *Hawkins v. First Fed. Sav. & Loan Ass’n*, 280 So. 2d 93, 96 (Ala. 1973) (finding no impossibility where city official denied building permit, as “the parties could have foreseen the possibility that a building permit would be denied and provided for that contingency in the terms of their contract”); see also *Mayo v. Andress*, 373 So. 2d 620, 624 (Ala. 1979) (declining to apply the remedy of impossibility where a court injunction against performance of the contract could have been accounted for by the contract).

Therefore, where government regulations such as the ones implemented by federal, state, and local governments in response to the COVID-19 pandemic render performance impossible, a party may have an argument based on common law impossibility in Alabama, but only if the government action was unforeseeable.

B. Frustration of purpose

Alabama courts have not applied the common law remedy of frustration of purpose with much frequency. However, applying New York law, courts in Alabama have set a high bar for parties seeking to invoke frustration of purpose. The doctrine of frustration of purpose is applied narrowly and only when the frustration is “substantial.” *Drummond Coal Sales*, 2017 WL 3149442, at *7 (citing *Crown It Services v. Koval–Olsen*, 782 N.Y.S.2d 708, 711 (N.Y. App. Div. 2004)). Accordingly, the events justifying application of frustration of purpose must be “virtually cataclysmic” and “wholly unforeseeable” and must “render the contract valueless to one party.” Id. The fact that an event may cause a party to realize lower profits or sustain a loss is insufficient to justify application of this defense.
Alaska

Courts applying Alaskan law have emphasized the importance of the parties’ specifically chosen language in force majeure provisions. Alaska courts have dealt with force majeure disputes in admiralty and in the context of oil and gas leases. Alaska recognizes the common law defenses of impossibility, interpreted as impracticability, and frustration of purpose.

The key cases are broken down as follows:

I. Contractual force majeure provisions
II. Common law remedies
III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

The specific language the parties choose for contractual force majeure provisions is critical. For example, if the alleged force majeure event is covered within the terms of a parties’ provision, then assuming any other requirements are met, performance is excused. See Armco Steel Corp. v. Isaacsen Structural Steel Co., 611 P.2d 507, 519 (Alaska 1980) (“[T]his clause specifically lists strikes as excuses for performance. Therefore, to the extent that [the party’s] delivery was delayed due to the strike at its plant, the failure to perform is excused.”).

Where the alleged event is not listed, parties will have to rely on general catch-all provisions such as “other events beyond the reasonable control” of the party. See id. (if delay caused by late delivery by a supplier, then party will have to prove that it was beyond the party’s reasonable control to excuse performance); id. (remanding case for determination of whether late delivery by supplier to party was beyond party’s reasonable control); see also Christianson Constr. Co. v. Isaacsen Structural Steel Co., 648 P.2d 601, 603 (Alaska 1982) (finding lower court failed to follow remand instructions).

Applying admiralty law to a parties’ force majeure provision, the U.S. District Court for the District of Alaska focused on the specifically defined events from a parties’ agreement to find that because the unexplained sinking of a ship was not listed, relief under the force majeure clause was not available. See Tug Blarney, LLC v. Ridge Contracting, Inc., 14 F. Supp. 3d 1255, 1276 (D. Alaska 2014) (distinguishing Facto v. Pantagis, 915 A.2d 59 (N.J. Super. Ct. App. Div. 2007)).

The Supreme Court of Alaska has confronted force majeure disputes in the context of reviewing interpretations of oil and gas leases by the Commissioner of the state’s Department of Natural Resources. See, e.g., White v. State of Alaska, 14 P.3d 956, 960 (Alaska 2000).

In Alaskan Crude Corp. v. State of Alaska, the court considered what standard of review applied to the Commissioner’s interpretation of force majeure clauses. 261 P.3d 412, 419 (Alaska 2011). The court concluded the agency’s interpretation was entitled to deference because the definition of force majeure was contained in the agency’s regulations. Id. (upholding agency determination that court decision finding that well was not a gas-only well and subsequent appeal of that decision were not force majeure events); see State of Alaska v. Alaskan Crude Corp., 441 P.3d 393, 404 (Alaska 2018) (concluding that Commissioner’s interpretation of “reasonable diligence” was an “interpretation of the agency’s own regulations” using the same reasoning and affirming decision that lessee did not attempt to resume drilling activity with reasonable diligence). The agency’s regulations define a “force majeure” as “war, riots, acts of God, unusually severe weather, or any other cause beyond the unit operator’s reasonable ability to foresee or control and includes operational failure to existing transportation facilities and delays caused by judicial decisions or lack of them.” ALASKA ADMIN. CODE tit. 11, § B3.395(3).
The Supreme Court of Alaska has explained that the requirement of a force majeure event being unforeseeable is common, especially in oil and gas leases. *Alaskan Crude Corp.*, 261 P.3d at 420 & n.30. This includes circumstances when the alleged force majeure is a decision from a government authority. *Id.* at 420. “A government order predating the lease execution has never been held to be a force majeure event.” *Id.* (quoting Joan Teshima, Annotation, *Gas and Oil Lease Force Majeure Provisions: Construction and Effect*, 46 A.L.R.4th 976 § 2(a) (1986)); *id.* (“It was also reasonably foreseeable at the time [the company] agreed to the amended deadlines that if [the company] chose to appeal [the] decision, that appeal would not be resolved before the deadlines arrived.”).

II. Common law remedies


A party seeking to assert the defense must show that performance became impracticable without the party’s fault because of a fact of which the party had no reason to know and the non-existence of which was a basic assumption of the contract at the time it was made. *Id.*; see also *Alcan Forest Prods. LP v. A-1 Timber Consultants, Inc.*, 982 F. Supp. 2d 1016, 1037 (D. Alaska 2013) (citing Alaska Civil Pattern Jury Instruction 24.08C for elements and concluding disputed questions of fact as to foreseeability of ground conditions precluded summary judgment). Performance may remain possible but only “at an excessive and unreasonable cost.” See *N. Corp. v. Chugach Elec. Ass’n*, 518 P.2d 76, 81 (Alaska 1974) (quoting *Natus v. United States*, 371 F.2d 450, 456 (Ct. Cl. 1967)).

If the event alleged to cause the impracticability was foreseeable, then the defense is not available. *Carpenter*, 869 P.2d at 1184 (rejecting the defense where party failed to prove it was unaware of the soil conditions or the profitability of the land the party purchased); *Aleut Enter., LLC v. Adak Seafood, LLC*, No. 3:10-cv-17, 2010 WL 3522348, at *1–2 (D. Alaska Sept. 2, 2010) (rejecting party’s defense that it became commercially impracticable to operate plant because fuel supplier will not provide fuel given parties foresaw this risk, as evidenced by the parties’ force majeure provision that mentions “[c]hanges in the availability of or access to fuel”); *Wigger*, 684 P.2d at 857 (“At the time of contracting the original parties knew that the government regulated the price of gold then and they assumed the risk that the government would continue to do so.”).

If a party knows or should know of the impossibility of performance and nevertheless continues to attempt to perform, it cannot recover for damages based on those futile attempts. See *N. Corp. v. Chugach Elec. Ass’n*, 523 P.2d 1243, 1246–47 (Alaska 1974) (“If at some time prior to termination of the contract Northern had actual knowledge or should have known that the ice haul method was impossible, it may not recover for damages thereafter in attempting to perform.”).

Although some Alaska courts have referred to this same commercial impracticability principle as frustration, the defenses as applied by those courts are the same. See, e.g., *Mat-Su/Blackard/Stephan & Sons v. State of Alaska*, 647 P.2d 1101, 1105 (Alaska 1982) (rejecting frustration of purpose defense where party assumed the risk of unavailability of materials and the removal of gravel was not the object of the contract, and rejecting defense based on impossibility by virtue of supervening illegality).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

If a party has reasonable grounds for insecurity about its counterparty’s ability (or willingness) to perform, the party may demand adequate assurances from the counterparty pursuant to Alaska law. ALASKA STAT. § 45.02.609. The failure to give such assurances may constitute an anticipatory repudiation of the agreement. See *id.*; *Bonanza Fuel, Inc. v. Delta Western, Inc.*, No. 2:12-cv-1, 2013 WL 12120092, at *11 (D. Alaska Sept. 11, 2013) (finding party that sought assurances and failed to receive them did not repudiate contract given its counterparty’s failure to provide assurances constituted a repudiation).

This section is not applicable when the breach of contract has already occurred. See *Sumner v. Fel-Air, Inc.*, 680 P.2d 1109, 1115–16 (Alaska 1984).

B. Commercial impracticability

In addition to the common law defense of commercial impracticability, Alaska law also recognizes the UCC-based statutory defense of commercial impracticability in the sale of goods context. ALASKA STAT. § 45.02.615; see also *Sheffield Enters., Inc. v. Pre-Built Structures, Inc.*, No. 5688, 1982 WL 889006, at *1 (Alaska Oct. 6, 1982) (approving of jury instruction for commercial
impracticability that required jury to find event must be beyond control of party).

The U.S. District Court for the District of Alaska considered the defense in *Bonanza Fuel* when a party claimed that the port of Nome freezing over prevented its fuel delivery. 2013 WL 12120092, at *8–9. The court rejected the defense because the party asserting it failed to show that delivery was impracticable. *Id.* at *9–10 (rejecting theory that costs 1/3 higher than originally anticipated constituted impracticability and finding the increased expense insufficient).
Arizona courts have been skeptical of any alleged force majeure defenses grounded on economic or market conditions. Arizona recognizes impossibility, construed as impracticability, and frustration of purpose. Arizona has multiple cases analyzing the concept of commercial frustration.

The key cases are broken down as follows:

I. Contractual force majeure provisions
II. Common law remedies
   A. Impossibility
   B. Frustration of purpose
III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

Courts applying Arizona law to force majeure provisions have started with the *Black's Law Dictionary* definition of a force majeure clause: “A contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.” *MD Helicopters Inc. v. Boeing Co.*, No. 17-cv-2598, 2019 WL 3840974, at *5 (D. Ariz. Aug. 15, 2019) (quoting *Black's Law Dictionary* (11th ed. 2019) (granting summary judgment excluding party from relying on force majeure defense where party failed to properly invoke force majeure provisions)).

Parties’ force majeure provisions may provide for relief in the event of certain contingencies only for one party. See, e.g., *Al-Misehal Commercial Grp., Ltd. v. Armored Grp.*, LLC, No. 2:10-cv-1303, 2011 WL 4543924, at *2 (D. Ariz. Sept. 30, 2011) (examining force majeure provision that allowed one party to cancel “on account of . . . failure to supply” but not the other party).

Where parties do not include a force majeure provision in their agreements, courts may cite that omission as assuming the risk that such an event would not excuse performance. See, e.g., *Tech. Constr., Inc. v. City of Kingman*, 278 P.3d 906, 909 (Ariz. Ct. App. 2012) (“The City could have insulated itself from damages based upon an act of God. It did not do so. . . . It is apparent to the Court that the Contract placed the risk of loss clearly upon the City.”); see also *Austin Ranch, L.L.C. v. West Surprise Landowners Grp.*, No. 1 CA-CV 08-0837, 2010 WL 363830, at *6 (Ariz. Ct. App. Feb. 2, 2010) (finding arbitrator exceeded authority by rewriting agreement including force majeure provision).

In *B.F. Goodrich Co. v. Vinyltech Corp.*, the U.S. District Court for the District of Arizona considered whether changes in market conditions causing a fall in the prices of PVC pipe was an event reasonably beyond the control of the party declaring force majeure. 711 F. Supp. 1513, 1517–18 (D. Ariz. 1989). Specifically, the parties’ catch-all language within the force majeure provision provided, “Or any other cause or causes of any kind or character reasonably beyond the control of the party failing to perform, whether similar to or dissimilar from the enumerated causes.” *Id.* The court had to determine how Arizona law should apply to the provision even though there were no Arizona cases dealing with force majeure at that time. See *id.* at 1518–19.

The court looked to other federal courts that applied different states’ laws to conclude that “other federal courts have interpreted substantially the same force majeure clause at issue in this case as not extending to severe price fluctuations and/or changes in market conditions.” *Id.* at 1518 (relying on *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986)). The court reasoned that Arizona courts would likely find the same. *Id.* at 1519.
II. Common law remedies

A. Impossibility


Objective impossibility, not subjective impossibility, is needed to excuse performance for this reason. See Marshick v. Marshick, 545 P.2d 436, 440 (Ariz. Ct. App. 1976) (having insufficient income to perform is subjective impossibility and not grounds for excusing performance).

B. Frustration of purpose

Arizona courts have traced the doctrine of frustration of purpose to Krell v. Henry, [1903] 2 K.B. 740, in which the owner of a London apartment advertised it for rent to observe the King’s coronation parade. See 7200 Scottsdale Road Gen. Partners, 909 P.2d at 413. When the coronation parade was postponed, the renter refused to pay the rent, and the court ultimately discharged the renter’s duty to perform based on frustration of his purpose in entering the contract. Id.

The Arizona Court of Appeals noted two important points from Krell: First, the apartment owner was prepared to render full performance and the postponement did not diminish the value of the contract to him, and second, the renter could have performed by paying the rental fee but for his intended benefit being frustrated. See id. (discussing Krell). As interpreted by the Arizona Court of Appeals, “Frustration-in-fact results when, because of events subsequent to formation of a contract, the desirability of the performance for which a party contracted diminishes.” Id.

Modern Arizona decisions have focused on the equities of the case in analyzing frustration of purpose defenses. See, e.g., id. at 413–14 (collecting cases); see also Mohave Cty. v. Mohave-kingman Estates, Inc., 586 P.2d 978, 983–84 (Ariz. 1978) (refusing to apply doctrine where a zoning change affected the economic feasibility of contract to buy and develop land); Mobile Home Estates, Inc. v. Levitt Mobile Home Sys., Inc., 575 P.2d 1245, 1248 (Ariz. 1978); Garner v. Ellingson, 501 P.2d 22, 23–24 (Ariz. Ct. App. 1972) (“We do not believe that the duty to repair under these given facts was placed on either of the parties, but rather we hold that the government-imposed repairs on the undermined premises was an event not reasonably foreseen by either of the parties and that the extreme impracticability of performing these repairs so frustrated the value of the agreement between the parties so as to render the lease agreement worthless.”).

In 7700 Scottsdale Road, the Arizona Court of Appeals considered a party’s contention that the Gulf War and its attendant threats of terrorism constituted an event frustrating the basic assumption of the parties’ contract to use a resort’s facilities for an in-person convention. Id. at 415. The party argued that the principal purpose of the convention was to provide a forum for its European personnel to introduce new and innovative products to its North American dealers, but the court found that this was not properly understood by both parties as the principal purpose. Id. (“The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense.”).

The court concluded that the general threat of terrorism was not sufficient to justify the party’s cancellation of the convention, although made in good faith. Id. at 416–17 (rejecting party’s comparison to wartime shipping cases because the slight risk to domestic air travel by vague threats of terrorism did not equate with the actual and substantial danger of running a naval blockade in time of war). The court explained that just because fewer people decided to attend the convention, mere economic impracticability is no defense to performance. Id. at 418; see also B.F. Goodrich Co., 711 F. Supp. at 1519 (rejecting commercial frustration defense in take-or-pay context where price fluctuations and changes in market conditions are normal commercial risks); Next Gen Capital, L.L.C. v. Consumer Lending Assocs., L.L.C., 316 P.3d 598, 600–01 (Ariz. Ct. App. 2013) (rejecting defense where party could have reasonably foreseen that statute under which it was operating was due to expire four years after the contract it was entering).

When a party assumes the risk of the frustrating event, the defense is not available. See Kintner v. Wolfe, 426 P.2d 798, 803 (Ariz. 1967) (“If the parties to a contract have agreed in express or implied terms that the risk of loss shall fall upon one or the other parties, full effect is given to such provision.”).

Consider Arabian Score v. Lasma Arabian Ltd., in which the Eighth Circuit Court of Appeals applied Arizona
law to a contract for purchase of a horse that later died. 814 F.2d 529, 530–31 (8th Cir. 1987). The court rejected the defenses of impossibility and commercial frustration on the grounds that the horse’s death was foreseeable given the buyer purchased insurance to cover the event, and the promotor could still fulfill its duty of promoting the horse through two foals the horse sired in its brief life. Id. at 531. We cannot fail to include the court’s witty, albeit morbid, introduction to its opinion: “Beating dead horses is the sport of appellate judges, a generally harmless pastime painful only to the readers of appellate opinions. Paying for the proposition of dead horses can be an expensive proposition, however, as the facts of this case make abundantly clear.” Id. at 529.


III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Arizona recognizes a merchant’s ability to demand adequate assurances of due performance from a counterparty when it has reasonable grounds for insecurity about the counterparty’s ability to perform. ARIZ. REV. STAT. § 47-2610; Al-Misehal Commercial Grp., 2011 WL 4543924, at *2–3 (explaining that anticipatory repudiation can occur in several ways, including by a party’s failure to provide requested assurances within a reasonable time not exceeding thirty days); Adonia Holding GmbH v. Adonia Organics LLC, No. 14-cv-1223, 2014 WL 7178389, at *3–4 (finding party adequately pled that it was entitled to suspend performance for counterparty’s refusal to provide demanded adequate assurances).

B. Commercial impracticability

Arkansas

Arkansas courts, despite having limited experience in resolving force majeure disputes, apply them to implement the parties’ intent. The parties’ designated definitions of what constitutes a force majeure event are critical. The state has also recognized force majeure at common law, though those cases have more recently discussed impossibility and impracticability.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. Force majeure/impossibility
   B. Commercial frustration

II. Common law remedies
   A. Force majeure/impossibility
   B. Commercial impracticability

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions
Courts applying Arkansas law have enforced parties’ force majeure provisions where the defined events occur and prevent a party’s performance. For example, the Arkansas Court of Appeals excused performance by a seller of rice based on Mississippi River flooding that prevented barges from being loaded in time for delivery under the parties’ contract. See Cassinger v. Poinsett Cty. Rice & Grain, Inc., No. CA-09-677, 2010 WL 1487733, at *3–4 (Ark. Ct. App. Apr. 14, 2010). The court explained that it interpreted the parties’ force majeure clause to excuse “delays beyond the control of the contracting parties for such time as would be reasonable under the facts and circumstances of the particular case.” Id.

When a force majeure event exists and prevents contractual performance, unless the contract says otherwise, a party has a duty to attempt to overcome the impediment. For example, the Supreme Court of Arkansas concluded that in an oil and gas lease that provided no specified time for reinstating production if temporarily ceased because of force majeure, a party’s efforts in attempting to overcome the event were not reasonable. Wilson v. Talbert, 535 S.W.2d 807, 809–10 (Ark. 1976). The court said that even if a rupture in a storage tank constituted a force majeure event, the party’s efforts in attempting to repair and restore production were not reasonable under the facts and circumstances. Id. at 810 (citing evidence that party did not attempt repairs for several months, and an adjacent storage tank could have been utilized to restore production).


II. Common law remedies
A. Force majeure/impossibility
Courts applying Arkansas law have recognized common law force majeure. For example, the Eighth Circuit did so in North American Oil Co. v. Globe Pipe Line Co. to excuse performance in an oil delivery contract after lightning caused a fire that destroyed the oil in storage. 6 F.2d 564, 567 (8th Cir. 1925). The court explained, “When this particular subject of contract was destroyed by act of God and in the absence of any provision in the contract removing such excuse for performance, performance was excused during the period when such act of God effectively prevented such performance.” Id.; see also Stiles v. Van Briggie, 118 S.W.2d 588, 589–90 (Ark. 1938) (acknowledging act of God defense where flood waters made it impossible to secure materials to fill order, but finding that defense unavailing in this case given the counterparty’s willingness to give additional time to perform).
Over time, this defense morphed into the defense of impossibility, “where the subject-matter of the contract has been destroyed or the event creating the impossibility is one which could not reasonably be supposed to have been within the contemplation of the contracting parties, the promisor is discharged from the performance of the contract or the obligation to answer in damages.” *Butterworth v. Tellier*, 47 S.W.2d 593, 594 (Ark. 1932) (basing impossibility to excuse performance on insolvency); *Frigillana v. Frigillana*, 584 S.W.2d 30, 34–35 (Ark. 1979); *Davis & Co. v. Bishop*, 213 S.W. 744 (Ark. 1919) (portion of item to be sold never came into existence for reasons not within the contemplation of the parties); *Whipple v. Driver*, 215 S.W. 669, 670–71 (Ark. 1919) (approving general instruction on defense of impossibility and indicating that unfavorable weather conditions might, under certain circumstances, excuse breach); *Holton v. Cook*, 27 S.W.2d 1017 (Ark. 1930) (finding party excused from performance to send daughter to college when she became physically unable to attend).

Although originally the doctrine was one of strict impossibility, it has evolved into a broader and more equitable rule of impracticability. *Serio v. Copeland Holdings, LLC*, 521 S.W.3d 131, 138. Where contracts cannot be performed because of valid orders of state or federal regulatory agencies, the defense of impossibility will be available. See *Mathews v. Garner*, 751 S.W.2d 359, 361 (Ark. Ct. App. 1988); *Smith v. Decatur Sch. Dist.*, No. CA-10–665, 2011 WL 549057, at *3–4 (Ark. Ct. App. Feb. 16, 2011); *Serio*, 521 S.W.3d at 139 (“Because the IRS and the first mortgagee refused to give their required assents to the real estate contract at issue, the [party] established the defense of impossibility. . . .”)

If an event is foreseeable, the defense will not be applicable given the parties should have protected themselves within the bounds of their contract. See *Williams Grain Co. v. Leval & Co.*, 277 F.2d 213, 215–16 (8th Cir. 1960) (rejecting defense where freight car shortage was foreseeable, and finding that reliance on embargo of soybean shipments to the port of New Orleans failed because the embargo was well known and could have been avoided).

**B. Commercial frustration**

The Supreme Court of Arkansas has acknowledged the doctrine of commercial frustration, as set forth in the Restatement of Contracts § 288. *Pete Smith Co. v. City of El Dorado*, 529 S.W.2d 147, 148 (Ark. 1976). The Eighth Circuit, interpreting Arkansas law, has explained, “Under the doctrine of frustration as relieving a party from its contractual obligations, performance remains possible but is excused whenever an event not due to the fault of either party supervenes to cause a failure of consideration or destruction of the expected value of performance. . . .” *Pac. Trading Co. v. Mouton Rice Milling Co.*, 184 F.2d 141, 148 (8th Cir. 1950).

If the frustrating event only causes a partial but not total frustration, then the event is less likely to discharge a party’s performance. *Pete Smith Co.*, 529 S.W.2d at 148. For example, the Supreme Court of Arkansas did not excuse performance where torrential rainfall only caused a partial frustration of the contract and where the contract itself expressed an intent that the contractor bear the risk of unfavorable weather. *Id.* at 148–49.

**III. UCC provisions regarding excused performance**

**A. Demands for adequate assurances**


The Supreme Court of Arkansas considered this issue in detail in *Ford Motor Credit Co. v. Ellison*, 974 S.W.2d 464, 466–68 (Ark. 1998). In that case, an automobile buyer’s husband was arrested by a drug task force while in the automobile, which was impounded and then returned to seller with warning that task force could not assure seller that its lien would be protected if it again seized the car. *Id.* at 466. Seller then required the buyer to provide additional security before it would release the automobile to her, and when unable to do so, the seller repossessed the vehicle, sold it at auction, and brought suit against the buyer. *Id.* The court, in part because of the seller’s practice in generally returning seized vehicles to its other customers, concluded that the seller did not have reasonable grounds to ask for the additional security, and the buyer’s late payments following seizure of the vehicle did not entitle the seller to demand adequate assurance. *Id.* at 466–68 (applying section to merchant/consumer transaction even though section is technically applicable just to merchant/merchant contracts for the sale of goods).

In making its decision, the court listed a number of factors that may be considered in determining whether a demanding party has reasonable grounds for insecurity: “(1) the nature of the sales contract; (2) the repetition by the party upon whom demand is made of conduct that
caused insecurity in other transactions; (3) insecurity existing in the performance of other contracts unrelated legally to the contract at issue; (4) expanding use of a credit term by the party upon whom demand is made; and (5) reputation and rumors concerning the stability and conduct of the party upon whom demand is made.” *Id.* at 467.

**B. Commercial impracticability**
Although no cases applying Arkansas law discuss the defense in detail, Arkansas law recognizes the UCC-based defense of commercial impracticability. ARK. CODE ANN. § 4-2-615.
California

California has long recognized a common law remedy of force majeure, which is also codified in the California Civil Code. Cases interpreting contractual force majeure provisions have largely adopted the common law framework, but acknowledge that parties are free to contract freely. For example, even though a duty to mitigate the potential effect of a force majeure event is applicable under California common law, parties could specifically state that there is no such duty in their agreement.

California common law also takes a broader reading of impossibility by recognizing that performance does not have to be strictly impossible, but merely impracticable, for the defense to apply, and courts have applied this in certain situations where a supervening event has rendered performance unreasonably expensive.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability

II. Common law/statutory remedies
    A. Impossibility
    B. Frustration of purpose

III. UCC provisions regarding excused performance
     A. Demands for adequate assurances
     B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

Courts often read the elements of California’s common law force majeure defense into contractual force majeure provisions. See Watson Labs. Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001); see also Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1540 (5th Cir. 1984) (“[T]he California law of force majeure requires us to apply a reasonable control limitation to each specified event, regardless of what generalized contract interpretation rules would suggest.”). But where the parties have specifically bargained for certain terms, the common law doctrine of force majeure will not supersede the specific, bargained-for terms. See Sun Pac. Mktg. Coop., Inc. v. DiMare Fresh, Inc., No. 06-cv-1404, 2010 WL 3220301, at *10 (E.D. Cal. Aug. 13, 2010) (citing Perlman v. Pioneer Ltd. P’ship, 918 F.2d 1244, 1248 (5th Cir. 1990)).

Discerning the parties’ intent is necessary where a specified reason in the force majeure clause is ambiguous. For example, the US District Court for the Eastern District of California concluded that a force majeure clause’s inclusion of “product shortage” as an event of force majeure was ambiguous and susceptible to different meanings such that the jury would have to decide whether a heat wave’s impact on tomato crops caused a “product shortage,” as contemplated by the parties, sufficient to excuse performance. See Sun Pac. Mktg. Coop., 2010 WL 3220301, at *10–11.

California courts have read an implied covenant of good faith into force majeure clauses. See InterPetrol Bermuda Ltd. v. Kaiser Aluminum Int’l Corp., 719 F.2d 992, 1000 (9th Cir. 1983) (citing Terry v. Atl. Richfield Co., 140 Cal. Rptr. 510, 511 (Cal. Ct. App. 1977)).

The burden of establishing that the force majeure clause applies, as was the case with proving impossibility or excuse at common law, is with the party seeking to excuse nonperformance. See San Mateo Cmty. Coll. Dist. v. Half Moon Bay Ltd. P’ship, 76 Cal. Rptr. 2d 287, 294 (Cal. Ct. App. 1998) (citing Butler v. Nepple, 354 P.2d 239, 244–45 (Cal. 1960)).

Even though events of force majeure are generally non-economic, parties can specifically tailor a force majeure clause to incorporate economic events. See
InterPetrol Bermuda, 719 F.2d at 998–99 (affirming district court’s conclusion that the agreed-upon force majeure clause, which excused seller’s performance if “due to failure or delay of seller’s suppliers” including for economic reasons, was applicable until the crude oil left loading port in the Persian Gulf, at which point then non-economic, “standard” force majeure such as acts of God applied).

Force majeure contractual provisions likely explain whether an event of force majeure excuses performance of the agreement altogether or just suspends performance while the event of force majeure persists. See, e.g., Dist. Servs. Ltd. v. Hong Kong Islands Line Am. S.A., 963 F.2d 378, 378 (9th Cir. 1992) (explaining that particular force majeure provision did not operate to cancel contract entirely, but provided for performance after the event of force majeure ends); Rio Props. v. Armstrong Hirsch Jackoway Tyerman & Wertheimer, 94 Fed. App’x 519, 521 (9th Cir. 2004) (indicating broad force majeure clause likely covered performance becoming impossible because of performer’s illness, but contractual provision required rescheduling of performance to a mutually agreeable future time).

B. Causation


A party cannot affirmatively cause the event that precludes performance or else the party would have no effective obligation to perform. See id. (citing Squillante and Congalton, Force Majeure, 80 Comm. L.J. 4, 4 (1979)). And, of course, the party relying on a force majeure argument cannot continue to perform the agreement. See Horsemens’s Benevolent & Protective Ass’n v. Valley Racing Ass’n, 6 Cal. Rptr. 2d 698, 713 (Cal. Ct. App. 1992) (rejecting application of force majeure provision that allowed for termination where party continued to perform and took no action to terminate the agreement); see also Warner Bros. Pictures, Inc. v. Bumgarner, 17 Cal. Rptr. 171, 177–79 (Cal. Ct. App. 1961) (finding sufficient evidence to support trial judge’s conclusions that Hollywood writers’ strike, even if a defined force majeure event in employment agreement between studio and James Garner, did not preclude studio from performing contractual obligations where evidence showed studio continued production of motion pictures despite strike).

“[M]ere increase in expense does not excuse the performance unless there exists ‘extreme and unreasonable difficulty, expense, injury, or loss involved.’” San Mateo Cmty. Coll. Dist., 76 Cal. Rptr. 2d at 296 (quoting Butler, 354 P.2d at 245). If the reason for declaring force majeure comes down to money, the party must present evidence to show that performance would have entailed excessive or unreasonable difficulty or expense. See id. (affirming trial judge’s decision to conclude party that failed to perform—allegedly because of the lack of market for gas, reduced oil prices, and new air quality regulations—had not carried burden of proof based on lack of evidence); see also Butler, 354 P.2d at 245 (finding similarly because apart from pointing to higher prices for parts caused by a steel strike, drilling contractor did not prove how the higher prices made performance extreme and unreasonable).

Proximate causation is required between the force majeure event and the specific contractual obligation that the party allegedly cannot perform. See E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 980 (5th Cir. 1976) (applying California law and concluding district court should have instructed jury that aircraft manufacturer was not liable for any production delays “proximately caused” by Government’s informal jawboning policy, and not just those caused by formal Government mandates).

Parties cannot declare force majeure until the defined event of force majeure occurs. The Supreme Court of California, in a close 4-3 decision, considered a case in which a buyer refused to accept the seller’s milk because the buyer’s employees threatened to strike if forced to handle the milk. See Oosten v. Hay Haulers Dairy Emps. & Helpers Union, 291 P.2d 17, 20–21 (Cal. 1956). The court ruled that because the defined force majeure event (a strike) never actually occurred, the buyer had not proved that performance was impossible because it could not assume that the strike would occur. See id. (explaining that at no time did the buyer tell employees that if they refused to handle the milk they would be discharged, and concluding trial court was justified in finding that buyer had proven at most a “vague threat” of adverse action if performing the contract); Nissho-Iwai Co., 729 F.2d at 1541 n.17-18 (relying on Oosten, and opining that the outcome would not be different under California law regardless of whether the force majeure provision said performance needed to be “impossible,” whether nonperformance needed to be “caused by,” or whether the clause said “prevented from complying”).
Force majeure clauses are not intended to buffer against the normal risks of a contract. See Emelianenko v. Affliction Clothing, No. 09-cv-7865, 2011 WL 13176615, at *27 (C.D. Cal. June 7, 2011) (finding a reasonable jury could conclude fighter’s opponent’s ineligibility was one of the “normal” risks of a bout contract); see also Horsemen’s Benevolent & Protective Ass’n, 6 Cal. Rptr. 2d at 713–14 (quoting N. Ind. Pub. Serv. v. Carbon Cty. Coal, 799 F.2d 205, 275 (7th Cir. 1986) (“A force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract.”)).

C. Mitigation/beyond a party’s control

Force majeure will only excuse a party’s performance when the event of force majeure is beyond the party’s control. See Watson Labs., 178 F. Supp. 2d at 1110 (“[U]nder either the common law of force majeure or the express terms of the contract, construed under California law, [a party] may only escape liability if the [force majeure event] was ‘beyond the reasonable control of either party.’”); Nissho-Iwai Co., 729 F.2d at 1541 (explaining Supreme Court of California “requires proof that a party relying on a force majeure clause did not exercise reasonable control over the excusing event”).

The Supreme Court of California, quoting Professor Corbin, has said:

We can not always be sure what ‘causes are beyond the control’ of the contractor. Many fires can be prevented by the use of foresight and sufficient expenditure. Most strikes can be avoided by a judicious yielding or by an abject surrender to demands. No contractor is excused under such an express provision unless he shows affirmatively that his failure to perform was proximately caused by a contingency within its terms; that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive.

Oosten, 291 P.2d at 20–21 (quoting Corbin, Contracts, § 1342).

For example, where a performer attempted to excuse his inability to perform based on a court order requiring him to surrender himself to the sheriff’s department at a given time, the court rejected his attempt to claim force majeure because the date chosen in the court order reflected a schedule modification the performer chose. See World Mix Entm’t, Ltd. v. Bone Thugs Harmony, Inc., No. 07-cv-2159, 2009 WL 10671949, at *5 (C.D. Cal. Mar. 3, 2009) (“In other words, the court date in the order was not outside of [the performer’s] control; rather, it was a direct result of [the performer’s] control.”). Similarly, where Supplier A to Buyer failed to secure a binding promise from its supplier, Supplier B, the Ninth Circuit concluded that Seller A could not rely on force majeure to excuse failure to perform its supply obligations to Buyer. See Jin Rui Group, Inc. v. Societe Kamel Bekdache & Fils S.A.L., 621 Fed. App’x 511, 511–12 (9th Cir. 2015) (“Although [Seller A] did not want to seek a binding promise from [Seller B] because of a familial relationship, it was within [Seller A’s] control to account for this fact in its own business commitments.”).

Courts interpreting California law have required that force majeure events be beyond a party’s control even for specifically defined events, not just events of force majeure falling within catch-all language. See, e.g., Nissho-Iwai Co., 729 F.2d at 1540 (affirming jury instruction that required jury to find that pipeline difficulties and Libyan oil embargo were not reasonably within the control of the oil company seeking to excuse performance).

California law requires a party invoking force majeure to show “that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive.” See Jin Rui Group, 621 Fed. App’x at 511 (quoting Oosten, 291 P.2d at 21); Emelianenko, 2011 WL 13176615, at *28 (finding sufficient evidence that a reasonable jury could conclude that the cancellation of a professional fight could have been prevented by the exercise of due care in finding a replacement opponent after a fighter tested positive for steroids); Nissho-Iwai Co., 729 F.2d at 1543 (hypothesizing that if Libyan Government had demanded that oil company pay five extra dollars, the expense, though unlawful, would not be unreasonably expensive in light of the oil company’s good faith obligation to perform its contract).

Diligence and good faith, however, do not require attempting to violate government orders. See, e.g., E. Air Lines, 532 F.2d at 995 (explaining that courts have found that where the government’s compulsion is the cause of nonperformance, a party is justified in complying with the government request, “no matter how informally presented or politely phrased”).

The parties, however, could contract specifically to avoid any requirements for mitigation or substituted performance. See United States v. 1.57 Acres of Land, More or Less Situated in San Diego Cty., No. 12-cv-3055, 2015 WL 5254558, at *3 (S.D. Cal. Sept. 9, 2015) (finding no requirement by county to substitute performance where force majeure clause stated county has no obligation to replace taken property following federal government’s action that prevented the property’s use for habitat conservation).
D. Foreseeability

For any event not specifically defined in the force majeure clause, the event must be unforeseen to excuse performance. See E. Air Lines, 532 F.2d at 990 ("Exculpatory provisions which are phrased merely in general terms have long been construed as excusing only unforeseen events which make performance impracticable."); Free Range Content, Inc. v. Google Inc., No. 14-cv-2329, 2016 WL 2902332, at *6 (N.D. Cal. May 13, 2016) (rejecting force majeure argument covering invalid activity on websites because contract did not explicitly cover scenario, which was foreseeable).

Consider Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc., in which a supplier of a drug to a pharmaceutical company relied on a force majeure provision to excuse performance following the Food and Drug Administration’s shutdown of the plant used to manufacture the drug. Watson Labs., 178 F. Supp. 2d at 1107–08. Because the shutdown of the plant was “entirely foreseeable” and not specifically encompassed within the defined events of force majeure in the parties’ contract, the court rejected reliance on the force majeure clause to excuse nonperformance. Id. at 1113 (also highlighting a separate provision in the agreement that required supplier to maintain “the manufacturing capacity and capabilities which shall allow it” to provide the requisite product supply).

The court explained that where parties “expressly contemplate a known risk,” they should contract specifically to allocate that risk, “rather than rely upon a boilerplate clause enumerating a parade of horribles that are so unlikely to occur as to make them qualitatively different” from the foreseeable, known risk. Id. at 1113–14 ("In the absence of such allocation [for regulatory prohibition], only governmental action not previously contemplated could qualify as force majeure."); E. Air Lines, 532 F.2d at 991 (“Courts have often held, therefore, that if a promisor desires to broaden the protections available under the excuse doctrine he should provide for the excusing contingencies with particularity and not in general language.").

The Watson Labs. court distinguished its facts from Eastern Air Lines, where the Fifth Circuit, applying California law, concluded that an aircraft manufacturer was excused by force majeure for delays in supplying airplanes because of the federal government policy requiring priority of planes to the military during the Vietnam War. Watson Labs., 178 F. Supp. 2d at 1113. The parties in Eastern Air Lines had specifically contracted to include the precise kind of governmental action that caused the delay; their force majeure provision included “any act of government, governmental priorities, allocation regulations or orders affecting materials, equipment, facilities or completed aircraft . . .” Id. (quoting E. Air Lines, 532 F.2d at 963)). When a party anticipates a particular event by specifically including it in the contract, the party “should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable.” E. Air Lines, 532 F.2d at 992 (citing Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 451 F.2d 721, 728 n.13 (Cal. 1969)).

II. Common law/statutory remedies

A. Force majeure/impossibility

California’s common law recognizes a defense of “force majeure,” which is not necessarily limited to acts of God. The test focuses on whether under particular circumstances there was such an insuperable interference occurring without the party’s intervention as could not have prevented by the exercise of prudence, diligence and care. See Pac. Vegetable Oil Corp. v. C.S.T., Ltd., 174 P.2d 441, 447–48 (Cal. 1946) (confirming arbitration award that determined onset of World War II qualified as force majeure to sustain cancellation of a supply agreement); see also Nugget Hydroelectric, L.P. v. Pac. Gas and Elec. Co., 981 F.2d 429, 431 (9th Cir. 1992) (explaining force majeure “refers to uncontrollable or unforeseeable circumstances or actions which would relieve one party in a contract from certain obligations”) (internal citations omitted); Emelianenko, 2011 WL 13176615, at *27 (clarifying fundamentals of force majeure defense).

California has also codified the common law defense of force majeure in statute. The California Civil Code provides, “The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate . . . (2) When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary. . . .” Cal. Civ. Code § 1511(2).

California also recognizes impossibility as an excuse to contractual performance. See Hensler v. City of Los Angeles, 268, P.2d 12, 21–22 (Cal. Ct. App. 1954); see also Cal. Civ. Code § 1597 (“Everything is deemed possible except that which is impossible in the nature of things.”). Modern California cases have acknowledged that performance is legally impossible when it is impracticable. See Emelianenko, 2011 WL 13176615, at *28 (relying on Kennedy v. Reece, 37 Cal. Rptr. 708, 712 (Cal. Ct. App. 1964)); see also Oosten, 291 P.2d at 24 (Edmonds, J., dissenting) (explaining that California’s recognition of impracticability is a more liberal view than the courts of many other jurisdictions in construing the doctrine of impossibility).
When performance becomes so difficult and expensive it is impracticable, nonperformance may be excused, but this does not mean that any set of facts that renders performance more difficult allows for nonperformance. See id. (citing City of Vernon v. City of Los Angeles, 290 P.2d 841, 847 (Cal. Ct. App. 1955)).

In City of Vernon v. City of Los Angeles, the Supreme Court of California affirmed a trial court’s ruling that the City of Los Angeles was excused from continuing to perform its obligations to build new sewage disposal facilities much more expensive than those contemplated by the parties’ contract. 290 P.2d at 846–47. The trial court found that the City of Los Angeles would incur approximately $500,000 per year to operate and maintain the new plant after constructing it for $41 million and found this constituted an excessive and unreasonable cost that made performance impracticable. Id. at 846. The Supreme Court of California agreed, finding that even though the City could not excuse itself by showing that performance was made more expensive, “where the difference in cost is so great as here . . .,” performance is impracticable. Id. at 847 (comparing situation to Mineral Park Land Co. v. Howard, 156 P. 458 (Cal. 1916)).

The court distinguished other cases where performance was not excused because the unforeseen hardship or expense was not so disproportionate to the costs expressly contemplated by the contract. See id. (distinguishing W. Indus. Co. v Mason M., 205 P. 466 (Cal. Ct. App. 1922), and Orr v. Forde, 282 P. 429 (Cal. Ct. App. 1929)). Note, however, the strong dissenting opinion that questioned the majority’s ruling and cited the City’s continuing performance of the contract; the dissent contended the City should not be relieved of its contractual obligations because it made a bad contract. See id. at 849–50 (Carter, J., dissenting) (“It is obvious, then, that the doctrine of legal impossibility as here applied by the majority does not excuse an obligor from liability for failure to perform a contractual duty; instead that doctrine is employed by the majority to rewrite the contract between these parties.”). In most states, the dissent’s view of impossibility would be the majority viewpoint.

The party invoking any of these common law remedies to excuse nonperformance bears the burden of establishing the defense. See Oosten, 291 P.2d at 20. As is true when relying on contractual force majeure protections in California, a party invoking these common law remedies must establish that it used reasonable efforts to overcome the obstacles that prevented performance. See Emelianenko, 2011 WL 13176615, at *28 (internal citations omitted) (finding question of fact for jury on whether party exercised reasonable efforts to overcome obstacles to performance). California law recognizes that impracticability excuses performance for as long as the impracticability exists, or allows for permanent discharge if performance after the impracticability ceases would impose a substantially greater burden on the party. See Oosten, 291 P.2d at 20 (reading requirements for common law impossibility of performance into force majeure provision with regard to whether performance was “impossible”).

B. Frustration of purpose

The doctrine of frustration of purpose poses an even higher bar to excusing nonperformance in California than any of the aforementioned reasons. The doctrine applies when performance is possible but a supervening, fortuitous event has virtually destroyed the value of the consideration to be rendered. See, e.g., Glendale Fed. Sav. & Loan Ass’n v. Marina View Heights Dev. Co., 135 Cal. Rptr. 802, 833–34 (Cal. Ct. App. 1977) (citing Lloyd v. Murphy, 153 P.2d 47, 53 (Cal. 1944)). Unlike strict impossibility, performance remains possible but the expected value of performance is rendered effectively meaningless. See Lloyd, 153 P.2d at 53–54. The Supreme Court of California has explained that a party cannot invoke the doctrine of frustration to escape its obligations when the party’s contract references the frustrating event or has otherwise contemplated the risks arising from it (i.e., the event must be foreseeable). See Glenn R. Sewell Sheet Metal, 451 P.2d at 727; see also Lloyd, 153 P.2d at 55 (“It is settled that if parties have contracted with reference to a state of war or have contemplated the risks arising from it, they may not invoke the doctrine of frustration to escape their obligations.”).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

For contracts for the sale of goods, the California Commercial Code allows for a party to demand adequate assurances of due performance from its counterparty when reasonable grounds for insecurity arise. Cal. Comm. Code § 2609(1). Whether grounds for insecurity are reasonable and whether an assurance of performance is “adequate” are determined by commercial standards. See Trust Co. for USL, Inc. v. Wien Air Alaska, Inc., No. 95-15222, 1997 WL 267777 (Table), at *1 (9th Cir. May 20, 1997) (explaining statute).

Although whether grounds for insecurity are reasonable and whether any provided assurances are adequate are generally factual questions not appropriate for summary judgment, conduct may be sufficiently extreme as to be capable of decision as a
matter of law. See id. (affirming decision that party had reasonable ground for insecurity as a matter of law based on cumulative undisputed facts showing repeated delinquencies in performance, and explaining that the grounds for insecurity can arise from conduct not directly related to the contract); see also Volkswagen of Am., Inc. v. Maverick Auto Grp. 2, LLC, No. 2:13-cv-802, 2014 WL 7012404, at *4 (E.D. Cal. Dec. 11, 2014) (holding counterparty’s response failed to provide adequate assurances that it would complete construction of facility by contracted-for deadline, and notably applying this concept in a context not involving the sale of goods).

To be subject to the California Commercial Code, the demand for adequate assurances must be in writing, at least where there may be conflicting evidence about whether a demand is made. See, e.g., Micelle Labs., Inc. v. Univ. Med. Prods/USA, Inc., No. G030083, 2003 WL 21055104, at *4 (Cal. Ct. App. May 12, 2003) (acknowledging that some courts have excused the writing where both parties had a clear understanding that a demand was being made, but distinguishing those cases because of conflicting evidence as to whether a demand was made).

The demand for adequate assurances does not give rise to a separate cause of action for breach, but permits a party to suspend certain elements of performance. See, e.g., Student Loan Mktg. Ass’n v. Hanes, 181 F.R.D. 629, 635 n.6 (S.D. Cal. 1998).

B. Commercial impracticability

Delay or nondelivery of goods is excused when performance is rendered “commercially impracticable” by an unforeseen supervening event not within the contemplation of the parties at the time of contracting. Cal. Comm. Code § 2615. This defense is only available to a seller who has not “assumed a greater obligation” via contract. Id.; see E. Air Lines, 532 F.2d at 988–89 (reversing trial judge’s conclusion that aircraft manufacturer had waived protection of § 2615 by agreeing to a greater obligation via contract). The defense is only available for unforeseeable events. See InterPetrol Bermuda, 719 F.2d at 999 (explaining defense was not available where parties foresaw specific risk and bargained over which party would bear loss in such event).

When confronting government action, the seller’s good faith belief in the validity of the government action is the test used for determining commercial impracticability. See E. Air Lines, 532 F.2d at 996 (quoting § 2615 cmt. 10).

When commercial impracticability causes a diminished supply that allows a seller to partially perform some of its obligations, the seller is permitted to allocate the available supply among customers in a manner that is “fair and reasonable.” Cal. Comm. Code § 2615(b). Consider Terry v. Atlantic Richfield Co., in which a California appellate court had to consider the supply allocation system adopted by a gasoline supplier in the wake of the 1973 gasoline shortage. 140 Cal. Rptr. 510 (Cal. Ct. App. 1977). The court granted summary judgment in favor of the supplier on the issue that its supply allocation was fair and reasonable under § 2615. Id. at 515. The supplier’s plan treated all customers alike and drew no distinctions between contract dealers and stations operated by the company’s subsidiaries. The court embraced the “fair and reasonable” plan comprising a collective quality that applied the same criteria to all customers, as opposed to an individualized approach that “may provide adequacy to some, insufficiency to others.” Id. at 513 (“Plaintiffs’ demand for treatment shaped to their unique circumstances runs counter to statutory insistence upon collective fairness.”). The court explained that the fact that the counterparty may have received a more favorable distribution under another plan for allocation did not make the chosen plan unfair or unreasonable. Id. at 513–14.
Colorado

There are very few cases in Colorado regarding force majeure. Instead, Colorado courts have generally examined unforeseen events outside of a party’s control under the common law doctrine of impossibility, interpreted as impracticability. Colorado also recognizes the frustration of purpose defense.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Foreseeability
   C. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements
Colorado courts interpret force majeure clauses as they would any other clauses in a written contract. Absent an ambiguity, the written agreement, including any force majeure provisions, will be enforced according to its terms, “construed by application of the accepted meaning of the words and with reference to all of its provisions.” Church Commc’n Network, Inc. v. Echostar Satellite L.L.C., No. 04-cv-2206, 2006 WL 8454330, at *15 (D. Colo. Mar. 17, 2006).

For example, in Gillespie v. Simpson, a party entered into leases with the state for the development and production of geothermal products from state lands, with the obligation to pay rent and royalties. 588 P.2d 890, 891–92 (Colo. App. 1978). When the state failed to enact drilling regulations for approximately three years, such that the party was deprived of its right to earn income on the leased lands, the party sued for the return of rental payments under the force majeure provisions of the leases. Id.

The court found in the party's favor and observed that the leases “specifically define force majeure as any action by the state which interferes with lessees’ rights.” Id. at 892 (citing Black’s Law Dictionary definition of “affect” to mean the interference must only “act upon, influence, enlarge or abridge” the obligation adversely). Because the state’s failure to enact the drilling regulations in question interfered with the lessees’ right to “generate income by development of the leasehold for payment of the rentals,” the obligation to pay rent was suspended during the term of the force majeure. Id.

Where parties allocate the risk of force majeure by contract, courts will hold parties to their bargain. For example, in Continental Materials Corp. v. Valco, a party agreed contractually to pay certain minimum royalties on “Agreed Sand and Gravel Reserves,” determined by the parties to be 50 million tons. No. 1:14-cv-2510, 2016 WL 9735761, at *7–9 (D. Colo. Sept. 15, 2016). When the actual reserves turned out to be much less, the party invoked force majeure in an effort to avoid its obligation to pay minimum royalties, but the court rejected the force majeure defense. Id. The court found that the agreement specifically allocated the risk of force majeure on the party in the lease, which provided that “[t]he number of tons adopted herein as the amount of the Agreed Sand and Gravel Reserves will apply notwithstanding any event, occurrence or condition, including but not limited to, any event of force majeure.” Id. at *9.

B. Foreseeability
An event of force majeure generally must be unforeseeable at the time of contracting to excuse performance. See, e.g., Hoyl v. Babbitt, 927 F. Supp. 1411, 1415 (D. Colo. 1996) (finding that potential impediments to the development of a mine through adjacent fee simple lands, on which a fire subsequently broke out, were foreseeable and did not constitute force majeure events).
C. Notice

II. Common law remedies
A. Impossibility

Moreover, the Supreme Court of Colorado found that impossibility occurs when “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.” City of Littleton, 453 P.2d at 812. In City of Littleton, the city and some contractors contracted for the reconstruction of collapsed water tanks, which depended on the city providing revised design specifications. When the city did not provide such specifications (because reconstruction proved not structurally possible based on the testimony of numerous engineers in the trial court), the Supreme Court of Colorado affirmed that the contractor’s performance was rendered impossible and therefore excused. Id. at 812–13 (and indicating the parties could have allocated the risk of impossibility due to presently unknown facts to eliminate the common law impossibility defense if they so wished).

Colorado courts have repeatedly held that changes in economic circumstances are reasonably foreseeable and therefore will not in general render a contract impossible. See, e.g., Ruff, 690 P.2d at 1298 (finding that increased competition, delay in regulatory approvals, and changed economic circumstances “are not situations which are so unforeseeable as to be outside the risks assumed under the contract and do not excuse [a party’s] performance because of impracticability”); Magnetic Copy Servs., 805 P.2d at 1165 (finding that the loss of suppliers was foreseeable and thus did not render company’s obligation to provide 3,000 tapes for $10/each impossible).

B. Frustration of purpose
Colorado courts have treated frustration of purpose similarly to impossibility. See Cont’l Materials Corp., 2016 WL 9735761, at *9. Colorado federal courts “will not hold a contract to be frustrated merely because of an increase in cost to one of the parties.” Id. For example, in Resources Inv. Corp. v. Enron Corp., the U.S. District Court for the District of Colorado held that “price-induced energy conservation, foreign commodity competition . . . , an economic recession, [and] an unforeseeable change in the natural gas market” did not frustrate the parties’ take-or-pay natural gas contract. 669 F. Supp. at 1043.

III. UCC provisions regarding excused performance
A. Demands for adequate assurances
Demands for adequate assurances under Colorado state law are governed by Colorado Revised Statutes Section 4-2-609(1) (derived from the UCC):

A contract for sale imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance and, until he receives such assurance, may if commercially reasonable suspend any performance for which he has not already received the agreed return.


Commentary to Section 4-2-609 elaborates on the right to adequate assurance:

[It] rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain.... Once [the seller] has been given reason to believe that the buyer’s performance has become uncertain, it is an undue hardship to force him to continue his own performance.

Section 4-2-609, Comment 1, 2 C.R.S. (1992): see also Col. Interstate Gas Co. v. Chemco, Inc., 854 P.2d 1232, 1240 ( Colo. 1993) (en banc) (finding that
company did not provide adequate assurances when it refused to guarantee that it would not waive judicial recourse regarding its alleged obligations under the contract, which in turn relieved counterparty of obligation to perform).

Whether a party has reasonable grounds for insecurity is a question of fact. See, e.g., id.; Scott, 765 P.2d at 1046. Colorado courts typically require that demands for assurances be in writing, as required by the statute, in order to be effective, but have accepted oral demands for assurances where there “appears a pattern of interaction which demonstrated a clear understanding between the parties that suspension of the demanding party’s performance was the alternative.” Scott, 765 P.2d at 1046 (rejecting that the seller’s request to the buyer’s driver to “settle” some questions with the buyer were effective oral demands for assurance, as they were not clear and the subsequent conduct by the seller provided no further clarity).

B. Commercial impracticability

With respect to the sale of goods, Colorado applies the UCC-based defense of commercial impracticability. COLO. REV. STAT. § 4-2-615.

The Tenth Circuit in Leanin’ Tree, Inc. v. Thiele Technologies, Inc., interpreted this provision of Colorado law to require three conditions that “must be satisfied before a seller’s performance is excused as commercially impracticable: (1) a contingency has occurred; (2) the contingency has made performance impracticable; and (3) the nonoccurrence of that contingency was a basic assumption upon which the contract was made. 43 Fed. App’x 318, 322 (10th Cir. 2002). In that case, Thiele claimed that its obligation to produce a machine to automate card-packaging operations was rendered commercially impracticable when Leanin’ Tree failed to “supply production cartons equal in quality to the samples it supplied [to Leanin’ Tree and Thiele] in August 1998.” Id. at 321. The district court found, and the Tenth Circuit affirmed on appeal, that the parties’ agreement contained no basic assumptions regarding the design of the cartons, and Thiele should have foreseen the carton problems identified. Id. at 324. Accordingly, Thiele’s performance was not rendered impracticable. Id.

Colorado federal courts have rejected increased costs and market conditions, including “a rise or collapse in the market,” as grounds for invoking commercial impracticality. See Res. Inv. Corp., 669 F. Supp. at 1043 (rejecting that a downturn in the gas market rendered a take-or-pay gas purchase contract commercially impracticable).
Connecticut courts recognize and enforce force majeure clauses relieving parties from their contractual obligations where performance is prevented by an unforeseeable occurrence beyond a party’s control. Connecticut courts look to the precise wording of the contract, the risk allocation between the parties, and the particular circumstances of the contract in determining whether a force majeure event excuses a party from performing its obligations under the contract. Connecticut law recognizes the doctrines of impossibility and frustration of purpose.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Mitigation/beyond a party’s control
   C. Foreseeability
   D. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

Under Connecticut law, the examination of force majeure clauses is guided by the parties’ intent, as determined by the plain language of the contract, in light of the situation of the parties and the circumstances connected with the transaction. Stanley Works v. Halstead New England Corp., No. CV010506367S, 2001 WL 651208, at *4–5 (Conn. Super. Ct. May 18, 2001) (finding that the plain language of the contract was clear and unambiguous, and concluding that the parties “meant what they said and said what they meant”); see also Overseas Metal & Ore Corp. v. Rosenfield, 44 A.2d 625, 626–27 (Conn. 1945) (finding that based on the nature and background of the agreement, the term “shortage of power” contained within the force majeure clause included conditions affecting the party’s business as a whole, rather than just affecting individual commitments).

Force majeure clauses providing for a defense where performance of the contract is prevented by government action may need to specify the degree to which the government’s action impacts the parties’ performance. See Wheelabrator Envt’l Sys., Inc. v. Galante, 136 F. Supp. 2d 21, 29 (D. Conn. 2001) (holding that a court decision impacting the party’s performance did not qualify as a force majeure event where the clause provided “[c]hange of [l]aw” as a qualifying event, but the court’s decision only impacted the party’s profitability and not its actual ability to perform); see also Rand-Whitney Containerboard Ltd. P’ship v. Town of Montville, No. Civ. 3:96CV413(HBF), 2005 WL 2481480, at *4 (D. Conn. Aug. 31, 2005) (finding that the issue of obtaining a permit was not “an act or order of a governmental authority” as contemplated by the contract’s force majeure clause because it was within the party’s control and was foreseeable as the need for permits existed before the parties contracted).

Connecticut courts have interpreted catch-all phrases within force majeure clauses broadly. In International Auto. Showcase, Inc. v. SMG, the force majeure clause provided coverage for damage “from any cause whatsoever or if any other casualty or unforeseen cause beyond the control of SMG, including, without limitation, acts of God, fires, floods, epidemics, quarantine restrictions, strikes, failure of public utilities or unusually severe weather.” No. CV030477177S, 2004 WL 1833312, at *2 (Conn. Super. Ct. July 21, 2004). The court found that although the closing of a coliseum was not listed, it was a qualifying force majeure event because it was unforeseeable, and
because the parties used broad enough language to encompass such circumstances. Id.

However, Connecticut courts have imposed limitations on the enforcement of force majeure clauses. At least one court has found that parties to a contract cannot invoke a force majeure clause to extend the term of the contract. Monarch Shipping Agency, LLC v. Logistic Conn., Inc., No. CV034018185, 2003 WL 21185783, at *1 (Conn. Super. Ct. May 7, 2003) (contract’s one-year term was not automatically renewed in light of party’s failure to meet the contract’s minimum volume guarantee).

B. Mitigation/beyond a party’s control

Connecticut courts have established that force majeure events must be beyond the parties’ control in order to excuse performance of obligations under the contract. Rand-Whitney Containerboard Ltd., 2005 WL 2481480, at *4 (holding that the issue of obtaining a permit did not qualify as a force majeure event because it fell within party’s control).

Regarding the parties’ attempt to overcome the impediment posed by the force majeure event, Connecticut law is clear—the duty to mitigate damages arises only at the time of the breach. Id. at *5.

C. Foreseeability

An event of force majeure must be unforeseeable at the time of contracting in order to excuse performance unless otherwise stated in the agreement. Connecticut courts have rejected force majeure defenses where parties were aware of known risks. See Hershmans Recycling, Inc. v. Am. Disposal Servs. of Mo., Inc., No. CV0104504069S, 2003 WL 283813, at *3–4 (Conn. Super. Ct. Jan. 28, 2003) (rejecting a force majeure defense based on a material shortage because material shortages had been occurring for several months and thus were a known risk at the time the parties contracted); see also Rand-Whitney Containerboard Ltd., 2005 WL 2481480, at *4 (finding that the issue of obtaining permit did not qualify as a force majeure event because it was foreseeable, given the need for permits existed before parties contracted).

D. Notice

Connecticut courts will enforce a notice requirement within a force majeure clause where such notice is a condition precedent to recovery under the contract’s terms. See Milford Power Co., LLC v. Aistom Power, Inc., No. X04CV0001216725, 2001 WL 822488, at *4 (Conn. Super. Ct. June 28, 2001) (finding that where a force majeure clause required notice upon invocation, notice of the occurrence of the unforeseen event was insufficient, as notice of the party’s intention to invoke the force majeure defense was required).

II. Common law remedies

A. Impossibility/impracticability

“The impracticability doctrine represents an exception to the accepted maxim of pacta sunt servanda, in recognition of the fact that certain conditions cannot be met because of unforeseen occurrences.” Dills v. Town of Enfield, 557 A.2d 517, 523 (Conn. 1989). Connecticut courts have established that, for the doctrine of impracticability to excuse performance, the parties must establish: “(1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes.” Id. (quoting 2 Restatement (Second) Contracts § 261; E. Farnsworth, Contracts § 9.6, p. 678 (1982)).

Further, for the impracticability doctrine to apply, the event rendering performance impracticable must have been unforeseen. Id. In Dills, the court found that “the contingency upon which fulfilling the contract allegedly depended was Dills’ obtaining the requisite financing.” Id. Accordingly, the court found that it could not find that failure to obtain financing was a basic assumption on which the contract was made, noting that “only in the most exceptional circumstances have courts concluded that a duty is discharged because additional financial burdens make performance less practical than initially contemplated. Id. at 523–24.

B. Frustration of purpose

The doctrine of frustration of purpose excuses a party in certain situations where the objectives of the contract have been utterly defeated by circumstances arising after the formation of the contract. The excuse applies even where there is no impediment to actual performance. See Hess v. Dumouchel Paper Co., 225 A.2d 797, 800–01 (Conn. 1966). However, the event upon which the party relies to excuse performance must have been unforeseeable at the time of contracting. O’Hara v. State, 590 A.2d 948, 954 (Conn. 1991) (finding that because the parties foresaw that the state might take such action, the actual occurrence of this action did not excuse duty to perform).

To invoke frustration of purpose, the party claiming that a supervening event has frustrated and excused a promised performance must show that: “(1) the event substantially frustrated his principal purpose; (2) the nonoccurrence of the supervening event was a basic assumption on which the contract was made; (3) the
frustration resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes.” Id. at 954 n.7.

III. UCC provisions regarding excused performance

A. Demands for adequate assurances
Connecticut’s Uniform Commercial Code provides that where a party to a contract has reasonable doubt regarding whether the other party is capable of performing its obligations under the contract, the party may require an assurance that said obligations will be performed as required. CONN. GEN. STAT. § 42a-2-609; see also Roessler v. New England Glass Enclosures Inc., No. CV 90 0108712, 1993 WL 7537, at *5 (Conn. Super. Ct. Jan. 7, 1993). Whether there is a right to demand such an assurance depends on whether the “insecurity” is based on reasonable grounds and is a question of fact. Cherwell-Ralli, Inc. v. Rytman Grain Co., 433 A.2d 984, 987 (Conn. 1980).

Under Section 42a-2-210(6), an assignment or delegation of one’s obligations under the contract may be ground for the other party’s insecurity, justifying a demand for adequate assurance under Section 42a-2-609. See Gulf Dealers of Connecticut v. Blue Hills Fuels, LLC, X07HHDCV176083069S, 2019 WL 6881347, at *2 (Conn. Super. Ct. Nov. 26, 2019).

Where such a demand for adequate assurance is made, it must be done in writing. CONN. GEN. STAT. § 42a-2-609.

B. Commercial impracticability
Connecticut recognizes the UCC-based defense of commercial impracticability though courts applying Connecticut law have not considered it in detail. CONN. GEN. STAT. § 42a-2-615.
Delaware

Due to its significance as a popular jurisdiction for incorporation of legal entities and its role in interstate and international commerce, Delaware law is frequently chosen to govern commercial agreements. Delaware courts interpret force majeure provisions consistent with the parties’ drafting, and generally an alleged force majeure event must be listed in the parties’ agreement to constitute a force majeure event excusing performance. Delaware recognizes common law impossibility, interpreted as impracticability; commercial frustration; and commercial impracticability, which Delaware courts have expanded beyond the sale of goods context.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability
   E. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

“Force majeure clauses are, as a general matter, drafted to protect a contracting party from the consequences of adverse events beyond its control.” VICI Racing, LLC v. T-Mobile USA, Inc., 763 F.3d 273, 286 (3d Cir. 2014) (quoting Stroud v. Forest Gate Dev. Corp., No. Civ.A. 20063-NC, Civ.A. 2045-NC, 2004 WL 1087373, at *5 (Del. Ch. May 5, 2004)). “A force majeure clause defines the area of unforeseeable events that might excuse nonperformance within the contract period . . . [T]o use the clause as an excuse to nonperformance, the event must have been beyond the party’s control and without its fault or negligence. The nonperforming party bears the burden of proof.” VICI Racing, 763 F.3d at 287 (quoting Gulf Oil Corp. v. FERC, 706 F.2d 444, 452 (3d Cir. 1983) (“Gulf Oil II”).

“Application of a force majeure provision . . . starts with the words chosen by the drafters.” Stroud, 2004 WL 1087373, at *5. With respect to specific categories of enumerated events, Delaware courts have found that where the contractual force majeure provision contained express provisions requiring the invoking party to nevertheless perform certain obligations, the counterparty had a “colorable claim” for breach of contract where the invoking party failed to perform such obligations. Arkema Inc. v. Dow Chemical Co., No. 5479-VCP, 2010 WL 2334386, at *2, *4 (Del. Ch. May 14, 2010); see also Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1297–99, 1301 (D. Del. 1970) (finding suppliers of Venezuelan oil were excused for failure to supply where Venezuelan government forbade its supply to its counterparty).

Where the scope of excused performance in the force majeure clause is limited to nonmonetary obligations, the fact that money may be able to cure nonperformance does not preclude the force majeure clause’s enforceability. See, e.g., VICI Racing, 763 F.3d at 288 (affirming that harm from car crash was repairable with extra money does not prevent car crash from constituting force majeure event).
Where the event in question is not included within an expressly enumerated list of force majeure events, Delaware courts will consider whether the list also contains a “catch-all” phrase that may encompass the event in question. Such a catch-all phrase “must be construed within the context established by the preceding listed causes” and with the wording of the catch-all phrase in mind. See Stroud, 2004 WL 1087373, at *5.

Although Delaware courts will avoid construing catch-all phrases so broadly as to render the contractual obligations optional in practice, the use of broad language such as “whatsoever” in the catch-all phrase would suggest “that an especially narrow reading of the phrase was not intended.” Id (interpreting real estate sale contract’s force majeure clause with catch-all phrase referencing “any other reason whatsoever beyond the control of [the developer]” to encompass delay-causing events beyond the “reasonable control of [developer]” and which were not reasonably foreseeable in the ordinary course of real estate development).

Finally, note that Delaware courts enforcing non-U.S. arbitral awards will not review a finding on contractual force majeure made by an arbitral tribunal where the arguments against the finding could have been made in the arbitration proceeding. See Nat’l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 815–16 (D. Del. 1990) (declining to review tribunal’s finding of no force majeure based on incorrect testimony where other party had opportunity to present arguments against the truth and credibility of the testimony in the arbitration); see also id. at 819–20 (rejecting “public policy” defense to enforcement of the award where the defense was premised on an alleged force majeure that the arbitral tribunal rejected and where the party resisting enforcement was permitted in the arbitration to present all of its arguments in favor of force majeure).

B. Causation

Delaware courts have required a party asserting a contractual force majeure defense to bear the burden of showing that “but for” the force majeure event, the party would have performed its contractual obligation. See, e.g., Stroud, 2004 WL 1087373, at *8 (“In order to prevail under the Agreement, FGDC must show that, but for the excused delays, it would have completed the tasks in accordance with the Agreement. It has failed to meet that burden, and, thus, the Plaintiffs are entitled to specific performance.”).

C. Mitigation/beyond a party’s control

“To invoke force majeure . . . the nonperforming party’s duty extends to showing what action it took to perform the contract regardless of the occurrence of the excuse. Gulf Oil II, 706 F.2d at 452 (citing US v. Brooks-Callaway Co., 318 U.S. 120, 120–21 (1943)) (grant of force majeure excusal for obligor’s failure in absence of showing of efforts to overcome force majeure events was “not supported by substantial evidence” and reversed). This is, at times, referred to as the “due diligence” obligation.

Thus, Delaware courts have rejected a force majeure defense to a developer for its delays in constructing and conveying townhouses where the delays were attributable to a design choice that, while not necessarily in violation of any regulatory requirements, fell below the contemporaneous “prevailing practice” in the area and guidelines in the industry, holding that this did not qualify as a “reason whatsoever beyond the control of [the developer].” Stroud, 2004 WL 1087373, at *6. Conversely, where the nonperformance is compelled by a foreign state in its territory, such measures will generally not be reviewed by U.S. courts under the act of state doctrine, and the nonperforming party can plead the defense of compulsion without having to show efforts to circumvent or violate such measures. See, e.g., Interamerican Ref., 307 F. Supp. at 1298–99.

D. Foreseeability

An event of force majeure generally must be unforeseeable at the time of contracting to excuse performance. Thus, for example, Delaware courts have declined to find that a typical delay caused by a routine administrative certification procedure in the sale of real estate cannot be a force majeure event. Stroud, 2004 WL 1087373, at *7 (“[C]ooperating with the County Law Department to accomplish the transfer is just another one of the tasks which a developer must accomplish and the time required to accomplish that task, unless it is out of the ordinary, cannot be considered a reason for delay.”).

Even so, that the alleged force majeure event was unforeseeable at the time of contracting may not be sufficient to establish force majeure. For example, the Third Circuit in Gulf Oil II held that even if the force majeure event was not foreseeable or even expressly enumerated in the force majeure clause at the time of contracting, its later regularity of occurrence can bring it outside the scope of valid force majeure, as the requisite “element of uncertainty that defines unforeseeability [would be] negated . . . .” 706 F.2d at 454.
Generally, only events that are unforeseeable, beyond the invoking party’s control, and not attributable to its fault or negligence can qualify as force majeure events. But see VICI Racing, 763 F.3d at 289–90 (obiter dicta) (noting that the Delaware Supreme Court has not yet confirmed whether all force majeure clauses must be read to incorporate the concept of foreseeability and suggesting that the specific industry context may be relevant to this determination).

E. Notice
The Third Circuit has explained that the determination of the existence and form of notice requirements for the effective invocation of force majeure to excuse performance is informed by the parties’ specific contractual provisions. See, e.g., Gulf Oil II, 706 F.2d at 448 n.8, 455 (explaining that the non-performing party, inter alia, “must show the notice of the [force majeure] breakdowns,” where contract provision on force majeure required giving notice as a step in invoking the suspension of obligations due to force majeure). We did not, however, review any reported Delaware cases that had to determine the effect of a failure to adhere to a contractual force majeure provision requiring notice.

II. Common law remedies
A. Impossibility

Although common law contract cases not involving the sale of goods are not governed by the Uniform Commercial Code, the courts of Delaware have indicated that they are likely to be guided by the formulation of the UCC rule on commercial impracticability (in UCC §2-615) in other contexts as well:

Delaware has enacted Section 2-615 of the U.C.C. . . . , which in turn served as a model for the Restatement. Although the U.C.C. does not govern this case, I conclude that the Delaware Supreme Court would be likely to follow the rule of the U.C.C. and the Restatement to resolve this dispute.

Freidco, 529 F. Supp. at 825 (lease contract dispute); see also J & G Assocs., 1989 WL 115216, at *4 (same).

B. Frustration of purpose
Delaware common law recognizes the doctrine of commercial frustration, which “excuses future performance under a contract [w]here, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances indicate the contrary.” Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 901 A.2d 106, 113 (Del. 2006) (citing Restatement (Second) Contracts § 265).

“[T]he doctrine cannot apply if the events in question were actually foreseen, anticipated by the parties, and explicitly provided for at the time of contracting.” McReynolds v. Trilantic Capital Partners IV L.P., C.A. No. 5025–VCL, 2010 WL 3721865, at *5 (Del. Ch. Sept. 23, 2010). “The frustration of a contractor’s purpose may be either complete or only partial. A partial frustration by subsequent events is less likely to discharge a contractor from its duties.” Akorn, Inc. v. Fresenius Kabi AG, C.A. No. 2018–0300–JTL, 2018 WL 4719347, at *57 n.595 (Del. Ch. Oct. 1, 2018) (holding that frustration is a default rule under common law and does not alter the contractual definition for or consequences of a Material Adverse Effect).

In City of Harrington v. Delaware State Fair, Inc., C.A. No. K14C–10–034 WLW, 2015 WL 4464899 (Del. Super. Ct. June 22, 2005), the City of Harrington moved for judgment on the pleadings on its claims for breach of wastewater service agreements it had with the Delaware State Fair. The Superior Court of Delaware denied the City’s motion on the grounds that, viewed in the light most favorable to the Fair, it might be proven that the Fair “may have suffered some amount of commercial frustration, as the shutting down of [City’s] treatment facility [and City’s] outsourcing of treatment to Kent County] speaks directly to the ability of one party to perform its contractual obligation to the other . . . .” Id. at *1, *3.

III. UCC provisions regarding excused performance
A. Demands for adequate assurances
Under Delaware’s UCC Section 2-609, “when reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance . . . . After receipt of a justified demand failure to provide . . . such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.”


In World Class Wholesale, the Superior Court of Delaware found that the shipment by plaintiff wholesaler of defendant’s supplied alcoholic beverage products was “contrary to [defendant’s] business interests” because plaintiff believed it was illegal (regardless of whether or not it is in fact illegal), and thus constituted reasonable grounds for making a demand of adequate assurance that the conduct would cease, and thus found that plaintiff’s failure to provide adequate assurances constituted repudiation of the agreement. Id.

In AMG Vanadium LLC, the Superior Court of Delaware reviewed demands of adequate assurance in the context of a multi-year installment contract. The Superior Court held that, in the context of a multi-year installment contract, a failure to provide adequate assurance would only constitute a repudiation if the resulting breach were a material breach within the meaning of Section 2-612 of the UCC. 2020 WL 1233752, at *5 & n.58 (citing Brasby, 2007 WL 949485, at *4; Biolife Sols., Inc. v. Endocare, Inc., 838 A.2d 268, 278 (Del. Ch. 2003)).

Specifically, Plaintiff AMG had contracted with defendant GAM for the long-term supply of tantalum pentoxide concentrate from its Mibra Mine in Brazil. Id. at *1. *2. AMG experienced a fire in its Mibra Mine, an event that neither party disputed constituted reasonable grounds for demanding adequate assurances under Section 2-609 that AMG would be able to meet its supply obligations to GAM. Id. at *5. In response to GAM’s demands for adequate assurance, AMG offered to source the tantalum pentoxide from an unspecified “ethical source of supply, previously audited and certified by the Electronic Industry Citizenship Coalition. AMG also required that GAM agree to this resolution within four (4) days.” Id. at *7. The court explained that, in order not to constitute repudiation, provision of adequate assurance by means of alternative performance must be commercially reasonable within the meaning of Section 2-609. The court held that triable questions of fact precluded it from determining whether the alternative performance offered by AMG was commercially reasonable and denied GAM summary judgment in this regard. Id. at *8.

Likewise, the Superior Court declined summary judgment on the question of whether AMG’s offers of delayed shipments constituted a material breach and thus repudiation of the long-term supply agreement. Id. at *5–6. While the Superior Court explained that a delay in performing a contract where time is of the essence is a material breach, the setting of a “target date” for performance under the contract does not suggest an intent to make failure to adhere strictly to that date a material breach. Id. at *6 (“Absent specific language, a delay in performance raises a rebuttable presumption that time is not of the essence, and reasonable delay does not constitute a material breach.”).

Finally, the Superior Court denied summary judgment on the question of whether, even if it were found to be in breach of the supply agreement, AMG had a contractual right to cure any breach. In so doing, the Superior Court explained that “the alleged repudiation . . . does not supersede the express language in the Supply Agreement” providing a materially breaching party the right to cure its performance. Id.

Because it found that the alleged repudiation before it was not an express one but rather one under Section 2-609, and that GAM had not proven futility of the right to cure, the Superior Court found that triable issues of fact precluded it from determining whether AMG had a right to cure its breaches or whether the agreement was repudiated. Id. at *12; cf. Solitron Devices, Inc. v. Honeywell, Inc., 842 F.2d 274, 276, 278 (11th Cir. 1998) (failure to comply with termination provisions was irrelevant where other party already expressly repudiated contract).

B. Commercial impracticability

Under the Delaware courts’ interpretation of the doctrine of commercial impracticability, a party to a contract governed by the UCC may have a contractual obligation discharged upon a showing of three elements:

i. “the occurrence of an event the non-occurrence of which was a basic assumption of the contract.” Freido, 529 F. Supp. at 825. The emphasis is on the assumption of non-occurrence; the event need not have been unexpected, unforeseeable, or even unforeseen. Id.;

ii. that “continued performance is not commercially practicable.” Id. Although the standard is not impossibility, mere impracticability is not enough. In cases dealing with impracticability due to cost,
the party seeking to be excused must show that the loss would be "so excessive and unreasonable that the failure to excuse performance would result in grave injustice." Id. at 825, 830 (citing Gulf Oil Co. v. F.P.C., 563 F.2d 588, 599–600 (3d Cir. 1977), cert. denied, 434 US 1062 (1978)). Impracticability is to be evaluated at the present time; a forecast of impracticable conditions in the future, absent some effect on present conditions, will not support this element. Id. at 830;

iii. that the party claiming discharge "did not expressly or impliedly agree to perform in spite of impracticability that would otherwise justify his nonperformance." Id. at 825-826; see also Arkema, 2010 WL 2334386, at *2, *4.

6 Del. C. § 2-615. For a general discussion of these three elements, see UCC § 2-615.

In Freido, the lessee argued that the lessor’s obligation under the lease to pay for all utility costs in excess of $1.10/sq. ft. amounted to an unconditional undertaking to perform in spite of the alleged impracticability of the sudden rise in utility costs from $0.52/sq. ft. at the time of negotiation to $1.43/sq. ft. in 1979. 529 F. Supp. at 826, 828 (utility costs below $1.10/sq. ft. were to be covered by the lessee). The district court disagreed, finding that a mere promise to pay utility costs in excess of $1.10/sq. ft.—in contrast to a warrant to do so—did not amount to an assumption of "all risks, known and unknown, associated with a particular kind of change of circumstance" and thus lessor still satisfied the third element. Id. at 826.

The court concluded that the lessor was nevertheless not discharged from the obligation to perform because it found that the price of $1.43/sq. ft. was not "beyond the universe in which these parties contracted" for the lease and its $1.10/sq. ft. utility cap. Id. at 829. Further, the court found that the burden of utility costs above $1.10/sq. ft., which represented just over 5% of the total consideration received by lessor under the lease for the relevant year, although possibly resulting in negative net cash flows, was not so excessive and unreasonable as to make failure to excuse the obligation a grave injustice. Id. at 830. Thus, lessor failed to establish either of the first two elements for commercial impracticability.

Similarly, the Delaware Court of Chancery has denied a motion to dismiss an action for declaratory relief of commercial impracticability on a lease agreement where the allegedly unforeseen event (faulty construction of a garage) was not among the enumerated events under which plaintiff agreed to perform notwithstanding any commercial impracticability, and where, in the absence of an order permitting plaintiff to terminate the lease representing less than 3% of the annual rents of the garage, lessor would have had to forgo 30-40% of total annual rents for the garage. J & G Assocs., 1989 WL 115216, at *2, *4-5.
District of Columbia

The District of Columbia’s courts account for some of the highest volume in per capita case filings every year, but they surprisingly have had few occasions to resolve disputes involving force majeure. They do recognize common law defenses of impossibility, interpreted as impracticability, and in rare instances, frustration of purpose.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Review of federal agency determinations

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

District of Columbia caselaw is sparse regarding disputes about the applicability of contractual force majeure provisions. The concept of a party raising a force majeure argument is not absent in the caselaw, but in those cases, resolution of whether the force majeure declaration was proper was not necessary by the courts. See, e.g., Janini v. Kuwait Univ., 43 F.3d 1534, 1537 (D.C. Cir. 1995) (explaining Kuwait terminated contract because of 1990 invasion by Iraq, but reasons for terminating contract were immaterial to court’s consideration of the commercial activity exception to sovereign immunity); Dome Petroleum Corp. v. Schlesinger, Civ. No. 79-139, 1979 WL 1006, at *2 (D.D.C. Feb. 2, 1979) (party claimed force majeure based on 1979 oil crisis leading Congress to pass the Emergency Petroleum Act); E. States Petroleum & Chem. Corp. v. Seaton, 165 F. Supp. 363, 367–69 (D.D.C. 1958) (basing force majeure argument on Voluntary Oil Import Program of 1959).

In order to be considered an event of force majeure, the event must be "of such character that it could not have been prevented or avoided by foresight or prudence." Whole Foods Mkt. Grp., Inc. v. Wical Ltd. P’ship, No. 1:17-cv-1079, 2019 WL 5395739, at *3 (D.D.C. Oct. 22, 2019) (citing Watts v. Smith, 226 A.2d 160, 162 (D.C. 1967)).

In a recent case, the U.S. District Court for the District of Columbia considered whether a rat infestation at a grocery store was an "act of God" beyond the control of the party attempting to excuse performance. Id. The court noted that a rat infestation could, under certain circumstances, "constitute an ‘act of God’ if it was truly a force of nature outside the control of the party claiming the benefit of the force majeure clause." Id. (explaining that intervening human factors could make an "act of God" legal defense unavailable) (citing Am. Nat’l Red Cross v. Vinton Roofing Co., 629 F. Supp. 2d 5, 9 (D.D.C. 2009)).

As is typical in most force majeure disputes, the court determined that the question of whether the rat infestation was beyond the control of the grocery store owner was a question of fact to be decided at trial. Id. at *5.

B. Review of federal agency determinations

The U.S. Court of Appeals for the District of Columbia Circuit’s experience with force majeure often arises in the context of appeals from administrative law cases involving federal agencies’ interpretations of force majeure issues. Generally, the court applies an arbitrary and capricious standard of review to the federal agency’s interpretation. See 5 USC. § 706(2)(A); see also Nat’l R.R. Passenger Corp. v. Interstate Commerce Comm’n, 610 F.2d 865, 877–79 (D.C. Cir. 1979) (“A [force majeure] provision governs the burden of costs that cannot be controlled by either party.”).

For example, in North Baja Pipeline, LLC v. FERC, a regulated natural gas pipeline proposed to share costs with gas shippers if a force majeure event interrupted its cross-country gas transport. 483 F.3d 819, 819–22 (D.C. Cir. 2007). In its shipment fee schedule, the pipeline included “scheduled maintenance” as an event of force majeure. Id. at 821. The Federal Energy
Regulatory Commission previously had issued guidance defining force majeure events as both uncontrollable and unexpected, but FERC disagreed with the pipeline’s inclusion of “scheduled maintenance” as a force majeure event. \textit{id}. In reaching its decision, FERC asserted that scheduled maintenance was an activity “over which [the pipeline] exercises a degree of control, unlike acts of God in typical force majeure situations.” \textit{id}. The court deferred to the agency, noting that FERC had applied a “reasonable definition of a force majeure event to the case before it.” \textit{id}; \textit{see also Columbia Gas Transmission Corp.} v. \textit{FERC}, 448 F.3d 382, 385 (D.C. Cir. 2006) (finding substantial evidence to affirm FERC’s rejection of a liquid natural gas supplier’s force majeure defense where the supplier could have “prevented or overcome [the event] by due diligence”).

**II. Common law remedies**

**A. Impossibility**


To invoke the impossibility of performance defense, “first, a contingency—something unexpected—must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable. Unless the court finds these three requirements satisfied, the plea of impossibility must fail.” \textit{Island Dev. Corp.} v. \textit{D.C.}, 933 A.2d 340, 350 (D.C. 2007) (citing \textit{Transatlantic Fin. Corp. v. US}, 363 F.2d 312, 315–16 (D.C. Cir. 1966)).

However, the doctrine of impossibility “will relieve a party of his obligations under a contract only in extreme circumstances.” \textit{id}; \textit{see also Transatlantic Fin. Corp.}, 363 F.2d at 315–16 (holding that the Suez Canal’s closure did not render a shipping contract impossible given the availability of an alternate route around the Cape of Good Hope). “It must be a real impossibility and not a mere inconvenience or unexpected difficulty.” \textit{Bergman}, 216 A.2d at 583.

The alleged impossibility must be beyond the non-performing party’s control. In \textit{Bergman v. Parker}, the appellant failed to secure the necessary building permits for a construction project and subsequently abandoned the project. 216 A.2d at 583. The District of Columbia government would not issue permits because the appellant failed to supply the required detailed specifications. \textit{id}. The appellant argued impossibility of performance as its defense to breach of contract, but the court disagreed. \textit{id}. The court explained “that the contract was not impossible of performance” because the permits could have been issued had the appellant modified its building plans. \textit{id}. In other words, it was within the appellant’s control to make modifications that would have led to the appellant obtaining the necessary building permits. \textit{id}

In \textit{Whelan v. Griffith Consumers Company}, a party was unable to deliver oil to its contractual counterparty’s farm because of heavy snow. 170 A.2d 229, 230 (D.C. 1961). In the first two attempts at delivery, no one was at the farm to accept delivery. \textit{id}. The third unsuccessful delivery attempt occurred in near blizzard conditions; despite adding skid chains to the truck, the party became trapped in the snow for six hours. \textit{id}. The trial court also found that the normal roadway to the farm was impassable due to snow drifts, precluding delivery. \textit{id}. The court accepted the impossibility defense, holding that, under the circumstances, the driver “was not required to take further risks, defy the elements, and plow into an impassable roadway.” \textit{id} at 231.

Consider \textit{Partridge v. Presley}, which involved a contract dispute related to the conversion of a single-family dwelling into a multi-family unit across the District of Columbia border in Maryland. 189 F.2d 645, 647–48 (D.C. Cir. 1951). The contract required the builder to obtain a dwelling conversion permit from the District of Columbia in order to complete the project. \textit{id}. In other words, the contract required a permit from the wrong jurisdiction, an “obvious impossibility.” \textit{id}. The applicable Maryland zoning regulations also forbade the contemplated conversion. \textit{id}.

The court explained that the contract contained “no express agreement on the part of [the builder] to assume the risk of performance, whether possible or not,” and that the impossibility of obtaining the District of Columbia permit was not her fault. \textit{id}. The court excused the builder “from the obligation of doing, and from liability for not doing, that which is made impossible by domestic law.” \textit{id} at 648.

**B. Frustration of purpose**

“Frustration of purpose is a defense to excuse performance on the basis of changed conditions that have rendered the performance worthless to one of the parties.” \textit{Island Dev. Corp.}, 933 A.2d at 352 (citing \textit{La Gloria Oil \\& Gas Co. v. US}, 72 Fed. Cl. 544, 573 (2006)). Under the frustration of purpose defense, “the promisor’s performance is excused because changed conditions have rendered the performance bargained from the promisee worthless, not because the promisor’s performance has become different or impracticable.” \textit{See id}. at 349.
To invoke the frustration of purpose defense in the District of Columbia, a party must demonstrate the following three elements: “First, the purpose that is frustrated must have been a principal purpose of that party in making 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. . . . 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.” *Id.* at 350 (citing Restatement of Contracts § 365).

### III. UCC provisions regarding excused performance

#### A. Demands for adequate assurances


For example, in *Design for Business Interiors*, a furniture supplier’s letter to the buyer “was not, as [the supplier] contends, a demand for adequate assurance of performance, but was instead an anticipatory repudiation.” *Id.* at 1111. The supplier’s letter “erroneously stated [the] amount owing, demanded immediate payment of that amount . . . and then took opportunity of [the buyer’s] supposed ‘delinquency’ to refuse to perform except on terms that altered contract significantly.” *Id.*

Instead of anticipatorily repudiating the contract, the court found that the supplier should have availed itself of its right to demand adequate assurances: “Rather than having a party guess or suppose that the other party is in breach, as [the supplier] did here, the UCC provides that the doubting party ask for and receive ‘assurance of performance’ prior to acting in a way that would constitute anticipatory repudiation.” *Id.* (citing Restatement (Second) of Contracts § 251, at 278).

#### B. Commercial impracticability

There is only one case in the District of Columbia relating to commercial impracticability under the UCC, and it applies Missouri law. In *Engel Industries, Inc. v. First American Bank*, the defendant cited President George Bush’s July 1990 Executive Order issuing sanctions on Iraqi assets in the United States as an event of force majeure, which triggered the defendant’s unilateral withdrawal from the contract (the contract related to the sale of Iraqi assets). 798 F. Supp. 9, 11 (D.D.C. 1992). The court concluded that the defendant’s withdrawal constituted an anticipatory breach of the contract. *Id.* at 12.

The non-performing party claimed commercial impracticability, but the court disagreed on the grounds that the doctrine did not apply because the party “never notified [the plaintiff] of the problem it believed the [sanctions] created, nor did it give [the plaintiff] an opportunity to modify the contract” as required by the Uniform Commercial Code. *Id.*

District of Columbia courts have recognized the concept of commercial impracticability in contexts apart from the sale of goods, and generally apply it in the same manner as the common law impossibility defense. In order “to establish commercial impracticability, a party must show (1) the unexpected occurrence of an intervening act; (2) the risk of the unexpected occurrence was not allocated by agreement or custom; and (3) the occurrence made performance impractical.” Nat’l Ass’n of Postmasters of the US v. Hyatt Regency Washington, 894 A.2d 471, 477 n. 5 (D.C. 2006); see also *Duffy v. Duffy*, 881 A.2d 630, 639 (D.C. 2005) (recognizing the doctrine of commercial impracticability in contracts).
Florida

Florida case precedent, although limited, makes clear that a party cannot excuse performance based on force majeure where the alleged event only impairs profitability but does not preclude performance. Florida courts will not require a party to attempt to overcome an event of force majeure unless the contract contains this requirement.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements
Florida has recognized force majeure and/or “act of God” defense at common law, which applies “only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.” See, e.g., Francis v. MSC Cruises, S.A., No. 18-61463-CIV, 2018 WL 4693526, at *1 (S.D. Fla. Sept. 27, 2018) (quoting Warrior & Gulf Navigation Co. v. United States, 864 F.2d 1550, 1553 (11th Cir. 1989)).

To broaden that protection against unforeseeable events, parties may address the possibility of such an event by including a force majeure provision in their contract. The scope of a force majeure clause may be enforced beyond the scope of events that would be sufficient to employ the common law impossibility doctrine under Florida law. See Home Devco/Tivoli Isles LLC v. Silver, 26 So. 3d 718, 722 (Fla. Dist. Ct. App. 2010).

A force majeure clause is “a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.” See ARHC NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC, No. 18-80712, 2019 WL 4694146, at *3 (S.D. Fla. Feb. 5, 2019) (citing Force Majeure, Black’s Law Dictionary 718 (9th ed. 2009)).

Force majeure provisions will only protect the parties to the contract. See Davken, Inc. v. City of Daytona Beach Shores, No. 6:04-CV-207-ORL-19, 2006 WL 2085454, at *1 (M.D. Fla. July 25, 2006) (explaining that a contractual force majeure provision will not insulate a governmental body from a Contracts Clause claim when the governmental body impairs that contract to which it is not a party).

There is a relative lack of Florida caselaw interpreting force majeure clauses in contracts. See ARHC NVWELFL01, 2019 WL 4694146, at *3 (“Precedent on the enforcement of force majeure clauses is limited in Florida.”).

In general, courts read the provisions as courts would read any other contract provision. When the language of a contract is clear and unambiguous, the parties’ intent is determined “from within the four corners of the document.” See Burns v. Barfield, 732 So.2d 1202, 1205 (Fla. Dist. Ct. App. 1999). In the absence of ambiguity, the language of the agreement itself is the best evidence of the parties’ intent. Id.; J.C. Penney Co. v. Koff, 345 So. 2d 732, 735 (Fla. Dist. Ct. App. 1977) (recognizing that courts are allowed to consider extrinsic evidence only when confronting an ambiguous contract provision).

Applying Florida law, a Wisconsin federal district court found that a force majeure provision that did not specifically detail all related rights or duties that a party has when a force majeure event occurs did not

The U.S. District Court for the Southern District of Florida explained that clauses typically are construed narrowly and will excuse a party’s nonperformance only if the contract specifically identifies the event that caused the party’s nonperformance. See ARHC NVWELFL01, 2019 WL 4694146, at *3.

Resolving disputes about force majeure defenses almost always will depend on resolving questions of fact. For example, a Florida federal district court explained, “the issue of whether there was a force majeure or Act of God that caused the incident is an issue of fact, which cannot be decided on a motion to strike.” Francis, 2018 WL 4693526, at *1. It is possible a court can resolve issues as a matter of law related to disputed force majeure defenses, “but the court must possess all the material facts prior to making that interpretation.” See Tire Kingdom, Inc. v. Waterbed City, Inc., 654 So. 2d 1005, 1006 ( Fla. Dist. Ct. App. 1995).

**B. Causation**

The alleged force majeure event must cause the non-performing party’s failure to perform to excuse performance. Where the event only impacts the profitability of a contract, but does not preclude performance, performance will not be excused. See, e.g., ARHC NVWELFL01, 2019 WL 4694146, at *4 (finding force majeure inapplicable because government policies, even if force majeure events, only impacted profitability of contract and did not preclude performance); Stein v. Paradigm Mirasol, LLC, 586 F.3d 849, 858 (11th Cir. 2009) (finding delays by subcontractors and mistaken assumptions about future events or worsening economic conditions not excused by force majeure catch-all language that included other events “beyond the seller’s control”).

Similarly, an interruption to the primary supply of a seller is not sufficient to excuse performance where other sources of supply are available. See Gulf Power Co. v. Coalsales II, LLC, 522 F. App’x 699, 703–04 (11th Cir. 2013) (contract contained provision that “economic conditions which may adversely affect the anticipated profitability” of mining operations would not be taken into consideration in excusing performance under the force majeure provision).

Florida courts have found force majeure defenses justified to excuse performance where, for example, purchased equipment’s design error prevented it from properly functioning, thus triggering the contract’s limitation of the non-performing party’s liability to a capped amount per day because of the presence of the force majeure event. See St. Joe Paper Co. v. State Dep’t of Envtl. Regulation, 371 So. 2d 178, 180 (Fla. Dist. Ct. App. 1979).

The specific language regarding causation will be critical. See, e.g., Cartan Tours, Inc. v. ESA Svcs., Inc., 833 So. 2d 873, (Fla. Dist. Ct. App. 2003) (finding force majeure provision that included “affecting the ability of the Olympic Games to be held” ambiguous and reasonably meaning either preventing the games altogether or simply affecting them).

**C. Mitigation/beyond a party’s control**

The presence of a force majeure clause does not render a contract’s obligations “illusory” as long as it limits exclusions to events beyond the control of the party rather than those within its discretion, an issue that has often come up in Florida for purposes of the Interstate Land Sales Full Disclosure Act. Stein, 586 F.3d at 858; Snively Siesta Assocs., LLC v. Senker, 34 So. 3d 813, 818 (Fla. Dist. Ct. App. 2010); Home Devco/Tivoli Isles LLC, 26 So. 3d at 722 (“So long as the force majeure clause limits exclusions to events beyond the control of the seller, and not within its discretion, the contract ‘obligates’ the seller to complete construction within the two-year period for purposes of the Act; the obligation is not illusory.”).

Parties in Florida can contract to allow for extra costs related to force majeure to be recoverable by the party incurring the costs, but there is no automatic obligation for a party to mitigate costs arising from or related to a force majeure event. See S&B/BIBB Hines PB 3 Joint Venture v. Progress Energy Fla., Inc., 365 F. App’x 202, 204–06 (11th Cir. 2010).

**II. Common law remedies**

**A. Impossibility**

A party in Florida may invoke the doctrine of impossibility “where the purposes, for which the contract was made, have, on one side, become impossible to perform.” Harvey v. Lake Buena Vista Resort, LLC, 306 F. App’x 471, 472–73 (11th Cir. 2009) (quoting Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc., 174 So. 2d 614, 617 (Fla. Dist. Ct. App. 1965)).

Unforeseeability of the risk is key to the impossibility doctrine. The U.S. District Court for the Middle District of Florida explained the defense should be employed “with great caution if the relevant business risk was foreseeable at the inception of the agreement and could have been the subject of an express provision of the agreement.” Orlando Utils. Comm’n v. Century Coal, LLC, No. 068-CV-1008-ORL31KRS, 2008 WL 4570270, at *2 (M.D. Fla. Oct. 14, 2008) (“Where performance of a contract becomes impossible after
the contract is executed, the promisor cannot invoke impossibility as a defense to performance if knowledge of the facts making performance impossible were available to the promisor.”).

By applying only to unforeseeable risks, the doctrine highlights that foreseeable risks not otherwise designated in the contract are considered to be assumed by the parties. \textit{Id.; see also Am. Aviation Inc. v. Aero-F Serv., Inc., 712 So. 2d 809, 810 (Fla. Dist. Ct. App. 1998); Shore Inv. Co. v. Hotel Trinidad, Inc., 29 So. 2d 696, 697 (Fla. 1947) ("[T]he dominant rule seems to be that where performance of a contract becomes impossible after it is executed, or if knowledge of the facts making performance impossible were available to the promisor, he cannot invoke them as a defense to performance.”).

\section*{B. Frustration of purpose}

Under Florida law, the frustration of purpose defense applies "where one of the parties finds that the purposes for which [it] 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." \textit{Orlando Utils. Comm’n, 2008 WL 4570270, at *2.}

Similar to the common law impossibility doctrine, businesses are expected to cover foreseeable risks in their contracts. The defense of frustration of purpose is not available for difficulties that are “basic business risks” unless substantial evidence establishes that risks were not foreseeable. \textit{See Sub-Zero Freezer Co., 2002 WL 32357103, at *5 (applying Florida law).}

Where, at the time the contract is made, a party’s principal purpose is substantially frustrated by a fact of which he has no reason to know and the nonexistence of which is a basic assumption on which the contract is made, there is no duty on that party to perform. \textit{See Pendleton v. Witcoski, 836 So. 2d 1025, 1028–29 (Fla. Dist. Ct. App. 2002) ("[I]t 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.")}.

\section*{III. UCC provisions regarding excused performance}

\subsection*{A. Demands for adequate assurances}

When a contract involves the sale of goods, the Florida Uniform Commercial Code provides that a merchant has the right to demand adequate assurance of performance when “reasonable grounds for insecurity arise with respect to the performance of” the other party. FLA. STAT. ANN. § 672.609(1). Once adequate assurances are requested, the other party must provide adequate assurance within a reasonable time, not exceeding thirty days, or the contract is repudiated. \textit{See Cafaro v. Zois, 693 F. App’x 810, 813 (11th Cir. 2017); Exim Brickell LLC v. PDVSA Servs. Inc., 516 F. App’x 742, 754–55 (11th Cir. 2013).}

The party demanding adequate assurances may, if commercially reasonable, suspend any performance until assurances are received. \textit{See Cafaro, 693 F. App’x at 813.}

This statutory ability to demand adequate assurances in the sale of goods context does not extend to other types of contracts unless the contracts (or another statute) specifically incorporate the right. \textit{See, e.g., Nova Bank v. Madison House Grp., No. CIV.A. 11-1291, 2011 WL 6028213, at *6 (D.N.J. Dec. 5, 2011) ("The Court has not identified any Florida cases, state or federal, that apply Florida law to require a party to provide adequate assurances where such assurances were not required by statute or the express terms of the contract. While it is true that Florida has established that failure to adequately assure after a justified request is a repudiation in the context of sales contracts, it has not done so with respect to other contracts."); Carolina Consulting Corp. v. Ajax Paving Indus., Inc. of Fla., 86 So. 3d 502, 504 (Fla. Dist. Ct. App. 2012) (declining opportunity to determine whether adequate assurance right exists for construction contracts because even if it did, party lacked a reasonable basis to demand assurances where project was secured by a payment bond).}

\subsection*{B. Commercial impracticability}

The Florida Uniform Commercial Code excuses delay or nondelivery when the agreed upon performance has been rendered "commercially impracticable" by an unforeseen supervening event not within the contemplation of the parties at the time the contract was entered. FLA. STAT. ANN. § 672.615.

The defense is available to the seller only if the seller has not "assumed a greater obligation" in the parties’ contract. \textit{See E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 988 (5th Cir. 1976).}
The comments to the Florida Uniform Commercial Code, consistent with other states’ adoption of the section, explain that “[i]ncreased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the “essential nature of the performance.” FLA. STAT. ANN. § 672.615 cmt. 4 (explaining as well that a collapse in the market is also not a justification because “that is exactly the type of business risk which business contracts at fixed prices are intended to cover”); see Orlando Utils. Comm’n, 2008 WL 4570270, at *2.

Courts applying Florida law have stated that commercial impracticability rarely excuses performance. See, e.g., Teco Coal Corp. v. Orlando Utils. Comm’n, No. 6:07-CV-444-KKC, 2010 WL 8750622, at *3–4 (E.D. Ky. Sept. 17, 2010) (“The parties have pointed to no case in which the court found the seller’s performance excused for commercial impracticability under Florida law.”).

Excusing performance based on commercial impracticability requires an unforeseeable failure of a pre-supposed condition, which was an underlying assumption of the contract, “the risk of which was not specifically allocated to the complaining party. The burden of proving each element of claimed commercial impracticability is on the party claiming excuse. These courts require the seller to prove that: 1) a contingency occurred; 2) the contingency made the seller’s performance impracticable, and 3) the non-occurrence of the contingency was a basic assumption on which the contract was made.” Id. at *5. If the contingency was foreseeable, then the seller presumably assumed the risk in the contract.
Georgia

Georgia courts have not resolved many disputes about contractual force majeure provisions but have recognized the concept of force majeure, or act of God, dating back to the mid-1800s. Georgia also recognizes the common law defense of impossibility.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation

II. Common law remedies
   A. Impossibility

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

Georgia law lacks significant clarity on the application of force majeure provisions. Courts sometimes refer to these events and clauses as covering “force majeure,” “act of God,” or “providential hindrance.”

An act of God under Georgia common law is defined as “[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado.” Elavon, Inc. v. Wachovia Bank, Nat’l Ass’n, 841 F. Supp. 2d 1298, 1306 (N.D. Ga. 2011) (quoting Black’s Law Dictionary (9th ed. 2009)).

The term “act of God,” as used in the legal sense, protecting a man against responsibility for nonperformance of contract, applies only to events in nature so extraordinary that history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. See Sampson v. Gen. Elec. Supply Corp., 50 S.E.2d 169 (Ga. Ct. App. 1948).

The “act of God” definition has remained consistent since before the Civil War. “By the act of God is meant any accident produced by physical causes which are irresistible, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death or illness. The act of God excludes all idea of human agency.” Cannon v. Hunt, 38 S.E. 983 (Ga. 1901) (quoting Fish v. Chapman, 2 Ga. 349 (1847)). “If by skill and labor the work can be done by man so as to resist the ordinary, or what may be called the extraordinary, floods which often occur, but at long intervals, and the work is carried away, it cannot be attributed to the act of God.” Id. (quoting Doster v. Brown, 25 Ga. 24, 26 (1858)).


The consequence of an act of God is that a party can only recover for what is done, not the full contract price. Doster, 25 Ga. at 26. But “a party may by absolute contract, bind himself to perform things which subsequently become impossibilities, or to pay for their nonperformance, and such construction is to be put upon an unqualified undertaking when the event which causes the impossibility might have been foreseen and guarded against, or when the impossibility arises from the act or default of the promisor.” Cannon, 38 S.E. at 983 (quoting Wallace v. Clayton, 42 Ga. 447 (1871)).

Where a force majeure event is foreseeable, it will not excuse performance unless the parties specifically contract otherwise. An appellate court in Macon Water Authority v. City of Forsyth, for example, found no merit in the contention that the trial court erred in failing to rule that “the Great Flood of 1994” constituted force majeure where the contract expressly anticipated the disruption and damage by flood and stated that a flood would only abate the performance of the contract for the period of the flood. 585 S.E.2d 131, 134 (Ga. Ct. App. 2003) (where the party seeking to nullify the contract appealed from the court’s order compelling arbitration); see also Holder Constr. Grp. v. Ga. Tech. Facilities, Inc., 640 S.E.2d 296, 298 (Ga. Ct. App. 2006) (allocating risk according to the force majeure clause).

The U.S. District Court for the Northern District of Georgia held that the “economic downturn of 2008 was not an ‘act of God’” in Elavon. 841 F. Supp. 2d at 1306. In that case, the court concluded that the non-performing party’s impossibility defense failed as a matter of law, regardless of the foreseeability of the financial debacle of 2008. Id. Neither did the
economic downturn of 2008 constitute a force majeure where the contract defined force majeure as "factors attributable to events reasonably beyond the control of the party obligated to perform, including, without limitation, war, armed conflict, acts of terrorism or other similar events, conditions or events of nature, civil disturbances, failures of telephone lines and equipment, computer hardware or software failures or fires." Id. at 1307–08.

Although the downturn itself was beyond the defendant's control, its decision to extend the contract at issue was well within its control. Id. Such downturn did not objectively prevent the bank from continuing to refer customers for merchant processing to the plaintiff as it was contractually obligated. Id. Therefore, the court granted summary judgment in favor of the plaintiff on the defendant's force majeure defense. Id.

When the Georgia Supreme Court was faced with a contract to do certain work unless "providentially hindered," it explained that those words have "a strict legal significance" and are "wholly unambiguous." Day v. Jeffords, 29 S.E. 591 (Ga. 1897). The words "providentially hindered" include such acts only as may be attributed to the act of God, and not to mere unavoidable causes, such as from an accident resulting from and attributable to human conduct. Id. Parties will be presumed to have contracted with reference to the strict legal significance rather than with their own understanding or even their "conventional" meaning. Id. Thus, the breaking of machinery did not constitute a providential hindrance, and the court affirmed the trial court's directed verdict in favor of the plaintiff. Id.

The Second World War, which caused a labor shortage and prevented a purchaser from removing timber within the contract period, was not an "act of God" or an "unforeseen casualty" such as to authorize the extension of time for the removal of timber. See Felder v. Oldham, 35 S.E.2d 497 (Ga. 1945).

Relatedly, the court in Tallman Pools of Georgia, Inc. v. Fellner examined a contract to build a backyard swimming pool between specified dates, "weather permitting." 288 S.E.2d 46, 47 (Ga. Ct. App. 1981). The trial court instructed the jury that if it found time was of the essence of the contract, it was entitled to regard the party who failed to comply with the time limitation as having breached the contract. The Court of Appeals reversed, explaining that if time was of the essence of the contract, the contractual provision conditioning the completion time as "weather permitting" was so much a part of the essence as to require the plaintiff to show not only that the contractor did not complete the project by the specified date but that the weather permitted such completion. Id. The contractor argued on appeal that the trial court should have charged the defenses of impossibility of performance and act of God. Id. at 48–49.

B. Causation

The force majeure clause in Camafel Building Inspections, Inc. v. Bellsouth Advertising & Publishing Corp. provided that the defendant "shall not be held responsible for any delay or failure in performance of any part of this [a]greement to the extent that such delay or failure is caused by . . . [an] act of God, or other similar causes beyond [the defendant's] control." No. 1:06-cv-1501, 2007 WL 647288, at *4 (N.D. Ga. Feb. 27, 2007). The defendant argued that any delays in publication of the Yellow Pages resulted from Hurricane Wilma, described in the plaintiff's own complaint as an act of God. Id. But, read in the light most favorable to the plaintiffs on a motion for judgment on the pleadings, the plaintiffs had alleged not that the hurricane caused the defendant's breach but that it merely exacerbated it. Id. And though the force majeure clause protected the defendant from liability, it did not entitle it to payment by the plaintiffs in spite of its nonperformance. Id.

II. Common law remedies

A. Impossibility

Georgia also recognizes the common law defense of impossibility of performance. Georgia courts have applied the defense as follows: "[i]mpossibility of performance by providential cause cannot, under the terms of our law, be urged as a defense or excuse for nonperformance when the impossibility might have been avoided by the promisor by proper diligence." Cannon, 38 S.E. at 986–87. That same interpretation is essentially codified by statute, which sets forth that impossibility resulting from an act of God excuses nonperformance except where it may have been avoided by the promisor. GA. CODE ANN. § 13-4-21. Under Georgia law, impossibility functions as the equivalent of performance only when set up as a defense. See R. C. Craig Ltd. v. Ships of Sea Inc., 345 F. Supp. 1066, 1075 (S.D. Ga. 1972).

Applying this doctrine, the Georgia Supreme Court held that impossibility did not excuse performance in Cannon v. Hunt. 38 S.E. at 986–87. In that case, a party had from June 8 to December 1 to complete work that could have been completed in three months. Id. The unsympathetic court held that by waiting several months to commence work, the party took the risk that providential causes might prevent its performance and thus found no error in the trial court's instruction to the jury that if the contractor
commenced the work in time to have it completed within the limit had the season been an ordinary one then it would have been excused from nonperformance. *Id.*

“If one ‘contracts to perform covenants that are impossible, not because of an act of God or the conduct of a party, the failure to perform . . . is as fatal to a plaintiff’s right to recover as a breach of contract for any other reason.’ *Peach State Meat Co. v. Excel Corp.*, 860 F. Supp. 849, 852 (M.D. Ga. 1994) (quoting *Friedman v. Goodman*, 151 S.E.2d 455, 459 (Ga. 1966)).


### III. UCC provisions regarding excused performance

#### A. Demands for adequate assurances

Georgia law recognizes the UCC concept to demand adequate assurances from a counterparty when reasonable grounds for insecurity exist about the counterparty’s ability to perform. GA. CODE ANN. § 11-2-609. If the counterparty does not provide assurances within a reasonable time (not to exceed 30 days), then the counterparty is considered to have repudiated the contract. *Id.*

Having reasonable grounds for insecurity is something less than knowing the counterparty has actually materially breached the agreement. *See Spears Mattress Co., Inc. v. Innovative Mattress Solutions, LLC*, No. 4:15-cv-48, 2016 WL 1154408, at *28 (N.D. Ga. Mar. 1, 2016) (quoting *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 205 F. Supp. 2d 324, 330 (D.N.J. 2002)) (“[A] party need not wait for an actual material breach to demand assurances; it need only show that it reasonably believed that such an event might be in the offing.”). “Any facts which should indicate to a reasonable merchant that the promised performance might not be forthcoming when due should be considered reasonable grounds for insecurity.” *Id.*

Generally, that determination is a question of fact. In *SPS Industries, Inc. v. Atlantic Steel Co.*, evidence that the seller missed the first of three delivery dates over a six-month period did not support a finding as a matter of law that the buyer had reasonable grounds for insecurity, so as to have grounds for demanding adequate assurance of due performance, ten days after seller had missed first delivery. 366 S.E.2d 410, 411, 413–14 (Ga. Ct. App. 1988). There was a genuine issue of material fact as to whether the defendant had reasonable grounds for insecurity. *Id.*

In *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*, the Eleventh Circuit ruled that the district court was justified in declining to rule as a matter of law that an email referring to “a production issue” was not a demand for adequate assurance. 615 F.3d 1352, 1363–64 (11th Cir. 2010) (applying Georgia law). Similarly, the Georgia Court of Appeals in *SPS Industries* declined to rule that a letter demanding information on a defective product constituted as a matter of law a demand for adequate assurances, instead characterizing it as “nothing more than a request for information.” 366 S.E.2d at 411, 413–14. And, a request for a party to sign financial statements was not a demand of adequate assurance in *Automated Energy Sys., Inc. v. Fibers & Fabrics of Ga., Inc.*, 298 S.E.2d 328, 329–30 (Ga. Ct. App. 1982).

“Assurances are adequate when they would instill in a reasonable merchant a sense of reliance that the promised performance will be forthcoming when due.” *Spears Mattress*, 2016 WL 1154408, at *28. In *Spears Mattress*, the court found a genuine issue of material fact regarding whether the bedding manufacturer’s assurance to the retailer was adequate. The retailer had requested adequate assurance by requesting “all known instances of situations in which products were shipped to [the defendant retailer] which were not in fact manufactured in accordance with prior agreed-to product specifications,” and “adequate specific assurance that this practice will not be repeated with respect to future orders.”

The party arguing that it had made a demand for adequate assurance had communicated that it “appear[ed] to be that [the bedding manufacturer] was making the products with whatever materials happen[ed] to be on hand . . . at the time [the] order [wa]s manufactured” and had sent a lengthy series of letters detailing its concerns and insecurity regarding the quality of the mattresses. *Id.* at *15–17. The court held that there was a genuine issue of material fact as to whether the plaintiff had provided adequate assurance after it made some attempt to respond to the defendant’s demand for them within the thirty day period. The defendant had continued accepting goods for at least some time after the time it alleged the plaintiff had failed to give adequate assurance. *Id.*

There was also a genuine issue of material fact regarding whether the defendant was entitled to suspend performance while awaiting adequate assurance. *Id.*

#### B. Commercial impracticability

Georgia recognizes the UCC-based defense of commercial impracticability in the sale of goods context. GA. CODE ANN. § 11-2-615.
“[T]he fact that the contingency was contemplated by the parties indicates either that the seller assumed liability therefor or that by definition it was not an excusing contingency within [the statute].” Swift Textiles Inc. v. Lawson, 210 S.E.2d 167, 170 (Ga. Ct. App. 1975).

Impracticability is measured by an objective standard, focusing on “the reasonableness of the expenditure at issue, not upon the ability of a party to pay the commercially unreasonable expense.” Alimenta (U.S.A.), Inc. v. Gibbs Nathaniel (Canada) Ltd., 802 F.2d 1362, 1364–66 (11th Cir. 1986). Thus, the analysis focuses upon the nature of the agreement and the expectation of the parties, not the size and financial ability of the parties. Alimenta (U.S.A.), Inc. v. Cargill, Inc., 861 F.2d 650, 652 (11th Cir. 1988).

The buyer in Cargill argued that it was error to exclude evidence of the peanut supplier’s size because its size and financial resources were relevant to the issue of commercial impracticability. But the court rejected the argument, holding that evidence of the supplier’s grain elevators in Minnesota and barges on the Mississippi River was irrelevant to the contract issue. Id. Nor did its net sales and net worth have any relevance to the reasonableness of its decision to allocate the production of peanuts. Id. at 652–53.

In order for a seller to assume a greater obligation, the contract must contain an affirmative provision that the seller will perform the contract even though contingencies occur. Gold Kist, Inc. v. Stokes, 226 S.E.2d 268, 270–71 (Ga. Ct. App. 1976). In order to be excepted or exempted from the rule of allocation otherwise applicable to a contract of sale, that contract must contain an affirmative provision that the seller will perform the contract even though the contingencies that permit allocation might occur. Mansfield Propane Gas Co., Inc. v. Folger Gas Co., 204 S.E.2d 625, 627–28 (Ga. 1974).

In the absence of an affirmative provision, the seller in Gibbs was entitled to allocate its partial supply if it could satisfy the jury by a preponderance of the evidence that the occurrence of the contingency (in that case, drought) was not reasonably foreseeable when the contracts were entered into and that performance as agreed was made impractical thereby. 802 F.2d at 1364–66.
Hawaii

Courts applying Hawaii law have declined to find that economic or market conditions constitute force majeure events unless the parties specifically include them within force majeure provisions. Hawaii recognizes common law impossibility or impracticability of performance as a defense to nonperformance.

The key cases are broken down as follows:

I. Contractual force majeure provisions
II. Common law remedies
   A. Impossibility
III. UCC provisions regarding excused performance

In the case, the party hosting a conference claimed that only 150 of 500 potential rooms had been booked, and that only 38 companies were planning to attend compared to 102 the prior year. Id. at 1223. The court explained that although economically inadvisable to proceed with the conference, “a force majeure clause does not excuse performance for economic inadvisability, even when the economic conditions are a product of a force majeure event.” Id. at 1223–24 (citing Butler v. Nepple, 354 P.2d 239, 244–45 (Cal. 1960); Linder v. Meadow Gold Dairies, Inc., 515 F. Supp. 2d 1154, 1162 (D. Haw. 2007) (holding that financial hardships under commercial lease were “the hallmarks of the risks of a business, not an excuse for breach of contract”).

The party seeking to excuse performance cited evidence and expert testimony indicating that many Americans believed travel was inadvisable, but the court stated that this was subjective opinion and “not whether there were objective threats to travel to Maui in February 2002 sufficient to make performance under the Agreement ‘inadvisable.’” OWBR LLC, 266 F. Supp. 2d 1225; see id. at 1224 (also questioning whether concern of future acts of terrorism could be events of force majeure given present times could essentially render all contracts meaningless if the case).

The court did explain, however, that the parties could have crafted the force majeure clause to excuse performance on the basis of poor economic conditions, lower than expected attendance numbers, or withdrawal of commitments from sponsors or participants. Id. at 1224. In some force majeure provisions, financial or economic considerations...

Many force majeure provisions also require the party invoking the provision to meet certain notice requirements. See, e.g., United States v. Pflueger, No. 06-cv-140, 2007 WL 1876028, at *2–3 (D. Haw. June 27, 2007) (finding party failed to adhere to notice requirements in declaring force majeure under consent decree, which precluded party from being able to rely on such defense).

Other than the aforementioned cases, Hawaii state and federal courts have not resolved force majeure disputes other than on the periphery. See, e.g., United States ex rel. Atlas Copco Compressors LLC v. RWT LLC, No. 16-cv-215, 2017 WL 2884086, at *4 (D. Haw. July 13, 2017) (certifying interlocutory appeal to Ninth Circuit on whether force majeure provision in purchase order constituted a waiver of Miller Act rights; case resolved prior to decision at the Ninth Circuit).

II. Common law remedies

A. Impossibility

The performance of a contract is excused based on impossibility only when, because of an unforeseeable occurrence, performance becomes impossible and the risk of such occurrence has not been allocated by the parties. Waikiki Trader Corp., 2010 WL 11530615, at *10–11.

Where performance becomes impracticable, performance will be excused. Pflueger, 2007 WL 1876028, at *3–4 (excusing performance where impracticable because of unforeseen inability to obtain necessary surety bond, which was a condition precedent necessary to the remediation work that was the primary purpose of a consent decree).

Where the contingency was foreseeable, performance will not be excused. See Harris v. Waikane Corp., 484 F. Supp. 372, 380 (D. Haw. 1980) (rejecting defense where party made contract warranting it could deliver yacht where party was only an agent for an owner); Bates v. Prendergast, 1 Haw. 522, 527 (Haw. 1856) (occurrence of contingencies that should have been foreseen do not provide for a defense to breach of contract); Warner v. Denis, 933 P.2d 1372, 1381–82 (Haw. Ct. App. 1997) (finding seller’s performance not excused by wife’s refusal to join in conveyance given he knew he would need wife’s consent in order to convey marketable title at time he entered into contract); Farrow v. Sunra Coffee, LLC, No. 05-cv-715, 2006 WL 2884086, at *7–8 (D. Haw. Oct. 6, 2006) (rejecting defense where failure to obtain necessary approvals to make sale was foreseeable).

III. UCC provisions regarding excused performance

Hawaii courts have not had reason to examine in detail the state’s statutes providing for the right to demand adequate assurances, HAW. REV. STAT. § 490:2-609, or the defense of commercial impracticability, HAW. REV. STAT. § 490:2-615.

One case applied the demand for adequate assurances to the sale of land context even though the statute only provides for it to apply to the sale of goods context. See Romig v. deVallance, 637 P.2d 1147, 1152 (Haw. Ct. App. 1981) (determining unresolved factual questions pertaining to whether buyer had reasonable grounds for insecurity with respect to seller’s ability to perform sufficient to justify demand adequate assurances).
Courts applying Idaho law have required force majeure events to be unforeseeable. Idaho recognizes the common law defenses of impossibility of performance, construed as impracticability, and frustration of purpose.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions
A. General requirements
Courts applying Idaho law have explained that force majeure events, by their very nature, must be unforeseeable to some extent at the time of contracting. See Roost Project, LLC v. Andersen Constr. Co., No. 1:18-cv-238, 2020 WL 560574, at *7–8 (D. Idaho Feb. 4, 2020). Even where a contract does not use the word “foreseeability,” courts applying Idaho law consider that element when determining whether the event qualifies as an event of force majeure. See id. (citing Burns Concrete, Inc. v. Teton County, 384 P.3d 364, 367–68 (Idaho 2016)).

In Burns, the Supreme Court of Idaho found that a parties’ force majeure provision was broad enough to excuse a developer’s performance in a contract with an Idaho county based on the developer’s failure to obtain zoning approval to construct a cement plant. 384 P.3d at 365–68. The parties’ agreement required the cement plant to be constructed within eighteen months, but contained a force majeure clause excusing compliance with that timeframe ‘subject to delays resulting from weather, strikes, shortage of steel or manufacturing equipment or any other act of force majeure or action beyond [the developer’s] control.’ Id. at 366.

The court concluded that the failure of the county to give zoning approval for building a 75-foot high permanent facility was not reasonably foreseeable because the agreement required the developer to construct a permanent facility that was 75-feet high. Id. at 367. In other words, “[i]t would not be foreseeable that the County would require the Developer to build a facility 75 feet in height and then prevent the Developer from doing so.” Id. The court construed the specific force majeure clause’s catch-all phrase not to be limited to the types of specific events mentioned. Id. (“[T]he clause then states, ‘or action beyond Developer’s control.’ That shows that the ‘action beyond Developer’s control’ was something other than the type of acts that were previously mentioned in the clause as being an act of force majeure.”).

Force majeure coverage issues generally involve questions of fact. Idaho Power Co. v. Cogeneration, Inc., 921 P.2d 746, 749 (Idaho 1996) (determining that party should be entitled to litigate whether event of force majeure based on Idaho Public Utilities Commission ruling protected it from default in posting second security installment); Roost Project, 2020 WL 560574, at *8 (finding material facts in dispute as to whether the winter weather or labor shortage were foreseeable, whether they were within the party’s reasonable control, and whether either caused the project delays in question); Idaho Power Co. v. New Energy Two, LLC, 328 P.3d 442, 444 (Idaho 2014) (finding parties’ agreement provided for Public Utilities Commission to resolve force majeure dispute).

B. Notice
Force majeure provisions often contain notice requirements that a party seeking to invoke the provision must follow. See, e.g., Afton Energy, Inc. v. Idaho Power Co., 834 P.2d 850, 855 (Idaho 1992) (rejecting party’s assertion that it invoked force majeure provision because it failed to comply with contractual notice requirements).
Whether a party complied with a force majeure provision’s notice requirement is a question of fact. See Roost Project, 2020 WL 560574, at *8–9 (concluding whether party complied with notice provision or whether counterparty waived its right to notice were disputed questions of fact).

II. Common law remedies

A. Impossibility

The doctrine of impossibility excuses performance when the bargained-for performance is no longer capable based on an unforeseen, supervening act. See Haessly v. Safeco Title Ins. Co. of Idaho, 825 P.2d 1119, 1121 (Idaho 1992); see also Twin Harbors Lumber Co. v. Carrico, 442 P.2d 753, 758–59 (Idaho 1968) (rejecting impossibility defense). To prove impossibility, three elements are required: (1) a contingency must occur; (2) performance must be impossible, not just more difficult or expensive; and (3) the non-occurrence of the contingency must be a basic assumption of the parties’ agreement. Id. (citing Olsen v. Spitzer, 257 N.W.2d 459 (S.D. 1977)).

Idaho’s highest court has stated that the question of whether the doctrine of impossibility, construed as impracticability, applies is a mixed issue of law and fact. See City of Boise v. Bench Sewer Dist., 773 P.2d 642, 646 (Idaho 1989); Haessly, 825 P.2d at 1122 (finding genuine issue of material fact on impossibility defense).

That court has explained, “a contract embodies the choice of a planned future over the risk that subsequent events may cause the plan to become undesirable for one of the parties.” City of Boise, 773 P.2d at 647. The court continued, “The law generally enforces such choices because, even though a particular agreement may prove to be improvident, contracts as a whole benefit society by contributing to the rational ordering of human affairs.” Id. “Equity will not intervene unless a contract is unlawful, violates public policy, or produces unconscionable harm (where the doctrine of unconscionability applies. . . . It is not sufficient that the contract produces a suboptimal or insufficient result, viewed in hindsight.” Id. (citation omitted) (finding contract to be enforceable).

B. Frustration of purpose

Idaho courts also have recognized frustration of purpose as a defense to contract performance. “The frustration principle operates in a proper situation to excuse a promisor’s duty of performance if some supervening event has destroyed the value of the counter-performance bargained for by the promisor, even though the counter-performance is still literally possible.” Mitchell v. Leed HR, LLC, No. 2:14-cv-26, 2015 WL 1611447, at *3 (D. Idaho Apr. 10, 2015) (quoting Twin Harbors, 442 P.2d at 758). The supervening event must be unforeseen and its non-occurrence a “basic assumption on which the contract was made.” Id. (quoting Restatement (Second) of Contracts § 265); AES New Creek, LLC v. Exergy Dev. Grp. of Idaho, LLC, No. 1:12-cv-433, 2014 WL 12597906, at *5–6 (D. Idaho Aug. 18, 2014) (applying New York law and finding defense of frustration unavailable where possible negative changes to PURPA contracts in Idaho were foreseeable based on prior notice by Public Utilities Commission).

The defense is not available to excuse performance merely where the transaction has become less profitable. See Mitchell, 2015 WL 1611447, at *4 (rejecting defense).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Idaho recognizes the UCC-based remedy of demanding adequate assurances from a counterparty when reasonable grounds about the counterparty’s ability to perform exist. IDAHO CODE § 28-2-609.

Determining whether a party has reasonable grounds for insecurity about its counterparty’s ability to perform, and whether a party correctly demanded adequate assurances, are questions of fact generally not appropriate for summary judgment. See, e.g., Four Rivers Packing Co. v. Froerer Farms, Inc., No. 07-cv-240, 2008 WL 11348498, at *4 (D. Idaho Dec. 30, 2008) (denying summary judgment where disputed factual issue about whether party properly sought adequate assurances); Good v. Harry’s Dairy, LLC, No. 46350, 2020 WL 1846851, at *7 (Idaho Apr. 13, 2020) (reversing lower court’s grant of summary judgment finding party’s cessation of hauling hay was breach of contract given jury could have found that the party’s conduct could be excused if, for among other potential reasons, a commercially reasonable suspension of performance pending adequate assurances).

B. Commercial impracticability

Idaho recognizes the UCC-based defense of commercial impracticability in the sale of goods context. IDAHO CODE § 28-2-615. Idaho courts have adopted the commentary to the section that applies it to buyers as well as to sellers. See Lawrence v. Elmore Bean Warehouse, Inc., 702 P.2d 930, 932 (Idaho Ct. App. 1985).
To prevail under this defense, a party must prove that performance was impracticable by (1) the occurrence of a contingency; (2) the nonoccurrence of which was a basic assumption on which the contract was made; and (3) by which occurrence further performance has become commercially impracticable. \textit{Id.} Changing market conditions will rarely qualify as a basis for the defense given their general foreseeability. \textit{Id.} ("Shifting and changing market conditions appear to be the norm of the business world.").

For example, the Idaho Court of Appeals rejected the defense where the buyer of pinto beans attempted to prove that paying its fixed contract price would drive it into bankruptcy, but could not establish this point with evidence. \textit{Id.} at 932–33. The court explained, "The tough stance we are taking in this case is in view of the fact that virtually all contracts which are based upon a fixed price could be subject to modification if a change in the market price would occur." \textit{Id.} at 933 ("Interpreting the law as appellant suggests would invite countless suits by speculators in the market as well as by persons merely disappointed in their bargains. Few contractual agreements would be secure.").

If a seller has part of its supply available but the rest of the supply is affected by the unforeseen contingency, Idaho law requires the allocation of the partial supply in a fair and reasonable manner. IDAHO CODE § 28-2-615; see \textit{Harvey v. Fearless Farris Wholesale, Inc.}, 589 F.2d 451, 458 (9th Cir. 1979) (applying Idaho law and affirming district court that defense of commercial impracticability was inapplicable where parties did not have an enforceable contract for sale of gasoline).
Illinois

Courts applying Illinois law will not read common law concepts into contractual force majeure provisions unless the provisions are mere boilerplate. For any events falling within generic catch-all language such as “other events beyond the parties’ control,” the events need to be similar to specifically defined events and be unforeseeable. Notably, one court applying Illinois law has excused a party’s payment of rent, at least in part, based on a COVID-19-related executive order preventing on-site dining.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability
   E. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

Courts applying Illinois law have started discussions about force majeure provisions with the basic definition of force majeure from Black’s Law Dictionary: “An 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).” See Stepnicka v. Grant Park 2 LLC, No. 1-11-3229, 2013 WL 3213061, at *2 n.2 (Ill. App. Ct. June 21, 2013) (quoting Black’s Law Dictionary 718 (9th ed. 2009)).

Where parties merely recite the phrase “force majeure” or include a standard, boilerplate catch-all force majeure provision, courts will apply a body of common law to interpret the terms that is largely indistinguishable from the common law doctrine of impossibility or impracticability. See Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs., 731 F. Supp. 850, 855–56 (N.D. Ill. 1990) (applying New York law but courts applying Illinois law have not suggested otherwise). But where the parties spell out the specific circumstances that excuse nonperformance, courts will not read common law concepts into the contract.


Where general catch-all language such as “other causes beyond the reasonable control of” the parties follows a list of specifically defined events, Illinois courts will construe the events capable of being covered by that catch-all language as being similar to those specifically listed. See Stepnicka, 2013 WL 3213061, at *15 (applying ejusdem generis to affirm trial judge’s conclusion that groundwater delays were not covered by the force majeure provision’s catch-all language because they were unlike the other causes of delay specifically covered by the parties’ clause).

The party asserting that an event of force majeure excuses performance bears the burden of proving it. See, e.g., Wis. Cent., Ltd. v. TiEnergy, LLC, No. 15-C-2489, 2017 WL 1427065, at *7 (N.D. Ill. Apr. 21, 2017) (finding party asserting that weather conditions triggered force majeure event failed to prove it with any evidence).

Generally, when a force majeure event exists, parties’ contracts allow the party suffering the force majeure to cease performance upon notice to its counterparty until the event no longer prevents performance. See,
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e.g., Cent. Ill. Pub. Serv. Co. v. Atlas Minerals, Inc., 965 F. Supp. 1162, 1166 (C.D. Ill. 1997) (reviewing whether party’s obligations were suspended after party declared force majeure based on severe mining difficulties); Glen Hollow P’ship v. Wal-Mart Stores, Inc., No. 97-1433, 1998 WL 84144, at *3 (7th Cir. 1998) (“Where the circumstances giving rise to the impossibility cease to exist, a party is entitled to an appropriate extension of time for performance.”).

Resolution of disputes about whether force majeure should excuse contractual nonperformance generally resolve on disputed factual questions. See, e.g., Veath v. Specialty Grains, Inc., 546 N.E.2d 1005, 1012 (Ill. App. Ct. 1989) (explaining appellate court would not disturb trial judge’s factual findings where evidence supported that party was excused by force majeure provision from delivering the total 15,000 bushels of white waxy corn due to weather conditions); Gen. Atomic Co. v. Commonwealth Edison Co., 346 N.E.2d 437, 440 (Ill. App. Ct. 1976) (finding question as to whether plaintiff properly exercised force majeure clause to be dispute arising from contract and subject to resolution in arbitration based on parties’ contract).

B. Causation
The alleged force majeure event must be responsible for preventing the party seeking to excuse performance from performing (the specific causation requirement—prevent, hinder, impair, etc.—will come from the parties’ contractual language). See Glen Hollow P’ship, 1998 WL 84144, at *2; Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245, 256 (N.D. Ill. 1974) (applying Michigan law but applying the fundamental principle that the alleged force majeure event—a series of explosions—could not serve as a defense because it did not in any way affect the party’s contractual failure to meet its supply obligations).

In other words, under Illinois law, “a force majeure clause will only excuse contractual performance if the triggering event cited by the nonperforming party was in fact the proximate cause of that party’s nonperformance.” In re Hitz, 2020 WL 2924523, at *2.

In Glen Hollow Partnership, for example, the Seventh Circuit reversed a jury’s determination that a party’s failure to perform was excused. The parties’ agreement required a contractor to begin construction by a certain date, unless the delay was “caused” by governmental regulations, civil riot, or severe weather conditions. Id. at *3. The Seventh Circuit explained that “any delay in beginning construction must be both directly and proximately caused by the zoning delays.” Id.; see also N. Ill. Gas Co. v. Energy Coop Inc., 461 N.E.2d 1049, 1057–58 (Ill. App. Ct. 1984) (explaining delay in performing contractual duty must be proximately caused by event contemplated by force majeure provision).

The court found that the contractor’s delay was not caused by governmental regulations, but by its inability to obtain financing. Glen Hollow P’ship, 1998 WL 84144, at *4. The court explained, “While this excuse may seem reasonable, it was not a legitimate excuse under the contract.” Id. (“The evidence cited instead points to financial problems with the partnership—problems that certainly can cause unfortunate delays, but problems not absolved by any terms of the contract.”). The court remanded the case for a new trial to determine if the delay in obtaining financing was proximately caused by the zoning issues. Id. at *5.

In Northern Illinois Gas Co., an Illinois appellate court examined whether an Interstate Commerce Commission rate order prevented a public utility from performing a 10-year agreement for its purchase of naphtha for its supplemental natural gas plant based on the parties’ force majeure provision. 461 N.E. 2d at 1053. The court concluded that the rate order, which simply denied the utility’s request for a rate increase, did not do anything that was directly relevant or material to the utility’s performance of its contract. Id. at 1057.

The court reasoned that because the utility could not increase its rates, it made the business decision to curtail supplemental natural gas production and terminated its most expensive contract to buy naphtha. Id. The court explained, “By this we do not mean to say that in order to constitute a force majeure event, an ICC order or other utility regulation must specifically direct a party to breach an obligation. What is required is that the order clearly direct or prohibit an act which proximately causes nonperformance or breach of contract.” Id.

Of particular note is a recent decision by the Bankruptcy Court for the U.S. District Court for the Northern District of Illinois that applied Illinois law to a dispute about whether a restaurant group could be excused from paying rent by the Governor’s COVID-19-related orders prohibiting the offering of “on-premises” consumption of food and beverages. In re Hitz, 2020 WL 2924523, at *1–2. The court reasoned that performance of future rent payments while the Governor’s order was in place constituted an event of force majeure under the parties’ clause because it was “governmental action” and an “order” as contemplated by the parties’ agreement that “hindered” (the parties’ causation requirement) the ability to perform. Id. at *2–3 (rejecting as “specious” the counterparty’s argument that Governor’s order did not shut down banks or post offices and thus did not prevent rent payments from being made).

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The court also rejected the counterparty’s argument that the debtor could not pay rent because of a lack of money and not because of the Governor’s order. Id. at *3 & n.2. The court also rejected the counterparty’s argument that the debtor could have applied for an SBA PPP loan to get the money necessary to pay rent on the grounds that the contract did not require such mitigation efforts. Id. at *3 (“Nothing in that clause requires the party adversely affected by governmental action or orders to borrow money to counteract their effects.”). Although excusing partial performance of payment of rent, the court explained that because the Governor’s order still allowed Illinois restaurants to conduct carry-out, curbside, and delivery services, the rent obligation would need to be excused only in proportion to the restaurant group’s reduced ability to generate revenue due to the order. Id. at *3–4 (concluding that, at minimum, the restaurant group would still owe 25% of rent going forward).

C. Mitigation/beyond a party’s control
An Illinois federal court, applying New York law, has commented that the duty of “continuing diligence” to remove an obstacle to perform “is not a duty to exert heroic efforts to change laws, regulations, or policies of general applicability.” Commonwealth Edison Co., 731 F. Supp. at 860 (citing Glickman v. Coakley, 488 N.E.2d 906, 912 (Ohio Ct. App. 1984)). For example, seeking a variance from a zoning ordinance may well be within the scope of a party’s duty to overcome a force majeure impediment, “[b]ut to oppose the highest governmental authorities, no.” Id. at 859–63 (providing extensive analysis of the policy reasons behind such reasoning).

D. Foreseeability
The U.S. District Court for the Northern District of Illinois considered the requirement for force majeure provisions to only apply to unforeseeable events in United States v. Moore Am. Graphics, Inc., No. 84-c-6547, 1989 WL 81799, at *6–7 (N.D. Ill. July 10, 1989). The court, examining the force majeure clause in the context of consent decrees with the federal government, collected cases from other jurisdictions to opine that its research revealed a split in authority on the subject of whether force majeure clauses are intended only to reach unforeseeable events. Id. at *6.

The court explained the question really focused on the contractual allocation of risk. Id. at *7. Parties can protect themselves from events likely to prevent performance even when the parties are unaware of when those events may actually occur. Id. They do so to avoid mere reliance on the common law doctrine of impossibility that excuses performance only in those rare circumstances such as earthquakes, wars, or acts of God. Id. The court concluded that any non-specific catch-all language could only include unforeseeable events whereas anything foreseeable could have been addressed specifically in the contract. Id.; see also Ner Tamid Congregation of N. Town v. Krivoruchko, 638 F. Supp. 2d 913, 928 (N.D. Ill. 2009) (“It is precisely because inability to obtain financing is a foreseeable (and significant) risk that can be readily guarded against in the parties’ agreement that financing contingency provisions are common in both commercial and residential real estate contracts.”).

E. Notice
Force majeure provisions often contain notice requirements that parties must follow when trying to invoke the provision to excuse performance. If a party does not follow the technical notice requirements, however, a court may find that the party’s failure to rely on the force majeure provision may not be waived if its counterparty was kept informed about the party’s potential failure to perform. See, e.g., Moore Am. Graphics, Inc., 1989 WL 81799, at *6.

II. Common law remedies
A. Impossibility

For the alleged impossibility or impracticability to excuse performance, the supervening impossibility/impracticability cannot have been foreseeable. Illinois courts have explained that unforeseeability is a question of degree given that any kind of impossibility is more or less capable of anticipation. See Ner Tamid Congregation of N. Town, 638 F. Supp. 2d at 927 (“The risk of an economic downturn may have been uncertain, but it was not unforeseeable, as that term [sic] is used in the cases dealing with supervening impracticability.”); id. at 928 (“Whether a lender will make a desired loan in a particular deal is never
A party relying on the impossibility/impracticability defense must also demonstrate it has tried all practical, available alternatives to permit performance. Id. at 933–34; Ill.-Am. Water Co. v. City of Peoria, 774 N.E.2d 383, 391 (Ill. App. Ct. 2002); Blue Cross Blue Shield of Tenn. v. BCS Ins. Co., 517 F. Supp. 2d 1050, 1056 (N.D. Ill. 2007).

In Phelps v. School District No. 109, the Supreme Court of Illinois considered the effect on a teacher's employment contract of a closure order by the state board of health on the school for a two-month period based on an influenza epidemic. 134 N.E. 312, 312 (Ill. 1922). The court held that the school was responsible for paying the teacher's contract on the grounds that if the school "had desired to be relieved of liability in the event such a contingency arose and caused the school to be closed, it could have accomplished that result by so stipulating in the contract." Id. at 313. The court explained, "It works no hardship on any one to require school authorities to insert in the contract of employment a provision exempting them from liability in the event of the school being closed on account of a contagious epidemic." Id. at 314.

B. Frustration of purpose

The defense of frustration of purpose or commercial frustration is recognized in Illinois, but is not liberally applied. See Smith v. Roberts, 370 N.E.2d 271, 272 (Ill. App. Ct. 1977) (citing Greenlee Foundries v. Kussel, 301 N.E.2d 106 (Ill. App. Ct. 1973)). The Smith decision set forth two requirements: (1) frustrating event is not reasonably foreseeable; and (2) the value of counterperformance has been totally or nearly destroyed by the frustrating event. Id. (excusing performance where existence of main store was an implied condition of contract and that its destruction frustrated lease even though physically possible to operate the leased premises as a separate entity).

In the Northern Illinois Gas Co. case described in Part I, the public utility also argued that performance was excused because of frustration of purpose or commercial frustration. Specifically, the utility argued that the increase in natural gas supplies lessened its need for the naphtha, and coupled with increased naphtha prices caused by rising crude oil prices and the ICC's rate order, the contract was frustrated. N. Ill. Gas Co., 461 N.E.2d at 1059. The court explained that these events were not unforeseeable, including for the reason that as a public utility it should have known that the ICC might not grant all future requests for rate increases to cover costs generated by its performance of its contracts. Id.

The court quashed any argument that changes in market prices could justify a frustration defense. The court explained, "First and foremost, as any trader knows, the only certainty of the market is that prices will change. Changing and shifting markets and prices from multitudinous cases is endemic to the economy in which we live. Market forecasts by supposed experts are sometimes right, often wrong, and usually mixed. If changed prices, standing alone, constitute a frustrating event sufficient to excuse performance of a contract, then the law binding contractual parties to their agreements is no more." Id.

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Illinois recognizes the UCC-based right to demand adequate assurances of a counterparty when reasonable grounds for insecurity exist about the counterparty's ability to perform. 810 ILL. COMP. STAT. 5/2–609; see Koursa, Inc. v. manroland, Inc., 971 F. Supp. 2d 765, 788–89 (N.D. Ill. 2013). When a party fails to provide adequate assurances, the demanding party may suspend performance. See id. (citing AMF, Inc. v. McDonald's Corp., 536 F.2d 1167, 1170 (7th Cir. 1976)).

Whether a party has reasonable grounds for insecurity to justify a demand for adequate assurances is generally a question of fact. "There must be an objective factual basis for the insecurity, rather than a purely subjective fear that the party will not perform." Koursa, Inc., 971 F. Supp. 2d at 790 (quoting Puget Sound Energy, Inc. v. Pac. Gas & Elec. Co., 271 B.R. 626, 640 (N.D. Cal. 2002)); id. at 794 (finding genuine issue of unresolved fact on whether party's communication constituted a clear demand for adequate assurances); SMC Corp. v. Lockjaw, LLC, 481 F. Supp. 2d 918, 927 (N.D. Ill. 2007) (finding whether party had reasonable grounds for insecurity, and whether counterparty's response was adequate, were disputed questions of fact).

Insolvency of the counterparty, for example, has been found to justify a demand for adequate assurances. See Koursa, Inc., 971 F. Supp. 2d at 790. The same is

To constitute an official demand for adequate assurances it must be in writing. “Although a number of cases . . . waive the [writing] requirement when the party on whom the demand is made knows that it has been made, . . . the most recent Illinois cases insist on strict compliance with the requirement that the demand for assurance be made in writing.” See Koursa, Inc., 971 F. Supp. 2d at 792 (quoting Chronister Oil Co. v. Unocal Ref. & Mktg., 34 F.3d 462, 464 (7th Cir. 1994)) (internal citations omitted). But see AMF, Inc., 536 F.2d at 1170–71 (waiving requirement). The demand must mention the specific code section or demand assurances explicitly. Koursa, Inc., 971 F. Supp. 2d at 792 (citing Canteen Corp. v. Former Foods, Inc., 606 N.E.2d 174, 184 (Ill. App. Ct. 1992)).

The ability to demand assurances is not an opportunity to derive some benefit from the contract that the contract does not already contemplate. See, e.g., Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 581 (7th Cir. 1976) (“We do not construe 2-609 as being a vehicle . . . for an implied term being inserted in a contract when a substantially equivalent term was expressly waived.”); Koursa, Inc., 971 F. Supp. 2d at 792 (“The demand for assurances can only be a demand for that to which a party is already entitled to under the contract.”).

**B. Commercial impracticability**

Illinois recognizes the UCC-based defense of commercial impracticability. 810 ILL. COMP. STAT. 5/2-615; see, e.g., Waldinger Corp. v. CRS Grp. Eng’rs, Inc., 775 F.2d 781, 786 (7th Cir. 1985) (excluding performance for commercial impracticability where parties contracted for production of wastewater equipment, not foreseeing that third-party engineering firm providing specifications of which only one manufacturer could comply); Lawrence Crawford Ass’n for Exceptional Citizens, Inc. v. Convorsource, Inc., No. 5-11-0061, 2012 WL 7070067, at *5 (Ill. App. Ct. Aug. 15, 2012) (rejecting defense where breach occurred prior to alleged supervening event and where party failed to “notify the buyer seasonably” of the delay).

Even though by its language it applies only to sellers, Illinois courts have cited the section’s commentary to apply it to buyers as well. See N. Ill. Gas Co., 461 N.E.2d at 1060 (rejecting defense where adverse market shifts were foreseeable, the parties allocated the risk of changing prices, and the alleged events, even if unforeseeable, did not cause a sufficient degree of impracticability to excuse the public utility’s performance).

It is well established under Illinois law that a decline in market conditions, standing alone, cannot be the basis for a defense of commercial impracticability. See USX Corp. v. Int’l Minerals & Chems. Corp., No. 86-cv-2254, 1989 WL 10851, at *2 (N.D. Ill. Feb. 8, 1989) (citing N. Ill. Gas Co., 461 N.E.2d at 1059–61). This is particularly the case where the parties have expressly determined the party that bears the burden of changes in market prices within their contract. Id. (rejecting argument that decline in price of ammonia or natural gas was a non-occurrence that was a basic assumption on which ammonia sale contract was premised, and concluding force majeure provision also failed to excuse performance); see also N. Ind. Pub. Serv. Co. v. Urban Cty. Coal Co., 799 F.2d 265, 278 (7th Cir. 1986); Neal-Cooper Grain Co. v. Tex. Gulf Sulphur Co., 508 F.2d 283, 293 (7th Cir. 1974).

The defense is not available merely where performance is rendered more economically burdensome or unattractive. See Luria Bros. & Co. v. Pielet Bros. Scrap Iron & Metal, Inc., 600 F.2d 103, 112 (7th Cir. 1979) (rejecting defense where party failed to respond to invitation to deliver substitute goods and failed to offer any evidence showing that substitute goods were not available); Time Savers, Inc. v. Star Leasing Co., No. 96-cv-5670, 1998 WL 67603, at *6 (N.D. Ill. Feb. 10, 1998) (finding inability to leave trailers parked on certain property, even if a presupposed condition, only temporarily increased cost of non-performing party’s performance).

Whether the alleged event or condition that makes the contract commercially impracticable was foreseeable is a question of fact. See, e.g., Raw Materials, Inc. v. Manfred Forberich GmbH & Co., No. 03-cv-1154, 2004 WL 1535839, at *6 (N.D. Ill. July 7, 2004) (applying UCC concepts in case governed by Convention for the International Sale of Goods to determine that whether the early freezing of the St. Petersburg port was foreseeable and whether this prevented the party’s performance were questions to be resolved at trial).
Indiana

Parties governed by Indiana law will insert force majeure provisions in contracts to contract around the state’s strict impossibility of performance defense under common law. Courts applying Indiana law have explained that unless a contract states otherwise, then an event of force majeure does not necessarily have to be unforeseeable to excuse performance.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability
   E. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

Force majeure clauses are enforceable under Indiana law. Few Indiana courts have interpreted force majeure clauses, which causes Indiana courts to rely on other jurisdictions for guidance. See, e.g., Specialty Foods of Ind., Inc. v. City of S. Bend, 997 N.E.2d 23, 27 (Ind. Ct. App. 2013). The ability of a party to use a force majeure clause to excuse its performance will depend heavily upon the specific language of the clause and on the standards of general contract interpretation employed by Indiana courts. The party seeking to excuse its performance via force majeure bears the burden of establishing that defense. Id.

Indiana defines a force majeure clause as a “contractual provision allocating the risk if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.” Id. at 26 (quoting Black’s Law Dictionary 674 (8th ed. 2004)); see also Acheron Med. Supply, LLC v. Cook Inc., 1:15-cv-1510, 2019 WL 2574147, at *2 (S.D. Ind., June 24, 2019), aff’d, 958 F.3d 637 (7th Cir. 2020).

In Indiana, “the scope and effect of a force majeure clause depends on the specific contract language, and not on any traditional definition of the term.” Specialty Foods of Ind., 997 N.E.2d at 27 (quoting Va. Power Energy Mkgt., Inc. v. Apache Corp., 297 S.W.3d 397, 402 (Tex. Ct. App. 2009)). “In other words, when the parties have defined the nature of force majeure in their agreement, that nature dictates the application, effect, and scope of force majeure with regard to that agreement and those parties.” Id.

When interpreting a force majeure clause, an Indiana court’s goal is to determine the parties’ intent by examining the language of the contract as a whole. Id. Courts do so by considering: (1) the nature of the agreement; (2) the circumstances existing at the time the contract was made; (3) the parties’ relationship; (4) the contract’s subject matter; and (5) the apparent purpose of making the contract. Id. at 26. Indiana requires that contracts be read as a whole so that no words, phrases, or terms are rendered ineffective or meaningless. Id.

B. Causation

The alleged force majeure event must prevent the non-performing party from performing its contractual obligations. In Northern Indiana Public Service Co. v. Carbon County Coal Co., Judge Posner, writing for the Seventh Circuit, considered whether a utility could stop taking delivery of coal under a long-term coal supply agreement based on the Indiana Public Service Commission’s economy purchase orders. 799 F.2d 265, 274 (7th Cir. 1986). The court explained that the force majeure clause was not triggered by the orders and that the question of whether the force majeure
clause applied should not have been given to the jury. \textit{Id.}

The court reasoned, “All that those orders do is tell [the utility] it will not be allowed to pass on fuel costs to its ratepayers in the form of higher rates if it can buy electricity cheaper than it can generate electricity internally using [its contractual supplier’s] coal.” \textit{Id.} at 274–75. The court continued, “Such an order does not ‘prevent,’ whether wholly or in part, [the utility] from using the coal; it just prevents [the utility] from shifting the burden of its improvidence or bad luck in having incorrectly forecasted its fuel needs to the backs of hapless ratepayers.” \textit{Id.} at 275 (“If the Commission had ordered [the utility] to close a plant because of a safety or pollution hazard, we would have a true case of force majeure.”).

The court explained that the normal risk of a fixed-price contract is that the market inevitably will change. \textit{Id.} (“By signing the kind of contract it did, [the utility] gambled that fuel costs would rise rather than fall over the life of the contract; for if they rose, the contract price would give it an advantage over its (hypothetical) competitors who would have to buy fuel at the current market price. If such a gamble fails, the result is not force majeure.”). If a buyer could be excused because of market volatility, the buyer would be excused from the consequences of the risk the buyer expressly assumed as a critical term of the contract. \textit{Id.}

C. Mitigation/beyond a party’s control

Indiana courts require the cause of the alleged force majeure event to be outside of the parties’ reasonable control. For example, in \textit{Specialty Foods of Indiana}, decided by the Indiana Court of Appeals, the court held that the parties’ force majeure provision excused performance where the cause of the force majeure event was a third-party decision outside either party’s control. 997 N.E.2d at 28

There, Specialty Foods, a food and beverage vendor, contracted with the Century Center Board of Managers for the City of South Bend to be the exclusive provider of food and beverages in the College Football Hall of Fame. However, during the later years of the agreement, the Hall of Fame announced its intent to move to Atlanta, Georgia. In August 2012, the City notified Specialty Foods that the Hall of Fame’s relocation necessarily terminated Specialty Foods’ agreement with the Century Center. \textit{Id.} at 26–27.

Thereafter, Specialty Foods sued the City of South Bend and its board of managers to obtain a declaratory judgment as to its contractual rights to continue operating its food service business in the city-constructed Hall of Fame. \textit{Id.} at 27.

The force majeure provision in the parties’ agreement provided:

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

The parties’ dispute centered on the meaning of the phrase “any other reason not within the reasonable control of Century Center.” The trial court ruled that the force majeure clause excused the Century Center from performing its obligation of allowing Specialty Foods to continue to operate its business in the Hall of Fame building after the Hall of Fame terminated its agreement and moved. \textit{Id.} The Court of Appeals agreed, stating that even if the event was not unforeseeable, the “catch-all” language: (1) contained no mention of an event needing to be unforeseeable and (2) did not require the triggering event to be similar to the specifically enumerated events. \textit{Id.} at 27–29. Thus, because the event triggering the force majeure clause was outside the control of the party claiming force majeure the court found the provision enforceable. \textit{Id.} at 28.

Similarly, in \textit{Miami Sand & Gravel, LLC v. Nance}, a force majeure clause stated that a mining company’s failure to perform would not be grounds for termination when failure was due to conditions beyond its control. 849 N.E.2d 671, 681 (Ind. Ct. App. 2006). The mining company lost its force majeure defense where the opposing gravel pit company’s failure to comply with a permanent injunction directing it to remove equipment did not create an event beyond the mining company’s reasonable control because the mining company was able to conduct mining operations without the equipment. \textit{Id.}

D. Foreseeability

The holdings of the Seventh Circuit’s recent decision in \textit{Acheron Med. Supply, LLC v. Cook Med. Inc.} underscore Indiana courts’ reliance on the specific language of contract provisions. 958 F.3d 637 (7th Cir.)
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2020). There, the Seventh Circuit affirmed the lower court’s ruling that, although Acheron breached a contract, it was not liable for any damages because the specific language of the contract’s force majeure clause excused the breach. Id. at 650. Specifically, the court found that the denial by a governmental agency of a document necessary for other parts of performance under the contract to occur was a triggering event under the force majeure clause, which included an “act of government or . . . agency” in its enumerated events. Id. at 645.

When the party opposing force majeure argued that the government agency’s act was not an event of force majeure because it was foreseeable, the court held that the question of foreseeability was “irrelevant to the application of the force majeure provision” because “the provision nowhere requires the force majeure event be unforeseen, nor does it reference foreseeability at all.” Id. at 650–51 n.6.

Likewise, in Specialty Foods, the court held that a force majeure clause “contain[ing] nothing about foreseeability” was intended to apply regardless of whether the parties could have reasonably foreseen the event that precluded performance.” Specialty Foods, 997 N.E.2d at 27.

Thus, unless the force majeure provision provides otherwise, Indiana courts do not require an event to be unforeseeable for force majeure to excuse performance.

E. Notice

Generally, Indiana courts will not read specific notice requirements as a condition for a force majeure defense unless clearly required by the contract. See IPF/Ultro Ltd. P’ship v. UP Improvements, LLC, No. 2:08-cv-21, 2008 WL 3896746, at *6 (N.D. Ind. Aug. 19, 2008) (stating the agreement did not require the party to give written notice).

However, where a contract explicitly sets forth notice procedures, Indiana courts have precluded parties from relying on the force majeure provision to excuse performance where the party failed to comply with the notice requirements. See State v. Int’l Bus. Machines Corp., 51 N.E.3d 150, 164 (Ind. 2016).

In State v. International Business Machines Corp., the Indiana Supreme Court analyzed the language of a force majeure provision that included a list of specified occurrences that may excuse performance. The list also included a caveat that the non-performing party provide notice when performance was prevented or was rendered impractical. Id. at 164. After analyzing the force majeure provision, the court held that although a force majeure event had occurred, because the non-performing party had not provided requisite notice, the non-performing party could not rely on the force majeure provision to excuse performance. Id.

II. Common law remedies

A. Impossibility

Indiana law recognizes the doctrine of impossibility of performance as a defense to nonperformance, but the party invoking it must meet a high standard of strict impossibility; the defense is not available when performance becomes “merely very difficult or relatively impossible”. Wagler v. W. Boggs Sewer Dist., 980 N.E.2d 363, 378 (Ind. Ct. App. 2012).

Parties have met the standard, however, in prior pandemics. In the 1921 case of Greg School Township v. Hinshaw, 132 N.E. 586 (Ind. 1921), the Indiana Court of Appeals held that a school closure due to an influenza epidemic rendered a teacher’s employment contract impossible to perform. In that case, the school board was not required to compensate the teacher for the duration of the school closure. The court’s ruling provides the framework for impossibility defenses that Indiana continues to employ to this day:

It is the rule that, when the performance of a contract becomes impossible, nonperformance is excused, and no damages can be recovered. After the contract was entered into, and when the exigency arose, the health board, in the exercise of the police power delegated to it, closed the school, and the contract for the time that the order was in force was impossible of performance, and hence unenforceable, and there could be no recovery for such time.

Id.

Thus, where performance is rendered impossible—that is, where there is no possible way to perform under the contract due to factors outside the non-performing party’s control—the non-performing party can be excused based on this defense.

B. Frustration of purpose

The Indiana Supreme Court has not expressly adopted the doctrine of frustration as a defense to nonperformance. See N. Ind. Pub. Serv. Co., 799 F.2d at 277 (explaining that there was no need to predict whether Indiana Supreme Court would recognize defense when facts of case did not render defense justifiable); Ross Clinic, Inc. v. Tabion, 419 N.E.2d 219, 223 (Ind. Ct. App. 1981) (stating Indiana does not recognize defense).
III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Indiana Code 26–1–2–609 provides that a contract for sale imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. IND. CODE § 26-1-2-609(1). Thus, “[w]hen reasonable grounds for insecurity arise” regarding the other party’s ability to perform under the contract, the insecure party may demand adequate assurance of the other party’s ability to perform.

The standard to be applied when Section 609 is invoked “is one of reasonable insecurity, not absolute certainty.” Wildwood Indus., Inc. v. Genuine Mach. Design, Inc., 587 F. Supp. 2d 1035, 1047 (N.D. Ind. 2008) (quoting Clem Perrin Marine Towing, Inc. v. Panama Canal Co., 730 F.2d 186, 191 (5th Cir. 1984)).

The official UCC Comment 3 to Section 609 provides that a ground for insecurity need not arise from or be directly related to the contract. Thus, a buyer’s demand of adequate assurance of due performance need not be based on a term of the parties’ contract but may arise from other contracts or the parties’ separate dealings. Id. (citing Brisbin v. Superior Valve Co., 398 F.3d 279, 287–88 (3d Cir. 2005)).

B. Commercial impracticability

Indiana recognizes the UCC-based defense of commercial impracticability. IND. CODE § 26–1–2–615. In Indiana, this “commercial impracticability” concept eases the otherwise stringent standard of impossibility. Neil-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283, 293 (7th Cir. 1974).

In Indiana, “the applicability of the defense of commercial impracticability . . . turns largely on foreseeability.” Waldinger Corp. v. CRS Grp. Eng’rs, Inc., Clark Dietz Div., 775 F.2d 781, 786–87 (7th Cir. 1985). “Because the purpose of a contract is to place the reasonable risk of performance upon the promisor, . . . it is presumed to have agreed to bear any loss occasioned by an event that was foreseeable at the time of contracting.” Id. at 786. The foreseeability inquiry is “whether the risk of the occurrence of the contingency was so unusual or unforeseen and the consequences of the occurrence . . . so severe that to require performance is to grant the buyer an advantage he did not bargain for in the contract.” Id.

Whether a party’s contractual performance is commercially impracticable depends on its specific contractual obligations. See Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 727 (7th Cir. 2009). “If the risk of the occurrence of the contingency was unforeseeable, the seller cannot be said to have assumed that risk.” Waldinger, 775 F.2d at 786.

If a contingency is foreseeable, however, the commercial impracticability defense is not available “because the party disadvantaged by the fruition of the contingency might have contractually protected itself.” Id.

When determining whether circumstances warrant excusing performance under the doctrine of impracticability, parties should inquire (1) given the circumstances in which the parties dealt, was the triggering event foreseeable and (2) was the event one of the risks that the parties were tacitly assigning to the promisor by their failure to provide for it explicitly? Lawrence’s Anderson on the Uniform Commercial Code 3rd ed. § 2–615:5. If the answer to either of those questions is “yes” then Indiana courts are unlikely to excuse performance. Waldinger, 775 F.2d at 786.
Iowa

Iowa courts have rarely needed to resolve disputes about the enforceability of force majeure provisions under Iowa law. Iowa recognizes common law impossibility, discharge by supervening impracticability, and the UCC-based defense of commercial impracticability.

The key cases are broken down as follows:

I. Contractual force majeure provisions

II. Common law remedies
   A. Impossibility
   B. Discharge by supervening impracticability

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability
   C. Substitute performance

I. Contractual force majeure provisions

Few reported cases have interpreted force majeure provisions under Iowa law. The Supreme Court of Iowa case addressing the subject is American Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Tunk Fund Board, in which a state agency agreed to provide a soil decontaminating company with a yearly minimum amount of contaminated soil under a soil remediation contract. 586 N.W.2d 325, 327 (Iowa 1998).

The state agency argued that its failure to provide the requisite amount of soil under the contract was caused by governmental action not under its control, which excused performance based on a force majeure clause in the parties’ contract. Id. The court considered how to read the force majeure clause in connection with the contract’s liquidated damages provision that required the state to pay damages if it did not supply the minimum tonnage. Id. at 333–34 (explaining that both clauses have to have meaning given the agreements are to be interpreted as a whole).

The court explained that the force majeure provision applied only to select, defined events that were beyond the parties’ reasonable control; where those did not apply, the state agency would be on the hook for liquidated damages if it did not meet the minimum tonnage requirements. Id. at 334–35 (leaving open for the ultimate factfinder whether the government action in question was beyond the control of the contracting state agency and thus within the force majeure clause’s coverage).

Some Iowa courts have interpreted force majeure provisions under other states’ laws. See, e.g., Pillsbury Co. v. Wells Dairy, Inc., 752 N.W.2d 430, 439–41 (Iowa 2008) (interpreting Minnesota law; this case is covered in the Minnesota section of this guide); Rembrandt Enters., Inc. v. Dahmes Stainless, Inc., No. C15-4248, 2017 WL 3929308, at *10–13 (N.D. Iowa Sept. 7, 2017) (interpreting Minnesota law following force majeure declaration based on Avian Flu outbreak; this case is also covered in the Minnesota section of this guide); SNB Farms, Inc. v. Swift & Co., No. C01-2077, 2003 WL 22232881, at *10 (N.D. Iowa. Feb. 7, 2003) (applying Nebraska and Colorado law, and noting that outbreak of Porcine Reproductive and Respiratory Syndrome in hogs was assumed to be force majeure event for summary judgment purposes, and finding genuine issue of material fact as to whether party invoking force majeure provision satisfied the contractual notice requirements).

II. Common law remedies

A. Impossibility

Iowa courts have recognized the doctrine of impossibility of performance since 1913. See Mahaska Cty. State Bank v. Brown, 141 N.W. 459, 462 (Iowa 1913). Iowa’s highest court acknowledged, “Ordinarily a contingency which reasonably may have been anticipated must be provided for by the terms of the contract, else the impossibility of performance resulting therefrom will not excuse either party from carrying out the contract.” Id.; see also Salinger v. Gen. Exch. Ins. Corp., 250 N.W. 13, 16 (Iowa 1933) (rejecting defense of impossibility
where party knew of contingency of refinance corporation repossessing car prior to contracting).
Where a party objectively can perform, the defense will not be available. See Nora Springs Coop. Co. v. Brandau, 247 N.W.2d 744, 747 (Iowa 1976); Woodruff Constr., LLC v. Christensen, 928 N.W.2d 687 (Table), 2019 WL 1940733, at *2 (Iowa Ct. App. May 1, 2019) (finding ample evidence to support trial court’s findings that allegedly bitter cold winter weather did not make performance objectively impossible to excuse performance of a construction contract, particularly where winter weather conditions were foreseeable and could have been accounted for when party agreed to meet the contracted-for schedule). Where the impossibility is only temporary, performance is suspended only while the impossibility continues. See Nora Springs Coop., 247 N.W.2d at 747 (citing Weiditschka v. Supreme Tent K.M.W., 170 N.W. 300 (Iowa 1919)).

B. Discharge by supervening impracticability
Iowa also has recognized the doctrine of discharge by supervening impracticability from the Restatement (Second) of Contracts § 261. See DuTrac Cmty. Credit Union v. Radiology Grp. Real Estate, L.C., 891 N.W.2d 210, 217 (Iowa 2017) (citing Am. Soil Processing, 586 N.W.2d at 330) (finding performance impossible and impracticable where two-person committee could not meet to approve any buildings where one member was deceased and the other refused to act on committee’s behalf).

III. UCC provisions regarding excused performance
A. Demands for adequate assurances
Iowa has adopted the UCC provisions allowing a party to a sale of goods contract who has reasonable grounds for insecurity about its counterparty’s ability or willingness to perform to demand adequate assurances. IOWA CODE § 554.2609; Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 466 (Iowa 2000). There must be an objective factual basis for the insecurity, and whether that objective basis existed is a question of fact. See IronPlanet, Inc. v. Ritchie Bros. Auctioneers (Am.), Inc., 860 N.W.2d 923 (Table), 2014 WL 7343212, at *9 (Iowa Ct. App. Dec. 24, 2014); see also Heartland Coop. v. Nelson, 938 N.W.2d 722 (Table), 2019 WL 3317858, at *5–6 (Iowa Ct. App. July 24, 2019) (finding no error in district court’s instruction on adequate assurances after submitting the question of whether assurances were adequate was presented to jury).

Parties receiving a justified demand for assurances have a reasonable time, not to exceed thirty days, to provide assurance. IOWA CODE § 554.2609(4). Failing to provide assurances that are adequate within that time frame is a repudiation of the contract. See Land O’ Lakes, Inc. v. Hanig, 610 N.W.2d 518, 523 (Iowa 2000) (“[A]ny assurance provided beyond the thirty-day period is automatically inadequate.”).

When responding to demands for adequate assurances, a response cannot condition performance on a requirement that is not within the parties’ contractual agreement. See id. at 523–24 (“Hanig stated unequivocally that he would not deliver the grain as required by the contracts unless the contracts were determined to be enforceable, a condition not found in the contracts.”); see id. at 524 (citing Kaiser-Francis Oil Co. v. Producer’s Gas Co., 870 F.2d 563, 568 (10th Cir. 1989) (holding, as a matter of law, that conditioning performance on agreement to contract modification was an inadequate assurance)).

B. Commercial impracticability
Iowa law also recognizes the defense of commercial impracticability in sale of goods contracts. IOWA CODE § 554.2615; see also Nora Springs Coop., 247 N.W.2d at 748 (“[T]he [Iowa] Code expressly recognizes the doctrine of ‘commercial frustration’ which has been increasingly utilized as an additional excuse for nonperformance in certain instances.”). The fact that performance becomes economically burdensome or unattractive does not excuse performance unless the increased cost is due to an unforeseen contingency that alters the essential nature of the performance. Power Eng’y & Mfg., Ltd. v. Krug Int’l, 501 N.W.2d 490, 495 (Iowa 1993) (rejecting defense where embargo did not prevent performance; even though it prevented products from being shipped into Iraq, it did not prohibit a domestic purchaser from buying from a domestic manufacturer a machinery component part intended for shipment to Iraq); Nora Springs Coop., 247 N.W.2d at 748 (“Plaintiff did not show any increased cost would be so prohibitive as to change the nature of its corn contracts with Defendant.”).

C. Substitute performance
When unloading facilities are not available without fault of either party, Iowa law follows the UCC provisions on substitute performance. IOWA CODE § 554.2614; S & S, Inc. v. Meyer, 478 N.W.2d 857, 861 (Iowa Ct. App. 1991) (reading statute as requiring change in place of delivery as commercially reasonable substitute as long as neither party is at fault). If invoking the doctrine of commercial impracticability discussed above, the party must
show that a commercially reasonable substitute was not available. See Hansen-Mueller Co. v. Gau, 838 N.W.2d 138, 141–42 (Iowa Ct. App. 2013) (‘Failure of one method of delivery when another is available does not allow for the defense of impracticability unless the increased cost ‘alters the essential nature of the performance.’’); id. at 142 (finding buyer breached agreement where alternate method of delivery was available and the substitute—delivery to a different facility—did not alter the essential nature of the performance).
Kansas

Kansas courts have resolved multiple disputes involving force majeure provisions. Where a contract contemplates two alternative means of performing, such as a take-or-pay contract, the force majeure event must prevent both means of performance to justify nonperformance of the contract. Kansas courts clearly state that a party bears the risk for its suppliers and subcontractors unless those risks are specifically allocated in the party’s contract. Kansas recognizes common law impossibility, construed as impracticability, and frustration of purpose.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements


If a party erroneously declares force majeure and stops performing, the party’s action could result in an anticipatory repudiation of the contract. See, e.g., Kan. City Power & Light Co. v. Pittsburg & Midway Coal Mining Co., No. 88-cv-2224, 1989 WL 151919, at *9 (citing Phillips Puerto Rico Core, Inc. v. Tradex Petroleum Ltd., 782 F.2d 314, 321 (2d Cir. 1985)).

The contract generally will provide for what occurs in the event a force majeure event does exist. See, e.g., City of Chanute v. Williams Nat. Gas. Co., 678 F. Supp. 1517, 1527 (D. Kan. 1988) (explaining that even if pipeline’s refusal to transport gas is a force majeure event under contract, determining the effect of such an event on the parties’ performance obligation would require an examination of the entire contract and the intent of the parties as well as a consideration of the indefinite duration of the force majeure event).

B. Causation
If a contract calls for two alternate means of performing, and a force majeure event prevents one form of performance, but not the alternate form of performance, then the force majeure event will not excuse the party’s nonperformance of its contractual obligations. For example, in a take-or-pay contract, where a force majeure event prevents the buyer from...
taking natural gas, the buyer would still have to pay unless the force majeure event also prevented the buyer from making payment. See Benson Mineral Grp., 1988 WL 404348, at *7 (“Further, even if force majeure excused [the buyer] from taking the gas, [the buyer] would not be excused from paying for the gas not taken.”); see also Ashland Oil & Refining Co. v. Cities Serv. Gas Co., 462 F.2d 204, 211 (10th Cir. 1972) (“Failure of the withdrawal promise could not frustrate performance of either the entire contract or the optional alternative of performance.”).

In Welsch v. Trivestco Energy Co., a Kansas appellate court considered whether the bankruptcy of a gas purchaser excused performance under an oil and gas lease. Welsch v. Trivestco Energy Co., 221 P.3d 609, 617 (Kan. Ct. App. 2009). The court concluded that the financial issues of a gas purchaser that led to the unavailability of purchasing and transporting services, even if a force majeure event, did not prevent performance. Id. at 617–18 (citing Champlin Petroleum Co. v. Mingo Oil Producers, 628 F. Supp. 557, 560–61 (D. Wyo. 1986) (bankruptcy proceedings of lessee’s subsasignee did not constitute force majeure but were inherently the result of financial problems)). The court explained that nonperformance had to be “due to” the alleged force majeure event under the parties’ agreement, and here, the performance deficiency that caused the lease to expire was the failure to pay shut-in royalties, not the alleged force majeure event. Id. (equating “due to” to “caused by,” “because of,” and “resulting from”).

Whether an alleged force majeure event prevents performance of the invoking party’s contractual obligations is a question of fact. See, e.g., Kan. City Power & Light Co., 1989 WL 151919, at *4 (concluding material questions of fact remain about whether company’s installation of new equipment necessary to comply with sulfur emissions standards excuses performance based on force majeure provisions).

C. Mitigation/beyond a party’s control

Problems with a contractual party’s suppliers or subcontractors are not beyond the party’s control as a general matter. Consider Hutton Contracting Co. v. City of Coffeyville, in which the Tenth Circuit considered a party’s force majeure argument that late delivery to it by a subcontractor excused its performance under Kansas law. 487 F.3d 772, 778 (10th Cir. 2007). The court rejected the argument, reading the clause “fault of [the party]” to essentially be “fault of [the party] and those to whom it delegates its responsibilities under the contract.” Id. (“It would be absurd to assume that the City was concerned about delay only when caused by [its counterparty], and not by a supplier or subcontractor that [its counterparty] decided to employ.”).

The party is, of course, free to make its performance contingent on its supplier’s or subcontractor’s performance, but if the contract does not speak to that risk, then the potential nonperformance of the party’s supplier or subcontractor will fail on the contracting party. Id. at 779 (“We do not suggest that [the party] was at fault in its choice of supplier, only that it is responsible to the City for its supplier’s delays when those delays are not themselves excused by a force majeure. . . . In short, a delay by a subcontractor or supplier is not itself a force majeure.”).

The Tenth Circuit found no Kansas case directly on point but cited additional support from other federal courts. See id. (citing Johnson Mgmt. Grp. CFC, Inc. v. Martinez, 308 F.3d 1245, 1252 (Fed. Cir. 2002) (“A contractor is responsible for the unexcused performance failures of its subcontractor”); Olson Plumbing & Heating Co. v. United States, 602 F.2d 950, 957 (Ct. Cl. 1979) (“The contractor alone is responsible for the deficiencies of its suppliers and its subcontractors absent a showing of impossibility.”)). The assumption of risk that a supplier or subcontractor will fail is especially borne by the contracting party where the contract does not call for a specific supplier or subcontractor to complete the task. Id.

D. Notice

Courts applying Kansas law have not had to resolve many questions related to whether a party adhered to notice requirements within force majeure provisions. The U.S. District Court of Kansas has found on one occasion that a party complied with a notice requirement for advising its counterparty of the occurrence of a force majeure event and of its invoking the force majeure clause. Kan. City Power & Light, 1989 WL 151919, at *4.

II. Common law remedies

A. Impossibility

between the subjective “I cannot do it” versus the objective “the thing cannot be done,” and only objective impracticability excuses performance. Id. (citing T.S.I. Holdings, Inc. v. Jenkins, 924 P.2d 1239, 1248 (Kan. 1996)).


In Mid-Am Building Supply, the U.S. District Court for the District of Kansas considered a party’s argument that a bank compelled the surrender of its assets and closed its business after entering into an agreement for building supplies, which made it impossible to make further payments under the contract. 2013 WL 1308980, at *4. The bank’s actions occurred once the party entered into a settlement agreement with the bank, but the party failed to show that it was legally obligated to enter into such agreement. Id. at *5. The court concluded the party failed to show that paying its counterparty was not possible, as required by the objective standard. Id. (“In fact, others in a similar situation may have refrained from entering into a settlement agreement [with the bank], which may have allowed [the party] to satisfy its obligation to [its counterparty].”).

The court also explained that the party’s financial inability to pay, either the bank or its counterparty, should not be considered a basic assumption of the contract. Id. The court cited the Restatement to explain that the “continued existence of certain market conditions or the financial conditions of the parties is ordinarily not such an assumption.” Id. (quoting Restatement (Second) of Contracts § 261 cmt. b).

Similarly, “market shifts or the financial inability of the promisor does not usually result in discharge under the doctrine of impracticability.” Id.

When dealing with foreseeable contingencies, the parties should contract to allocate those risks accordingly. See, e.g., Freeto v. State Highway Comm’n, 166 P.2d 728, 758–63 (Kan. 1946) (rejecting impossibility defense where World War II potentially prevented performance of some parts of contract for a particular time, but did not objectively prevent performance of the contract); Mid-Am Bldg. Supply, 2013 WL 1308980, at *5 (explaining party also failed to establish that the closure of its business was unforeseeable and not an assumed risk); W. Drug Supply & Specialty Co. of Kan. City v. Bd. of Admin. of Kan., 187 P. 701, 703–04 (Kan. 1920) (finding supplier’s failure to deliver goods not excused because it was reasonably foreseeable that a creditor might file a lawsuit against a debtor causing debtor’s assets to be sold); City of Wellington v. Kan. Dep’t of Health & Envir., 431 P.3d 904 (Table), 2018 WL 6580495, at *14 (Kan. Ct. App. Dec. 14, 2018) (finding City should have known that it would be unable to provide party with untreated water before it contracted with them).

For a case in which a court applying Kansas law found performance impracticable, consider Ashland Oil & Refining Co. 462 F.2d at 211. In that case, the Tenth Circuit found that a U.S. Supreme Court decision holding that an independent natural gas producer that sold gas to an interstate pipeline company was not exempt from FERC regulation served to render a party’s existing contract impracticable. Id. at 208–12. The impossibility related not to the performance of the parties’ hybrid take-or-pay natural gas contract as a whole, but to an undertaking of the buyer designed to make an adjustment in the event that the buyer failed to purchase the quantity it had obligated itself to take. Id. at 205. The question arose in an unusual manner, as the seller alleged that the undertaking of the buyer was not capable of being performed and that as a result the seller was not receiving what it bargained for—an opportunity to make itself whole by the withdrawal of proportionate acreage. Id. at 209.

The court concluded that the intervening U.S. Supreme Court case prevented the buyer from being able to grant this permission without proceeding through the complexities and expense of obtaining FERC permission, and thus the “end result was that the entire character of the contract was changed.” Id. at 211. (“An undertaking which had had mutuality became one in which [the buyer] acquired an unexpected windfall and [the seller] suffered an unanticipated detriment.”).

B. Frustration of purpose

Kansas courts also excuse performance for frustration of purpose, generally relying on the Restatement (Second) of Contracts § 265, which provides: “Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract
was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.” See Mid-Am Bldg. Supply, 2013 WL 1308980, at *7 (citing Columbian Nat’l Title Ins. Co. v. Twp. Title Servs., Inc., 659 F. Supp. 796, 804 (D. Kan. 1997)).

Like the defense of impossibility, if the supervening event was reasonably foreseeable and controllable by the parties, the non-performing party cannot successfully invoke frustration of purpose to excuse performance. Id.; Benson Mineral Grp., 1988 WL 404348, at *7 (rejecting frustration of purpose defense where take-or-pay contract became a financial liability).

In State v. Boley, the Kansas Supreme Court used a three-element approach to examine the doctrine of frustration of purpose. 113 P.3d 248, 253–55 (Kan. 2005). First, whether the frustrated purpose was “so completely the basis of the contract that . . . without it the transaction would make little sense.” Id. at 253–54 (citing Restatement (Second) of Contracts § 265, cmt. a). Second, that the frustration be substantial and so severe that it not fairly be considered within the risks assumed under the contract. Id. (“It is not enough that the transaction has become less profitable for the affected party or even that [it] will sustain a loss.”). And third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. Id. at 254–55.

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

The Kansas UCC provides that when reasonable grounds for insecurity arise with respect to the performance of either party, the other party may demand written adequate assurances of performance and until receipt of commercially reasonable assurance, may suspend any performance for which the party has not already received its agreed-upon return. KAN. STAT. ANN. § 84–2–609; Romeo Papa Holdings, Inc. v. Cessna Aircraft Co., EP-09-cv-420, 2011 WL 13327296, at *4 (W.D. Tex. May 16, 2011) (applying Kansas law and finding party had reasonable grounds for insecurity); see also Learjet Inc. v. MPC Prods. Corp., No. 05-cv-1074, 2007 WL 2287836, at *3 (D. Kan. Aug. 8, 2007) (finding party failed to request assurances in the normal commercial fashion). When adequate assurances are requested, a party has thirty days to provide them or a breach by repudiation results. KAN. STAT. ANN. § 84–2–609(4) & cmt. 5.

Kansas law requires that the demand for adequate assurances be in writing, but the writing requirement is liberally construed. See Romeo Papa Holdings, 2011 WL 13327296, at *5 (citing LNS Inv. Co. v. Phillips 66 Co., 731 F. Supp. 1484, 1487 (D. Kan. 1990)). In Romeo Papa Holdings, for example, the court concluded that an email specifically requesting a counterparty to clearly express its intentions met the writing requirement. See id.

The questions of whether a party had reasonable grounds for insecurity and whether the counterparty’s response was adequate are generally questions reserved for the factfinder. See Remuda Jet One, LLC v. Cessna Aircraft Co., No. 09-cv-12029, 2012 WL 5866243, at *4 (D. Mass. Nov. 16, 2012) (applying Kansas law and finding questions inappropriate for summary judgment where counterparty identified genuine factual disputes). The reasonableness of a party’s insecurity must be assessed based on the facts as the buyer knew them after the contract was in place. See id. (quoting By-Lo Oil Co. v. ParTech, Inc., 11 F. App’x 538, 539 (6th Cir. 2001)); see also Bartlett Grain Co., L.P. v. Sunburst Farms P’ship, No. 13-cv-1152, 2013 WL 3366277, at *4 (D. Kan. July 5, 2013) (rejecting party’s argument that arbitration panel decision was at odds with Kansas statute governing demands for adequate assurances).

B. Commercial impracticability

Kansas law recognizes the UCC-based defense of commercial impracticability based on unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting. KAN. STAT. ANN. § 84–2–615; see also Benson Mineral Grp., 1988 WL 404348, at *5. Changes in cost do not, by themselves, excuse performance. See id. (citing Bernina Distribs., Inc. v. Bernina Sewing Mach., 646 F.2d 434, 439 (10th Cir. 1981)).

Kansas courts’ interpretation of this defense is essentially the same as the defense of common law impracticability now that those courts have moved away from strict impossibility. See id. at *6 (explaining comparison and rejecting party’s defense based on a collapse of the natural gas market).
Kentucky courts recognize contractual force majeure provisions involving events that are beyond parties’ control and avoidable by due care, yet closely scrutinize allegedly qualifying events and causes, and historically reject their application associated with certain commercial claims (i.e., coal suppliers not relieved from supply contract due to market depression and loss of coal supply sources).

Kentucky courts recognize common law doctrines of impossibility and frustration of purpose, yet focus on whether alleged qualifying events are actually “impossible” (i.e., influenza reduced available workforce, but did not render performance impossible). Kentucky courts historically do not discharge even “impossible” contractual performance obligations where parties did not contract against foreseeable risk (for example, 9/11 attacks ran off buyer’s investors, but did not release buyer from purchase contract), and rarely and narrowly consider frustration.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Mitigation/beyond a party’s control

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions
A. General requirements


Kentucky courts acknowledge that force majeure clauses typically apply to events “caused by overpowering, superior, or irresistible force, such as an act of God, which is beyond the reasonable control of the parties and cannot be avoided by the exercise of due care.” Gulf States, 2019 WL 7403970, at *9 (citing Ky. Utils. Co., 836 S.W.2d at 400 (internal citations omitted)). Parties often, however, contract to include broader and more expansive definitions of force majeure.

As contractual force majeure clauses have developed, Kentucky courts have read into these clauses an obligation of good faith arising out of its Uniform Commercial Code (“UCC”), dictating that “[e]very contract or duty within the [UCC] imposes an obligation of good faith in its performance and enforcement.” KY. REV. STAT. ANN. § 355.1-304.

To invoke a force majeure provision, a party must show that (1) an event occurred meeting the contract’s definition of a force majeure event, and (2) that event caused the party’s failure to perform. Emerald Int’l Corp., 2016 WL 4433357, at *3. The party claiming force majeure has the burden to prove the defense at trial. Gulf States, 2019 WL 7403970, at *9 (citing In re Clearwater Nat. Res., LP, 421 B.R. 392, 397 (Bankr. E.D. Ky. 2009)).

“A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations.” Gulf States, 2019 WL 7403970, at *5 (citing Cantrell Supply, 94 S.W.3d at 385). “The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms.” Id. “Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties.” Id. “[O]nce a court determines that a contract is ambiguous, areas of dispute concerning the extrinsic evidence are factual issues and construction of the contract become subject to resolution by the fact-finder.” Id.; see also Prime Finish, LLC v. ITW Deltar IPAC, No. 5:08-cv-438, 2017 WL 1823064, at *9 (E.D. Ky. May 5, 2017).

A recent Kentucky federal court demonstrates how the courts carefully analyze whether the event and cause qualify under the force majeure clause, and the party’s careful compliance with the requirements therein. See Gulf States, 2019 WL 7403970, at *9. The court analyzed whether a tank painting contractor was excused in its performance delays under an expanded force majeure clause.1 Id. at *10. The court analyzed definitional and causation arguments involving (1) counterparty defects causing delays, (2) counterparty control over the means and methods of performance, (3) change in security requirements for access, (4) counterparty interference with performance (removing equipment), (5) inspector delays and obstruction, (6) tank availability, and (7) weather impacts. Id. The court performed an exhaustive assessment of each and concluded that, to the extent that these events delayed the performance of the contract, these delays in total did not prevent the completion of the subcontractors in a timely manner. Id. Additionally, with respect to the events the court recognized as excusable delays, the court identified how the contractor failed to notify the counterparty of the force majeure events in a timely manner as required under the contract. Id.

In summary, Kentucky courts are willing to enforce force majeure provisions, but the parties will benefit from clear contracting of contemplated events and making a strong case that the occurrences match closely to the enumerated events.

B. Mitigation/beyond a party’s control

The typical Kentucky force majeure clause includes a provision that only excuses a party’s performance where the event of force majeure is beyond the party’s control. Kentucky courts acknowledge this qualification, but also highlight how the control element is not as expansive as it may seem, particularly in commercial contexts.

A Kentucky federal court highlighted the difficulty parties face in proving that an event is beyond their control, in a dispute involving a coal broker that failed to supply the contractually required coal tonnage to its purchaser. Native Energy, Inc. v. Peabody Coaltrade, Inc., No. CV 04-308-GFVT, 2006 WL 8445475, at *1 (E.D. Ky. Sept. 29, 2006). The undisputed reason for its delivery failure involved the inability to receive coal from three supplying mines—one due to a flood, one due to a workers’ strike, and one due to quality issues. Id.

The court questioned whether the loss of the coal sources sufficiently qualified as “beyond control of the [broker] affected” as required under the force majeure clause. Id. The court found that the floods were beyond the broker’s control, but questioned whether the labor dispute (in part by and through the broker’s affiliates) was within the broker’s control despite the broker having no obligation to go to extreme lengths to end the dispute. Id. The court denied summary judgment to allow for the finder of fact to make that assessment.

1 The force majeure clause defined such events as “acts of God or the public enemy, war, riot, embargo, fire, explosion, sabotage, epidemics, flood, accident, strikes, lockouts, or other labor disturbances from whatever cause arising, enactment, promulgation or issuance of any law, regulation, order or decree of any competent governmental, regulatory or judicial authority, or, without limiting the generality of the foregoing, any other circumstances of like or different character beyond such party’s control which could not have been prevented by reasonable precautions and cannot reasonably be circumvented by the non-performing party through the use of alternate sources, work-around plans or other means.”
Another Kentucky federal court highlighted how certain factors, which at face value seem to be outside of a party’s control, including market conditions, may not be deemed such when sophisticated parties are involved. See Emerald Int’l Corp., 2016 WL 4433357, at *5–6. The dispute involved a coal company that was obligated under the terms of a settlement agreement to make future coal deliveries of certain quantities, and ultimately was not able to deliver when the coal market crashed. Id. The company asserted that the decline in the coal market, as an element outside its control, caused its inability to perform. Id. The court held that the company could not argue the market change was a force majeure event beyond its reasonable control, because coal was still available and the company was a sophisticated party within the coal industry that assumed the risk of market changes when it agreed to use a pricing index to value the coal. Id.

The court specifically rejected this causation argument for two notable reasons. First, the company was not able to explain how a declining coal market would affect the availability of coal, noting a market decline might make the circumstances more costly and less profitable for the company (i.e., extra time, labor, and expense in order to produce the larger quantity of coal that amounted to a required delivery value), but the quality or the quantity of coal available to mine did not change. Id.

Second, the court reasoned that a change in the market does not amount to a force majeure event where the parties have agreed to price terms that assume market risks. Id. (citing In re Clearwater, 421 B.R. at 397–98) (by entering into a fixed-price contract, parties to that agreement “expressly assumed normal market risks, such as a downturn in the coal market and a reduction in demand and/or coal prices”); N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 275 (7th Cir. 1986) (“A force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed-price contract is that the market price will change.”). The court would not distinguish between fixed-price and index-based terms, as the relevant factor involved the assumption of risk that the market will change. Id. (citing Ky. Utils. Co., 836 S.W.2d at 398 (“It is obvious to this Court that neither [party] desired in the long term coal supply agreement to be willing to subject themselves to the risks typically associated with a pure market contract or to the converse, an agreement that made no recognition of market prices.”)).

II. Common law remedies

A. Impossibility

The impossibility doctrine is “a well-settled rule of [Kentucky] law that, where the law itself creates a duty, the nonperformance of it will be excused by an unavoidable accident previous to its performance.” Louisville & Jefferson Cty. Metro. Sewer Dist. v. T+C Contracting, Inc., 570 S.W.3d 551, 570 (Ky. 2018), reh’g denied (Apr. 18, 2019). As a general rule, the impossibility necessary to excuse the performance of a contract must relate to the nature of the thing to be done and not the inability or incapacity of the promisor or obligor to do it. Hubbard v. Talbott Tavern, Inc., No. 2003-CA-001468-MR, 2006 WL 2089308, at *3 (Ky. Ct. App. July 28, 2006). The burden of proving the defense of impossibility is on the party asserting it. Runyan v. Culver, 181 S.W. 640, 643 (Ky. Ct. App. 1916).

But this principle has no application to a case where a person has created a charge or obligation upon himself by an express contract for the reason that the party could have provided for such foreseeable relief within the contract. Louisville & Jefferson Cty., 570 S.W.3d at 570. In such a case, the party will not be permitted to excuse itself therefrom by, for example, pleading an act of God rendering performance impossible. Id.

The rule is that the promisor is not discharged where the performance becomes impossible subsequent to making the contract. Id. More specifically, where the party contracts to create a duty or charge upon itself, it is bound to make it good, notwithstanding an accident by inevitable necessity, because the party could have provided against the foreseeable event in the contract. Id.

The Supreme Court of Kentucky summarized the logic of this doctrine in stating that, “if it becomes impossible by contingencies which should have been foreseen and provided against in the contract, and still more if they might have been prevented, the promisor should be held answerable” and in turn be held liable to pay damages for breach of the contract. Id. (citing Runyan, 181 S.W. at 643). It is ultimately not a matter of penalizing what cannot be done, but rather the undertaking and promising to do such. Id.

The Napier case highlights the attempt to assert the impossibility doctrine on the basis of an influenza outbreak in Kentucky in the early 1900s. Napier v. Trace Fork Mining Co., 235 S.W. 766 (Ky. Ct. App. 1921). The dispute involved a contractor failing to perform timely under a construction contract, and attempting to excuse performance arguing the influenza epidemic
made it impossible for him to procure the necessary labor. Id. at 767. The court acknowledged "[t]hat his work was hindered and delayed by this condition which developed after the execution of the contract is thoroughly established, but it is by no means satisfactorily proven that the completion of the contract within the specified time was rendered impossible or other than more difficult and expensive." Id. at 766–67. The court further reasoned that the "time of the essence" provision within the contract served to place upon the contractor an absolute responsibility for every possible delay whatever its cause. Id. at 767.

The Hubbard case highlights how the courts do not excuse contract performance even if the required actions of third parties arguably render the performance obligations impossible. See Hubbard, 2006 WL 2089308, at *3. The appellate court heard a breach of contract dispute involving the purchase of a tavern set to close on September 19, 2001, but for which the purchaser’s investors backed out due to the September 11, 2001 terrorist attacks in New York. See id. The purchase contract did not include a force majeure clause and the defendant purchaser argued the doctrine of impossibility because its investors were "scared to take any chances with their money, and they backed out of the deal." Id. The court found that there was no legal basis to excuse the performance under the contract. Id. at *4. The court reasoned that there was no express condition of financing from a specific investor, and furthermore, that no force majeure clause existed within the contract that would have possibly provided relief for these very circumstances. Id.

B. Frustration of purpose

The commercial frustration doctrine generally involves the destruction of one party’s purpose for entering a contract without fault of either party, rather than whether the performance under the contract is impossible or impractical. However, Kentucky courts have limited precedent on this doctrine.

The primary Kentucky case analyzing this doctrine is an appeal from a judgment modifying a commercial lease contract because of changed conditions due to federal wartime regulations and restrictions. See Frazier v. Collins, 187 S.W.2d 816 (Ky. Ct. App. 1945). The court questioned whether a lessee that rented a property for the purpose of operating a filling station ought to be absolved or discharged from his written obligation because war conditions led to partial failure of the purpose for which the property was rented, including reduced profits and increased burdens due to federal restrictions on merchandise handled by him on the premises. Id. The court held that there was no right to terminate or modify the commercial gas station lease on the basis of the frustration of purpose doctrine. Id. at 22.

The court reasoned that "[a] promise will not be discharged, however, because the performance promised in return has lost value on account of supervening fortuitous circumstances unless they nearly or quite completely destroy the purpose both parties to the bargain had in mind," and emphasized this is particularly so for commercial leases. Id. In fact, the court seems to limit the doctrine of frustration, as applied specifically to leases, to those cases "where the law or rules, regulations and orders have made illegal or prohibited absolutely the conducting of the business contemplated by the parties." Id.

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Kentucky’s UCC provides for adequate assurance rights. KY. REV. STAT. ANN. § 355.2-609. A contract for the sale goods imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. Id. § 355.2-609(1). When reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance and until he receives such assurance may, if commercially reasonable, suspend any performance for which he has not already received the agreed return. Id.

As to the right to demand adequate assurance between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards. Id. § 355.2-609(2).

After receipt of a justified demand, failure to provide within a reasonable time not exceeding thirty (30) days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract. Id. § 355.2-609(4).

B. Commercial impracticability

Kentucky’s UCC recognizes the defense of commercial impracticability. KY. REV. STAT. ANN. § 355.2-615(a).

The Supreme Court of Kentucky has noted that “it is difficult to imagine the parties to the agreement having intended for the provisions of Section 2–615 to be applicable to the buyer . . . since the section expressly refers to sellers and no Kentucky appellate case before the Court of Appeals in this one has ever found, let alone hinted, at applying this provision of the UCC to buyers.” See Ky. Utils. Co., 836 S.W.2d at 397. While the court expressed that “it is strongly
believed Section 2–615 applies only to sellers, as its language states," the same court footnoted the appellate court’s subscription to the interpretation by some authorities that comment 9 of the official comments to the UCC makes Section 2–615 applicable to buyers. Id. at n.2.

Another example where the impracticability defense may not survive is where it conflicts with the express language of a commercial contract. Id. at 397. The Supreme Court of Kentucky considered whether Section 2-615 excused a coal seller’s performance due to commercially impracticable and unforeseen circumstances involving inflation and depressed market conditions. Id. The court rejected the defense on grounds that the contract language locked both parties into a risk situation as to the price to be paid or received for only a three-year period and either party then had the right to initiate a readjustment of the price so long as the triggering contractual conditions could be satisfactorily shown to exist: (1) that material unforeseen events or changed conditions had occurred, and (2) those events or conditions caused the price of the coal to be inequitable to one of the parties. Id. at 398.
Louisiana

Louisiana applies the civil code remedy of force majeure to contracts and as an affirmative defense to tort actions. Louisiana requires impossibility, and not impracticability, to excuse performance based on force majeure unless the parties specifically contract otherwise. Louisiana similarly does not consider any non-“act of God” reasons to be events of force majeure unless the parties specifically contract otherwise.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Mitigation/beyond a party's control
   C. Foreseeability
   D. Notice

II. Louisiana code
   A. Force majeure/impossibility
   B. Commercial impracticability

III. UCC provisions regarding excused performance

I. Contractual force majeure provisions

A. General requirements

Although the concept of force majeure is governed by statute in Louisiana and is not derived from the common law, parties still often contract to cover specifically what constitutes an event of force majeure and what other requirements are necessary for the event to excuse nonperformance.

Interpretation of force majeure disputes generally involve questions of fact. For example, that includes whether an event actually prevented a party from performing its contractual obligations, or whether an event is beyond the control of the party seeking to invoke force majeure. See, e.g., Exxon Corp. v. Columbia Gas Transmission Corp., 624 F. Supp. 610, 612 (W.D. La. 1985) (finding questions of fact about whether gas purchaser could claim force majeure based on abnormally mild winter, severe economic recession in the buyer’s service area, or the inability of the purchaser to market its gas due to relatively high prices compared to competing alternative energy sources); Dominion Expl. & Prod., Inc. v. Delmary Sys., Inc., No. 07-9492, 2016 WL 6276776, at *4 (E.D. La. Oct. 27, 2016) (finding question for trial as to whether some of party’s incurred costs following failure of mooring system were attributable to causes and events beyond or within the party’s control).


Parties often exempt certain contractual obligations, such as payment obligations, from coverage of force majeure provisions. See, e.g., IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal Dist., No. 16-cv-146, 2019 WL 1064264, at *10 (W.D. La. Mar. 6, 2019) (carving out “obligations or undertakings to pay any sums of money” as not being eligible to be excused by force majeure events).

B. Mitigation/beyond a party’s control

To excuse performance based on force majeure, unless the contract provides otherwise, the event must be beyond the control of the party invoking the force majeure provisions. See City of New Orleans v.
The court focused on the broad catch-all language of the parties’ force majeure provision, which excused performance for "other causes whether of the kind of the parties' force majeure provision, which excused nonperformance in cases where events were not foreseen from occurring by either force majeure or by any cause beyond their control within the lease's force majeure provisions.

The force majeure provision will be read in connection with the rest of the contract. See City of New Orleans, 517 So. 2d at 155 (rejecting party’s contention that impairments clause excused nondelivery in any case of the supplier having a gas shortage, and instead explaining that clause must be read in connection with the force majeure clause to only excuse liability for nonperformance if the party could not have avoided the shortage by reasonable foresight and good faith).

Where the event of force majeure could have been prevented by the party claiming it, the defense will not be available. See id. at 155–56 ("The trial judge’s factual conclusion, reasonably supported by the record, was that by the exercise of due diligence, in not releasing reserves, in acquiring reserves when it could have done so, and in not committing itself to further deliveries by added sales atop its preexisting contractual obligations, [the supplier] could have prevented the shortage that its own actions caused."); see also Louis Dreyfus Corp. v. Cont'l Grain Co., 542 So. 2d 677, 681 (La. Ct. App. 1989) (finding party seeking to excuse performance in wake of explosion at grain elevator exercised reasonable diligence in trying to prevent such an explosion and was entitled to force majeure defense excusing nonperformance).

C. Foreseeability

There may be more room to argue that unforeseeable market fluctuations are potential grounds for excusing nonperformance in Louisiana than in most other states. Consider Continental Oil Co. v. Crutcher, which the U.S. District Court for the Eastern District of Louisiana decided in 1977. 434 F. Supp. 464 (E.D. La. 1977). In that proceeding, the court denied a motion for preliminary injunction finding it unlikely that a purchaser could show that the parties reasonably intended the contract’s force majeure provision not to include an unforeseen five-fold market price rise over a three-year period. Id. at 470–71.

The court focused on the broad catch-all language of the parties’ force majeure provision, which excused performance for "other causes whether of the kind herein enumerated or otherwise not reasonably within the control of the party claiming suspension (of his duties to perform under the contract)." Id. at 470. The court explained, "the drastic rise in price of a magnitude of nearly 500% over a short period of time was not foreseen or contemplated by either of the parties at the time the contract was executed" even though the contract in 1972 was entered into "under conditions of rising but not skyrocketing gas prices." Id. at 470–71 ("The enormous elevation of gas prices after the contract was executed was not anticipated by the parties and was beyond their control.").

The court also relied on the principle that a contract should not be read to work hardship on a party where doing so would defeat the intent of the parties. Id. at 471 (relying on Coyle v. La. Gas & Fuel Co., 144 So. 737, 742 (La. 1932) ("Since persons may be expected to contract with one another on a basis equitable to each, a contract should not be given a construction that will work a hardship on one of the parties, where this may be avoided without defeating in whole or in part the intention of the parties at the time of execution of the agreement.").

D. Notice

Courts applying Louisiana law will enforce notice requirements within parties’ force majeure provisions. For example, the U.S. District Court for the Western District of Louisiana rejected a gas purchaser’s force majeure defense because even if the contract covered the alleged force majeure events, the purchaser failed to comply with the contract’s notice requirements for declaring force majeure. Superior Oil Co. v. Transco Energy Co., 616 F. Supp. 98, 108–09 (W.D. La. 1985).

Specifically, the contract required the declaring party to “give notice and full particulars of the same in writing or by telegraph to the other party as soon as possible after the occurrence relied on.” Id.; see also Carrollton Cent. Plaza Assocs. v. Picadilly Rests., LLC, 952 So. 2d 756, 758 (La. Ct. App. 2007) (affirming trial court ruling that even though Hurricane Katrina was a force majeure event, party failed to comply with 10-day notice provision within contract).

II. Louisiana code

A. Force majeure/impossibility

Louisiana courts have interpreted “force majeure” as an “unusual, sudden and unexpected manifestation of the forces of nature which man cannot resist.” See Guy v. Howard Hughes Corp., 262 So. 3d 327, 330 (La. Ct. App. 2018) (quoting Greene v. Fox Crossing, Inc., 754 So. 2d 339, 343 (La. Ct. App. 2000)). For example, a hurricane that causes unexpected and unforeseeable devastation is a classic case of an “Act of God” or force

Louisiana also applies this concept in tort. See Caldwell v. Let the Good Times Roll Festival, 717 So. 2d 1263, 1273 (La. Ct. App. 1998) (excusing liability for injuries caused by “a rare, extraordinary and highly dangerous micro burst produced by a severe thunderstorm, which was not foreseeable”). For example, to be caused by an act of God, the plaintiff’s injury must be due directly and exclusively to natural causes that could not have been prevented by the exercise of reasonable care. See id. (citing Terre Aux Bouefs Land v. J.R. Gray Barge, 803 So. 2d 86, 93 (La. Ct. App. 2001)); see also id. at 331–32 (rejecting defense where injuries caused, in part, by failure to properly anchor and secure carts, tents, and kiosks during thunderstorm).

Such a defense is available in tort if the accident is directly and exclusively due to natural causes without human intervention and no negligent behavior by the defendant contributed to the accident. Duboue v. CBS Outdoor, Inc., 996 So. 2d 561, 563 (La. Ct. App. 2008) (granting summary judgment in favor of defendant’s force majeure defense based on plaintiff’s injuries being caused by Hurricane Katrina and not defendant’s conduct); Bush v. Bud’s Boat Rental, LLC, 135 So. 3d 1189, 1191–92 (La. Ct. App. 2014); Rayfield, 185 So. 3d at 87–88; Saden v. Kirby, 660 So. 2d 423, 438 (La. 1995).

With respect to force majeure/acts of God in contracts, Louisiana’s Civil Code provides: “An obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible. An obligor is, however, liable for his failure to perform when he has assumed the risk of such a fortuitous event. An obligor is liable also when the fortuitous event occurred after he has been put in default. An obligor is likewise liable when the fortuitous event that caused his failure to perform has been preceded by his fault, without which the failure would not have occurred.” LA. CIV. CODE ANN. art. 1873.

The comments to the section provide, “In spite of strenuous doctrinal efforts to distinguish between cas fortuit (fortuitous event) and force majeure (irresistible force), the jurisprudence, in France, Louisiana, and even at common law, uses the two expressions interchangeably.” See id. cmt. c; see also Yor-Wic Constr. Co. v. Eng’g Design Techs., Inc., 329 F. Supp. 3d 320, 331 (W.D. La. 2018) (explaining Louisiana courts use the terms fortuitous events and force majeure interchangeably). For a detailed history lesson about the development of the “Act of God” defense, first used by Sir Edward Coke in 1581, review the dissenting opinion in Lehman, Stern & Co. v. Morgan’s L. & T.R. & S.S. Co., 2 Teiss. 236, 241–50 (Moore, J., dissenting) (La. Ct. App. 1905).

The Code provides that a “fortuitous event is one that, at the time the contract was made, could not have been reasonably foreseen.” LA. CIV. CODE ANN. art. 1875. Courts have held fortuitous events and force majeure to include “such acts of nature as floods and hurricanes” and consider the terms “essentially synonymous with the common law concept of ‘act of God.’” Yor-Wic Constr. Co., 329 F. Supp. 3d at 331 (quoting Payne v. Hurwitz, 978 So. 2d 1000, 1005 (La. Ct. App. 2008)).

Normal business risk will not be construed as a fortuitous event to excuse performance under the Code. Yor-Wic Constr. Co., 329 F. Supp. 3d at 331–32 (“It is true that [the company’s] performance was made impossible by [a third-party’s] waiver rejection, but this was a business risk assumed [by the company], not an ‘act of God.’”); Marionneaux v. Smith, 163 So. 206 (La. Ct. App. 1935); Desnoier v. Golden Gulf Marine Operators, Inc., 474 So. 2d 1314, 1317 (La. Ct. App. 1985) (“We agree with the trial judge that in any business venture the undertaker assumes the risk that circumstances beyond his control may cause the venture to fail. There is no guarantee to the entrepreneur that the general business climate will continue to exist.”).

Without a fortuitous event, there can be no impossibility under Article 1873. Sabre Indus., Inc. v. Module X Sols., LLC, No. 15-cv-2501, 2017 WL 4237919, at *3 (W.D. La. Sept. 22, 2017) (rejecting defense where party relied on business down turn, economic impracticability, and strategic business decisions to try and excuse performance, which were “not acts of nature such as floods and hurricanes and are in no way synonymous with an ‘act of God.’”); see also Breant v. Cazelles, 4 Teiss. 333, 333–35 (La. Ct. App. 1907) (explaining that if a party to the contract makes performance impossible, that party may not take advantage of the nonperformance, but the counterparty is released and may pursue an action for breach of contract).

The fortuitous event must also cause the non-performing party’s failure to perform. See Lehman, Stern & Co., 2 Teiss. at 239–40 (excusing liability for cotton destroyed by fire in the course of delivery); Industrias Magromer Cueros y Pielas S.A. v. La. Bayou Furs Inc., 293 F.3d 912, 923 (5th Cir. 2002) (rejecting force majeure argument based on adverse weather conditions where district court found weather conditions had nothing to do with non-delivery of nutria skins); West v. Cent. La. Limousine Serv., Inc.,
856 So. 2d 203, 205–06 (rejecting defense where party failed to pursue reasonable alternatives to rendering performance before declaring performance impossible). “The nonperformance of a contract is not excused by a fortuitous event where it may be carried into effect, although not in the manner contemplated by the obligor at the time the contract was entered into.” See Sabre Indus., 2017 WL 4237919, at *2–3 (citing Dallas Cooperage & Woodenware Co. v. Creston Hoop Co., 109 So. 844 (La. 1926)). Similarly, the defense is unavailable if performance merely becomes more difficult or burdensome. Id. at *3 (citing Schenck v. Captri Constr. Co., 194 So. 2d 378, 380 (La. Ct. App. 1967)). “The fortuitous event must pose an insurmountable obstacle in order to excuse the obligor’s nonperformance.” Payne, 978 So. 2d at 1005; Schenck, 194 So. 2d at 380 (performance of contract to construct house addition not rendered impossible by hurricane); Picard Constr. Co. v. Bd. of Comm’rs of Caddo Levee Dist., 109 So. 816, 818 (La. 1926) (concluding construction company undertaking excavating work and running into peculiarly hard subsoil formation not excused, and that “it follows that a party is obliged to perform a contract entered into by him if performance be possible at all, and regardless of any difficulty he might experience in performing it”); Hughes v. Grant Parish Sch. Bd., 145 So. 794, 797 (La. Ct. App. 1933); Esplanade Oil & Gas, Inc. v. Templeton Energy Income Corp., 889 F.2d 621, 625–26 (5th Cir. 1989) (rejecting defense where decline in market price of oil only made performance unprofitable, not impossible); St. Charles Ventures, L.L.C. v. Alberstons, Inc., 265 F. Supp. 2d 682, 696–97 (E.D. La. 2003) (rejecting force majeure claim under Civil Code and pursuant to parties’ agreement based on claim that imminent development of a rival grocer’s supercenter in its “market area” created an instance of impossibility of performance); Logan v. Blaxton, 71 So. 2d 675 (La. Ct. App. 1954) (rejecting defense where it was not impossible to improve roads or to use smaller transport trucks to overcome foreseeable seasonal rains); Trinidad Petroleum Corp. v. Pioneer Nat. Gas. Co., 416 So. 2d 290, 298–300 (La. Ct. App. 1982).

For example, even in the aftermath of Hurricane Katrina, which undoubtedly was a force majeure event, where contracts could still be performed, the contractual obligations were enforceable. See Associated Acquisitions, L.L.C. v. CareboneProps. of Audobon, L.L.C., 962 So. 2d 1102, 1107–08 (La. Ct. App. 2007) (“The unexpected and unforeseen damage of Hurricane Katrina does not change the agreement between these parties; therefore, this is an agreement which can still be performed.”); see also Payne, 978 So. 2d at 1006–07 (finding failure to perform volitional and rejecting defense of force majeure based on Hurricane Katrina).

As Article 1873 states, if a party was already in default prior to the fortuitous event, the fortuitous event will not excuse nonperformance. See Guillard v. Copeland’s of New Orleans, Inc., 971 So. 2d 451, 453 (La. Ct. App. 2007) (finding restaurant was in default one month prior to Hurricane Rita striking the Lake Charles area, which precluded a defense based on that fortuitous event).

Regardless of whether being applied in tort or contract areas of the law, allegations of force majeure often present genuine disputes of material fact. See, e.g., Milazzo v. Harvey, 245 So. 3d 346, 353 (La. Ct. App. 2018) (finding genuine issues of material fact regarding whether residence was flood prone under ordinary rain conditions such that damages were partly or totally caused by warranty defects in the premises).

B. Commercial impracticability

The common law doctrine of commercial impracticability has no application under Louisiana law. Hanover Petroleum, 521 So. 2d at 1240.

III. UCC provisions regarding excused performance

Although Louisiana has adopted the Uniform Commercial Code in most respects, Louisiana did not adopt Article II, which governs the sale of goods.
Maine

There are no reported decisions interpreting contractual force majeure provisions under Maine law. Maine recognizes impossibility of performance and act of God as common law defenses to nonperformance. Although an old decision, one Maine court has excused contractual performance because of a cholera outbreak.

The key cases are broken down as follows:

I. Force majeure

Maine courts define force majeure as “an unanticipated and uncontrollable event, including an act of nature such as a flood, tornado, or hurricane.” Opinion of the Justices of the Supreme Judicial Ct. of Maine, 123 A.3d 494, 521 n.26 (Me. 2015).

While Maine law recognizes the concept of force majeure, there does not appear to be any reported caselaw applying Maine law to a disputed contractual force majeure provision.

II. Common law remedies

Maine law recognizes a common law force majeure; specifically, impossibility of performance and acts of God are defenses to contract performance. See Lakeman v. Pollard, 43 Me. 463, 467 (Me. 1857) (“If the fulfillment of the plaintiff’s contract became impossible by the act of God, the obligation to perform it was discharged.”); see also Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc., 655 F. Supp. 513, 538 n.14 (D. Me. 1987) (noting that, while not raised, a possible defense was that performance became impracticable or impossible because of the occurrence of an event of which the non-occurrence was a basic assumption upon which the agreement was made (citing Cohen v. Morneault, 114 A. 307 (Me. 1921), and Restatement (Second) of Contracts § 261, aff’d in part, rev’d in part on other grounds, 832 F.2d 214 (1st Cir. 1987).

Whether impossibility will constitute a complete defense and relieve a party from liability for nonperformance “depends on the intention of the parties as disclosed by the contract.” See Cohen, 114 A. at 308.

For example, generally, contracts for personal services condition performance, at least implicitly, on the continued life and health of the person agreeing to render the service. Id. The death or disabling illness of such person excuses performance and provides a complete defense to an action for nonperformance. Id. Similarly, a contract to sell and deliver certain specific articles of personal property is impliedly conditioned upon the continued existence of the specific property that is the subject of the contract. Id. If the particular property to be delivered is destroyed accidentally and without fault, performance is excused. Id.

In Cohen v. Morneault, a seller agreed to sell and deliver potatoes to a buyer. Id. at 307–08. While the potatoes were in transit, they were destroyed by fire. Id. The court held that the seller remained liable to the buyer for the failure to deliver the potatoes. Id. at 308.

The court reasoned that even after the fire, the terms of the contract could have been satisfied—the seller could have shipped another pack of potatoes to the plaintiff. Id. Therefore, the fire did not render performance impossible. Id. The result would have been different had the contract called for the delivery of the specific bushels of potatoes that were destroyed by accident.

Notably, there is precedent in Maine supporting that a failure to perform may be excused due to an outbreak of an epidemic. In Lakeman v. Pollard, the court excused performance under a labor contract where the employee failed to perform due to a cholera outbreak. 43 Me. 463.
The court explained that the employee was “under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it.” *Id.* at 467. Nor did it make any difference that the men who remained at work, unlike the plaintiff, remained healthy. *Id.* Not only was the employee’s nonperformance excused, but he was able to recover in *quantum meruit* for the work he performed prior to departing due to the outbreak. *Id.*

Whether performance is rendered impossible is determined by the facts at the time of the nonperformance, and whether the defense of impossibility excuses the promisor’s performance is a question of fact for the jury. See *id*.

### III. UCC provisions regarding excused performance

#### A. Demands for adequate assurances

Under the Maine Uniform Commercial Code, “[w]hen reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.” ME. REV. STAT. tit. 11, § 2–609.

The “reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.” *Id.* In addition, “[a]cceptance of any improper delivery or payment does not prejudice the aggrieved party’s right to demand adequate assurance of future performance.” *Id.* A party that has received a demand for adequate assurance, must provide assurance of due performance within a “reasonable time not exceeding 30 days”; otherwise, that party has repudiated the contract. *Id.*

An assurance of due performance must be “adequate under the circumstances.” *Id.* Comment 3 to this Maine U.C.C. Section provides that “a ground for insecurity need not arise from or be directly related to the contract in question.” The right of a party to request adequate assurance applies equally to lease contracts. See *id.* § 2–1401.

Maine courts have not had to resolve disputes about the propriety of such demands. See, e.g., Martell Bros., Inc. v. Donbury, Inc., 577 A.2d 334, 337 n.1 (Me. 1990) (explaining that anticipatory breach justifying renunciation of entire contract, the actions of the party in breach refusing to perform must have been “distinct, unequivocal, and absolute” (citing 17 Am. Jur.2d Contracts § 450)).

#### B. Commercial impracticability

Maine has adopted the standard version of the Uniform Commercial Code section governing the defense of commercial impracticability. ME. REV. STAT. tit. 11, § 2–615.
Maryland

Generally, Maryland courts strictly interpret and enforce contractual force majeure provisions and have recognized a force majeure common law defense. Most Maryland caselaw covers other common law remedies such as the defense of impossibility, interpreted as impracticability, and frustration of purpose.

The key cases are broken down as follows:

I. Force majeure
   A. General requirements
   B. Foreseeability

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Force majeure

A. General requirements

Maryland common law recognizes a defense of force majeure, which is not solely limited to “acts of God.” For example, Maryland courts have held that a party’s contractual duty may be discharged due to force majeure “where performance is subsequently prevented or prohibited by a judicial, executive, or administrative order, in the absence of circumstances showing assumption of risk by the promisor or contributing fault on the part of the person subjected to the duty.” See Damazo v. Neal, 363 A.2d 252, 256 (Md. 1976) (finding that a seller could rescind sales contract when the City Planning Commission imposed an unforeseen requirement for dedication on the sale of a subdivision plat, which prevented the seller to convey good and merchantable title as part of the sale).

Although Maryland courts have not provided much guidance on how to interpret contractual force majeure provisions, Maryland courts will strictly follow the objective law of contracts. The interpretation of a contract, including the determination of whether a contract is ambiguous, is a question of law. Phoenix Servs. Ltd. P’ship v. Johns Hopkins Hosp., 892 A.2d 1185, 1223 (Md. 2006); see Lexington Square Partners, LLC v. Mayor & City Council of Baltimore City, No. 0724, Sept. Term 2014, 2015 WL 5921300, at *4 (Md. Ct. Spec. App. May 26, 2015) (“If the contract language is unambiguous and capable of only one meaning, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used.”) (unreported).

The “primary source for determining the intention of the parties is the language of the contract itself.” Phoenix, 892 A.2d at 1223 (citing Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P’ship, 674 A.2d 106, 142 (Md. Ct. Spec. App. 1996), aff’d, 695 A.2d 153 (Md. 1997)). Maryland courts will interpret unambiguous terms in a force majeure provision to determine its purpose. In Lexington Square Partners, the Maryland Court of Special Appeals applied strict contract interpretation to find that the purpose of the parties’ force majeure provision in a land disposition agreement was solely to extend the timeline for the parties to perform under the contract to prevent breach and/or default, and did not apply to the parties’ separate contractual right to invoke termination of the contract for nonperformance. 2015 WL 5921300, at *6–7 (“Under Section 13.1 of the LDA, in the event of any force majeure events resulting in project delays, ‘the time or times for the performance of the covenants, provisions and agreements of [the LDA] shall be extended for the period of the enforced delay . . .’”).

In the same vein, a Maryland federal district court recognized the parties’ intent to apply a “very broad” force majeure provision that covered “all contingencies, foreseen and unforeseen, from acts of God to business mismanagement.” See Wootton Enters., Inc. v. Subaru of Am., Inc., 134 F. Supp. 2d 698, 705–07 (D. Md. 2001), aff’d sub nom., F. App’x 57 (4th Cir. 2002) (The exculpatory clause stated: “if such failure or delay is due to the fact that delivery . . . was rendered impossible or
more burdensome... by any cause or event, whether foreseen or unforeseen, including, solely by way of illustration and not by way of limitation, any cause or event in the nature of force majeure..."

Force majeure provisions are not intended to buffer or excuse a party from the consequences of market risks that the parties assume as part of entering into a contract. See Langham-Hill Petroleum Inc. v. S. Fuels Co., 813 F.2d 1327, 1329–30 (4th Cir. 1987) (finding that the "realities of the business world," including price fluctuations, shortage of cash, or an inability to buy at a remunerative price, cannot be regarded as a contingency beyond the seller’s control) (citing Wheeling Valley Coal Corp. v. Mead, 186 F.2d 219 (4th Cir. 1950)).

The definition of what constitutes an “Act of God” in a boilerplate force majeure provision remains subject to interpretation in Maryland. The Maryland Court of Special Appeals has provided some guidance on what an “Act of God” may entail in explaining that an “Act of God” will excuse mortal man from responsibility only if God is the sole cause. See Mark Downs, Inc. v. McCormick Prop., Inc., 441 A.2d 1119, 1128 n.10 (Md. Ct. Spec. App. 1982) (“By the act of God, is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeding from physical causes alone, such as the violence of the winds, or seas, lighting, or other natural accidents.”).

B. Foreseeability

A force majeure event must be an unforeseen event by the parties at the time of entering into the contract to excuse performance. A force majeure event, by definition, is an event that is unlikely to occur. See Phoenix, 892 A.2d at 1212 n. 19. To invoke a force majeure defense, absent any contractual provisions stating otherwise, the invoking party has the burden to establish that the force majeure event was not foreseeable.

To determine whether a force majeure event or contingency was foreseeable, Maryland courts review the existing circumstances and knowledge of the parties at the time of contracting. See, e.g., Heat Exchangers, Inc. v. Map Constr. Corp., 368 A.2d 1088, 1094–95 (Md. Ct. Spec. App. 1977) (finding that supply shortages were foreseeable when shortages existed during the months preceding the execution of the contract, and the risk was assigned to seller through the parties’ failure to explicitly provide against it in the contract) (citing MD. CODE ANN., COM. LAW § 2-615 cmt. 1).

II. Common law remedies

A. Impossibility

Under Maryland law, in the absence of an agreed force majeure clause, a party may be discharged from its obligations under a contract because performance is impossible. “Actual impossibility is not required, only a showing of impracticability because of extreme or unreasonable hardship, expense, injury or loss, but not because a supervening event made performance more expensive.” See, e.g., Maryland Civil Pattern Jury Instructions (2019), MPJI-Cv 9:27 Impossibility of Performance, cmt. A.1.

Performance may be rendered impossible by events occurring after the formation of the contract, and which the party has no reason to anticipate and the occurrence of which the party did not contribute. See Stone v. Stone, 368 A.2d 496, 500 (Md. Ct. Spec. App. 1977) (“Where, after the formation of a contract facts that a promisor had no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the promise impossible, the duty of the promisor is discharged. . . .”) (citing Restatement of Contracts § 457 (1932)).

“A party relying on the defense of impossibility of performance must establish (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable.” See Berkley Trace, LLC v. Food Lion, LLC, No. CIV.A. RDB-11-03207, 2013 WL 3777040, at *7 (D. Md. July 18, 2013).

Further, a contractual duty is discharge “where performance is subsequently prevented or prohibited by a judicial, executive, or administrative order, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty.” Wischhusen v. Am. Medicinal Spirits Co., 163 A. 685, 688 (Md. 1933) (“Under such circumstances, the performance of the contract would be criminal, and so legally impossible.”); Kahn v. Brown, 259 A.2d 61, 64 (Md. 1969) (“But an order which interferes with the performance of the contract is not an excuse if the circumstances surrounding the formation of the contract are such as to indicate that the possibility of such interference was recognized and the risk of it was assumed by the promisor.”) (internal citations omitted).
A party attempting to excuse performance must demonstrate that the alleged reason for impossibility actually prevented the party from fulfilling its contractual obligations. See, e.g., Acme Moving & Storage Corp. v. Bower, 306 A.2d 545, 547–48 (Md. 1973) (holding that defense of impossibility was available to a landlord when it was impossible for the landlord to secure the necessary permit for sale due to conflicting governmental requirements). In Acme Moving, a landlord could not obtain the necessary use and occupancy permit to lease his property because of conflicting government requirements by two different government agencies. See id. The court found that the landlord’s inability to secure the government permit because of the conflict in law was not a foreseeable event. Id. ("He [landlord] has been impaled upon the horns of an administrative dilemma through no fault of his own . . . . the defense of impossibility of performance is properly available to him."); see also Wischhusen, 163 A. at 688 (finding that the defendant’s inability to secure a government permit to manufacture whiskey and lawfully operate his plant was a "subsequent, unanticipated, circumstance supporting impossibility of performance").

The defense of impossibility is limited to "objective impossibility" related to the nature of the contractual performance, and not "subjective impossibility" related to financial inability of one of the contracting parties to perform. See Harford Cty. v. Town of Bel Air, 704 A.2d 421, 431 (Md. 1998); see also Stone, 368 A.2d at 515 ("Impossibility of performing a promise that is not due to the nature of the performance, but wholly to the inability of the individual promisor, neither prevents the formation of a contract nor discharges a duty created by a contract.") (quoting Restatement of Contracts § 455 (1932)). The Court of Appeals of Maryland has held that "the financial inability of one of the contracting parties to meet the contract price is [not] an adequate ground upon which to grant rescission of a contract on the basis of impossibility of performance." See Baldi Constr. Eng’g, Inc. v. Wheel Awhile, Inc., 284 A.2d 248, 249–50 (Md. 1971).

Consider Stone v. Stone, in which an ex-wife argued that the doctrine of impossibility did not apply to her separation agreement with her ex-husband.

The agreement required him to pay a sum of money and purchase her joint interest in a 17-acre tract in lieu of paying alimony. 368 A.2d at 500. The court held that the doctrine of impossibility did not apply because (1) the wife remained ready and willing to convey her joint interest in the 17-acre tract, and (2) there was no subsequent legislative enactment rendering impossible the ex-husband’s contractual obligation to make the payment under the contract. Id. The court explained that the "subject matter of the agreement" was capable of being performed, and that the alleged impossibility was attributed solely to the husband’s financial inability to perform. Id. Therefore, the ex-husband’s obligations could not be discharged.

Similarly, in Levine v. Rendler, a construction company sought a directed verdict under the doctrine of impossibility when a change in a county ordinance required the use of higher quality concrete for county roads, which created a higher cost of performance. 320 A.2d 258, 264 (Md. 1974). The court held that the construction company’s performance was not impossible, but only disadvantageous. Id. The court reasoned that the change in county specifications adopting a more comprehensive road ordinance should have been foreseeable to the company because the county regulators had showed a preference for higher costing concrete in previous years. Id. ("The applicable rules do not permit a party to abrogate a contract, unilaterally, merely upon a showing that it would be financially disadvantageous to perform it; were the rules otherwise, they would place in jeopardy all commercial contracts."); see also Acme Moving, 306 A.2d at 547–48 ("It may be inconvenient; it may be profitless; it may and very likely would be expensive; but it is not impossible.").

B. Frustration of purpose

Maryland recognizes the doctrine of frustration of purpose, as stated in Section 265 of the Restatement (Second) of Contracts, which provides which an obligor’s duties may be discharged if that party’s principal purpose is substantially frustrated without his or her fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. See Panitz v. Panitz, 799 A.2d 452, 459 (Md. Ct. Spec. App. 2002) (finding the doctrine of frustration inapplicable because the appellant weighed the risk of his obligations to pay alimony prior to entering into the contract, a foreseeable risk which he failed to take any preventive measures against in the contract); Montauk Corp. v. Seeds, 138 A.2d 907, 911 (Md. 1958).

In Montauk Corp. v. Seeds, Maryland’s highest court outlined three factors that courts should examine when determining whether the frustration doctrine applies: (1) whether the intervening act was reasonably foreseeable so that the parties could and should have protected themselves by the terms of their contract; (2) whether the act was an exercise of sovereign power; and (3) whether the parties were instrumental in bringing about the intervening event. Id. at 910–11; see also Jeffrey
Sneider-Maryland, Inc. v. LaVay, 345 A.2d 79, 85 (Md. Ct. Spec. App. 1975) (“[i]f the supervening event was reasonably foreseeable the parties may not set up the defense of frustration as an excuse for nonperformance.”).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

For contracts for the sale of goods, Maryland law provides that “when reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.” MD. CODE ANN., COM. LAW § 2–609(1); see Rad Concepts, Inc. v. Wilks Precision Instrument Co., 891 A.2d 1148, 1162 (Md. Ct. Spec. App. 2006) (finding reasonable grounds for insecurity based on manufacturer’s poor payment history and avoidance of telephone calls); Ford Motor Credit Co., LLC v. Roberson, 25 A.3d 110, 116 (Md. 2011).

Comment 2 of Section 2–610 of the Maryland Commercial Law Article states that “a repudiation automatically results ... when a party fails to provide adequate assurance of due future performance within thirty days after a justifiable demand therefore has been made.” See Rad Concepts, 891 A.2d at 1162.


B. Commercial impracticability

In Maryland, a party must satisfy the following elements to excuse nonperformance under the UCC-based doctrine of commercial impracticability: (1) a contingency must occur, (2) performance must thereby be made “impracticable,” and (3) non-occurrence of the contingency must have been a basic assumption on which the contract was made. See Heat Exchangers, 368 A.2d at 1093; MD. CODE ANN., COM. LAW § 2–615.

In determining if a party should be relieved of its contractual duties based on impracticability, a court must consider the “[c]ircumstances existing at the contracting date and foreseeability.” Heat Exchangers, 368 A.2d at 1093; see also Rockland Indus., Inc. v. E+E (US) Inc., 991 F. Supp. 468, 472–73 (D. Md. 1998), on reconsideration in part, 1 F. Supp. 2d 528 (D. Md. 1998) (“Foreseeability is the key in commercial impracticality cases.”). Where an unforeseen occurrence precludes the seller from performing, the common law and U.C.C. § 2–615 may excuse the seller from performing. See id. 991 F. Supp. at 472 (finding that the market risks for antimony oxide were a foreseeable contingency at the time of contracting and therefore the parties should have known that the supply could fail given the market crisis).

In Heat Exchangers, the Maryland Court of Special Appeals had to determine whether the failure of a seller’s supply of air-conditioning units was a contingency that “could have been foreseen by the seller as a real possibility and would permit a conclusion to be reached that the risk of its occurrence tacitly was assigned to Heat by reason of the failure explicitly to provide against it in the contract.” 368 A.2d at 1093. The court concluded that the evidence failed to support that the alleged intervening contingency was unforeseeable when the company acknowledged supply difficulties prior to entering into the contract. Id. at 1093–94; see also Ecology Servs., Inc. v. GranTurk Equip., Inc., 443 F. Supp. 2d 756, 770 (D. Md. 2006).

Under Maryland law, when there is an agreed sole source in the contract and it is foreseeable that the sole source may fail, the risk of non-delivery is on the seller unless the seller includes exculpatory language, thereby expressly transferring the risk to the purchaser. See id.; see also Rockland Indus., 1 F. Supp. 2d at 531 (finding that where no exculpatory provision existed, the risk of non-delivery did not shift to the purchaser where it was clear to both parties at the time of contracting that the sole source might fail due to a tight market).

To invoke the “sole source” defense under the Maryland Commercial Code, which involves performance being impracticable, the source of supply must not only fail but: (1) it must have been mutually contemplated by the parties as the sole source of supply, (2) the failure must not have been foreseeable at the time of the contracting, and (3) the party seeking to be excused must have employed all due measures to insure that the source did not fail. See Ecology Servs., 443 F. Supp. 2d at 770 (“In order to overcome the foreseeability issue, an exculpatory clause must ‘expressly transfer[] the risk to the purchaser.’”).
Massachusetts

Courts applying Massachusetts law interpret force majeure provisions as intended by the parties, and in connection with the contract’s other provisions. Unless stated otherwise in the contract, a force majeure provision will excuse performance only for as long as the force majeure event persists. Massachusetts also recognizes the doctrines of impossibility, construed as impracticability, and frustration.

The key cases are broken down as follows:

I. Contractual force majeure provisions
A. General requirements
B. Causation
C. Foreseeability
D. Notice

II. Common law remedies
A. Impossibility
B. Frustration of purpose

III. UCC provisions regarding excused performance
A. Demands for adequate assurances
B. Commercial impracticability

I. Contractual force majeure provisions
A. General requirements


Consider Baetjer, which involved a contract for the sale of more than two million gallons of Puerto Rican molasses that the buyer used for the production of industrial ethyl alcohol at a Massachusetts plant. 66 N.E.2d at 799. In 1942, one day after the buyer took delivery of a load under the contract, a German submarine sunk the tanker containing the molasses. The buyer claimed it could not accept any additional deliveries under the contract based on account of war conditions. Id. at 800. The court had to construe the force majeure clause in connection with a “Withdrawals” clause in the agreement to determine that “delivery” had two meanings under the agreement—taking delivery into the seller’s storage tanks and taking delivery when loaded onto the buyer’s vessels. Id. at 801.

Taking the contract as a whole, the court reasoned that the force majeure provision only applied to failure to take the molasses on the buyer’s vessels for as long as the force majeure event remained in place. Id. That, however, did not excuse the buyer’s obligation to pay for the molasses that the seller had delivered into its storage tanks awaiting delivery onto the vessels given the contract required payment for any molasses that had been stored, but not yet delivered onto vessels, as of a date certain. Id. (reasoning that “may well have been inserted because of doubt whether in time of war available shipping would permit removal of the molasses in accordance with the contract and for the sole purpose of protecting the seller against unreasonable delay in payment if shipping could not be found”).

Where the parties specifically tailor a force majeure provision, courts will not read into the clause common law concepts of force majeure or vis major to determine its meaning and application. Int’l Paper Co. v. Beacon Oil Co., 290 F. 45, 49–50 (1st Cir. 1923).

In International Paper Co. v. Beacon Oil Co., the First Circuit Court of Appeals considered a suit by an oil company against a purchasing paper company for alleged breach of contract to purchase oil for a full year. 290 F. at 45. The buyer failed to take the full amount of oil it contracted to take, but claimed it could not do so for multiple reasons beyond its control, and argued that the force majeure provision allowed it to deduct those amounts from its requisite purchase obligation. Id. at 45–46. The district court confined the force majeure argument to any effects from a labor strike at the buyer’s plant, but the First Circuit explained
that the district court construed the force majeure provision too narrowly. *Id.* at 49.

Specifically, the court concluded that there was enough evidence of other factors that may have been beyond the control of the buyer that could have operated as a force majeure event to excuse additional performance. *Id.* The court explained:

> There was abundant evidence tending to show that, owing to frequent changes in styles and to the rapid deterioration of news print in storage, such a paper business as the defendant’s was invariably carried on upon orders; that the storage capacity of such mills was almost negligible; that operations at such mills are not merely financially dependent upon market conditions, but are in effect physically blocked when sales stop; that the chief customer of the Rumford Mill was the Continental Paper Bag Company, whose mill was next door, so that the defendant’s product was shipped directly into the Continental Company’s plant; that the employees of the Continental struck in May, 1921, and stayed out several weeks after the Rumford Mill had resumed operations, so that this important outlet for defendant’s product was blocked. Without further statement of the evidence, it is plain that a jury would have been warranted in finding that, apart from the effect of the strike in the defendant’s own mill, which began in May and lasted until well into the fall, the defendant’s normal operations were cut down by causes beyond its control, and which it could not overcome by any exercise of due diligence.

*Id.* The court also explained that the district court over-read the force majeure clause and failed to give proper effect to the catch-all caveat that started the provision, as well as the last clause that said the enumerated events shall “be in no wise exclusive of other causes or classes of causes.” *Id.* at 50–51 (noting that the buyer’s reasons for nonperformance went far beyond a simple “lack of market” argument).

Unless specifically stated otherwise in a parties’ contract, when an event of force majeure prevents performance, it will not serve as grounds for an outright termination of the contract; it will merely suspend performance while the force majeure event exists. See, e.g., *Altran Corp. v. WXIII/Far Yale Real Estate L.P.*, No. 4823BLS, 2001 WL 543224, at *8 (Mass. Super. Ct. Feb. 21, 2001); *Itek Corp. v. First Nat’l Bank of Boston*, 730 F.2d 19, 26 (1st Cir. 1984) (reasoning that the parties’ reference to estimated duration of force majeure events proved that the parties did not intend a force majeure event to cancel a contract entirely upon its occurrence, and noting that the contract allowed either party to cancel the contract if the force majeure event lasted for three months).

For agreements that call for arbitration to resolve disputes arising under or in connection with the contract, the arbitrator(s) will resolve disputes about the applicability of the force majeure provision. See, e.g., *Gen. Dynamics Info. Tech., Inc. v. Wireless Props., LLC*, 714 F. Supp. 2d 211, 216 (D. Mass. 2010) (finding arbitrator must resolve whether contract contemplated following force majeure protocol when party alleged excusable delay based on third party’s failure to provide financing).

**B. Causation**

The alleged force majeure event must be the cause of the non-performing party’s failure to perform to excuse performance. For example, even if an event qualifies as a force majeure event under a parties’ contract, the event still must meet the contract’s required causation standard. See, e.g., *Bellerman v. Fitchburg Gas & Elec. Light Co.*, No. WOCV0923B, 2009 WL 3086005, at *2–3 (Mass. Super. Ct. Sept. 9, 2009) (concluding even though storm played a role in initial power outage, allegations focused on party’s failure to put in place adequate tree-cutting and emergency response programs, as well as failure to mitigate damage from storm in timely fashion).

**C. Foreseeability**

Where an event is foreseeable, Massachusetts courts expect parties to contract around the risks of those events at the time of contracting. Force majeure provisions, unless specifically tailored to cover the events, will not apply. For example, if the parties want to condition performance upon some event, then the agreement should make the event a condition precedent to performance. See, e.g., *Harper v. N. Lancaster, LLC*, 18-P-1490, 2019 WL 2869577, at *1–2 (Mass. App. Ct. July 3, 2019) (explaining parties failed to make payment obligation conditioned on anything related to do with settlement of other proceeding, and concluding force majeure defense inapplicable because failure to settle other proceeding was foreseeable); *Kelton Corp. v. County of Worcester*, 688 N.E.2d 941, 945 (Mass. 2000) (holding party’s payment obligation was not contingent on availability of funds from special account because such limitation was not included in parties’ settlement agreements or agreement for judgment); *Goldman*, 2012 WL 1069345, at *1 (finding nothing in contract that makes performance conditional on obtaining necessary permits).
D. Notice
Many force majeure provisions have notice requirements that the party invoking the provision must follow. Even where an event of force majeure impairs a party’s performance, failure to follow the contract’s notice requirements can preclude a party from relying on the clause to excuse performance. See, e.g., Goldman, 2012 WL 1069345, at *1 (explaining that even if the state agency’s failure to approve the project in question constituted an event of force majeure, the non-performing party failed to “promptly notify the other of the particulars giving rise to the excuse,” as the contract required).

II. Common law remedies
A. Impossibility

Couching impossibility on market shifts and changed economic conditions will not be successful in excusing performance. See id. (“Certainly, the climactic market change made it more difficult for [the party] to perform its obligations under the Agreement, but economic downturns and other market shifts do not truly constitute unanticipated circumstances in a market-based economy.”); see also Imbeschied v. Lerner, 135 N.E. 219, 202 (Mass. 1922) (“If the defendant desired to have protected himself from liability to pay rent, a clause for that purpose should have been inserted in the lease.”).

For a detailed description of how the defense of impossibility has been recognized and has evolved in Massachusetts, see Baetjer, 66 N.E.2d at 802–03 (collecting cases).

Where the contract calls for alternative means of performance and only one means of performance becomes impossible, the party will be expected to still perform the alternative means. See, e.g., Drake v. White, 117 Mass. 10, 13 (Mass. 1875) (“The fact that one part of this alternative promise has become impossible of fulfillment does not relieve them from the other.”).

B. Commercial frustration

Where a party fails to bring forth evidence establishing the excuse for nonperformance, the commercial frustration defense is inapplicable. Id. at *2. The allegedly frustrating event must actually frustrate the purpose of the contract. See, e.g., Copp v. Modern Key Shop, Inc., No. 9299, 1995 WL 48364, at *3 (Mass. Dist. Ct., App. Div. Jan. 27, 1995) (rejecting defense where party failed to prove that individual’s death in any way frustrated the actual, basic purpose of the parties’ contract).

When the only frustration consists of known risks assumed by the party that turned out to the party’s disadvantage, the defense is not available. Baetjer, 66 N.E.2d 798; see also Essex–Lincoln Garage, Inc. v. City of Boston, 175 N.E.2d 466 (Mass. 1961); Gurwitz, 2006 WL 1646144, at *4 (rejecting defense where “[m]arket shifts and changes are foreseeable, even if the specific reason for an economic downturn in a particular industry, such as the advent of the internet, are not”).

III. UCC provisions regarding excused performance
A. Demands for adequate assurances
Massachusetts recognizes the UCC-based right for a party to demand adequate assurances of due performance from its counterparty when the party has reasonable grounds for insecurity about the counterparty’s ability to perform. MASS. GEN. LAWS c. 106, § 2–609; RGJ Assocs., Inc. v. Stainsafe, Inc., 338 F. Supp. 2d 215, 232 (D. Mass. 2004). The section does not provide any rights to a party for goods already in hand, but only with respect to future performance. See, e.g., Gutor Int’l AG v. Raymond Packer Co., 493 F.2d 938, 943 (1st Cir. 1974).

B. Commercial impracticability
Massachusetts recognizes the UCC-based defense of commercial impracticability in the sale of goods context, and its courts have equated that defense to the common law defense of commercial frustration discussed above. See Managed Air Sys., 2014 WL 88658, at *1.

Massachusetts’s highest court rejected an argument that a labor dispute could never be the basis for a defense of commercial impracticability. Mishara Constr. Co., 310 N.E.2d at 368. For example, “Where the probability of a labor dispute appears to be practically nil, and where the occurrence of such a dispute provides unusual difficulty, the excuse of impracticability might well be applicable.” Id.
Michigan

Michigan courts construe force majeure clauses narrowly and thus the parties’ specific provisions are critical to determining enforceability. Michigan courts are unlikely to enforce force majeure provisions based on economic reasons unless clearly covered by the parties’ agreement.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability
   E. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements


Force majeure is not recognized as “a contract defense under Michigan law, but it can be a bargained-for contract provision or protection.” Hemlock Semiconductor Corp., 2016 WL 67596, at *7. Michigan courts have cited other courts’ refusal to enforce force majeure clauses where the alleged force majeure event affects the contract’s profitability, but does not prevent a party from performing. Id.

Michigan courts construe force majeure clauses narrowly. See Kyocera Corp. v. Hemlock Semiconductor, LLC, 886 N.W.2d 445, 453 (Mich. Ct. App. 2015) (party cannot “by judicial action, manufacture a contractual limitation that it may in hindsight desire by broadly interpreting the force-majeure clause to say something that it does not”).


Whether a particular event will be covered within a force majeure clause will be determined by the plain language of the contract. See id. For example, where the terms of the force majeure clause expressly protect one party (and not both parties) from unanticipated events, the force majeure clause will apply only to that party’s performance. Hemlock Semiconductor Corp., 2016 WL 67596, at *7. If the force majeure clause provides for a delay in performance, but does not excuse performance entirely or provide for a total rescission of the contract, enforcing the force majeure clause will accordingly only delay performance. Id.

B. Causation

A party showing that it tried and was unable to perform will not be excused unless the party’s inability to perform arose out of the “nature of the act to be done, rather than the inability” of the party to do it. See Erickson, 474 N.W.2d at 155; see also McLouth Steel Corp. v. Jewell Coal & Coke Co., 570 F.2d 594, 608 (6th Cir. 1978) (affirming district court’s conclusion that no “governmental authority having jurisdiction in the premises” prevented contractual
performance, which was required for the party’s force majeure argument to be credible given the contractual language).

In Hemlock Semiconductor Corp., a buyer of industrial-grade polycrystalline silicon for solar panels in a long-term supply contract, which required purchasing specified quantities, attempted to declare force majeure based on changed market conditions. 2016 WL 67596, at *1–2. Specifically, based on action by the Chinese government and responsive action by the US government, the prices of both polysilicon and solar panels dropped precipitously after the parties entered into their agreement. Id. at *2.

The buyer contended that the changed market conditions caused by the government actors prevented its contractual performance. Id. The Michigan Court of Appeals agreed with the state trial court that the parties’ force majeure clause did not permit relief based on the changed market conditions. Id. (citing Kyocera Corp., 15–025786–CK, at *2 (Mich. Ct. App. Dec. 3, 2015)).

As explained by the US District Court for the Eastern District of Michigan, which also considered the issue in a later proceeding, the buyer’s performance may have become inconvenient, and even more costly, but the changed market conditions did not prevent the buyer’s performance of the contract. Id. at *6–7 (examining cases from other jurisdictions that found similarly).

C. Mitigation/beyond a party’s control

A party may not invoke a force majeure clause if “the delaying condition was caused by the party invoking it or could have been prevented by exercise of prudence, diligence, and care.” Cordoba, 2001 WL 1009308, at *3.

If a party fails to consider or utilize available options to mitigate the delaying condition, it might be unable to invoke the force majeure clause for lack of due diligence. Id.; see also Upjohn Co. v. Rachelle Labs., Inc., 661 F.2d 1105, 1110 (6th Cir. 1981) (finding that force majeure clause was inapplicable because even though the problem was unforeseeable, “its cause was a manufacturing decision which was within” the party’s control).

For example, in Chemetron Corp. v. McLouth Steel Corp., a court considered the force majeure provision in a contract for delivery of liquid nitrogen and oxygen following the seller’s failure to provide the contractually required minimum quantity. 381 F. Supp. 245 (N.D. Ill. 1974) (applying Michigan law). The contract provided that a party would not be liable if it was unable to perform its obligations due to an explosion “or by any other circumstances beyond the reasonable control of the party so failing.” Id. at 256.

The seller's equipment experienced some explosions, but not only did the seller fail to show that the explosions were beyond its control, it also failed to replace equipment that continuously broke down, and chose not to use other available equipment to produce sufficient product to meet the contract requirements. Id. Thus, the court concluded that the force majeure provision did not excuse the seller’s nonperformance. Id.

D. Foreseeability

Force majeure events generally must have been unforeseeable at the time the parties contracted. For example, if government action is the alleged cause of delay or interference, parties “are presumed to have contracted with knowledge of any preexisting law that could have caused delay.” See Erickson, 474 N.W.2d at 155.

Likewise, courts have held that a party’s inability to secure necessary financing is foreseeable, and therefore not sufficient to invoke force majeure to excuse nonperformance. See Great Lakes Gas Transmission, 2013 WL 12139846, at *13 (“While [the party] could have conditioned its performance on obtaining such financing, it failed to do so.”).


Where a contract is not a sole source supply contract—i.e., the contract does not contemplate that the product will be supplied from a specific facility or plot—the seller bears the risk of exhausting all reasonable alternative means of fulfilling the contract from alternative sources before being excused from performing. For example, the US District Court for the Eastern District of Michigan concluded that because a contract to provide steel did not contemplate that the steel would exclusively come from one particular factory, the seller bore the risk that this facility would not be able to manufacture the ordered steel, and that the seller might, therefore, have to obtain the steel from a different mill at a higher price. See Steel Indus., Inc. v. Interlink Metals & Chemis., Inc., 969 F. Supp. 1046, 1052 (E.D. Mich. 1997).

E. Notice

Michigan courts have not faced disputes with respect to compliance with force majeure notice provisions at length. In Can IV Packard Square LLC v. Packard Square LLC, the Michigan Court of Appeals affirmed a trial
judge's findings that a party could not rely on strikes or the inability to obtain an adequate labor force as force majeure events, in part because the party failed to comply with the contractual notice provision requiring notice of force majeure events within two business days of their occurrence. No. 335512, 2018 WL 5218433, at *1, 5–6 (Mich. Ct. App. Jan. 23, 2018).

II. Common law remedies

A. Impossibility

A promisor’s liability may be extinguished in the event his or her contractual promise becomes objectively impossible to perform. See Roberts v. Farmers Ins. Exch., 737 N.W.2d 332, 342 (Mich. Ct. App. 2007). Michigan courts recognize two kinds of impossibility: original impossibility and supervening impossibility, the latter of which develops after the contract is formed. Id. (relying on Bissell v. L.W. Edison Co., 156 N.W.2d 623 (Mich. Ct. App. 1967)).

Although absolute impossibility is not required, a party must show “impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.” See id.; see also Rogers Plaza, Inc. v. S.S. Kresge Co., 189 N.W.2d 346, 357 (Mich. Ct. App. 1971) (explaining concept of partial impossibility of performance).

Impossibility, however, is not synonymous with financial distress. Flathead-Michigan I, 2011 WL 940048, at *5.

B. Frustration of purpose

Frustration of purpose is an equitable doctrine, “meant to fairly apportion risks between the parties in light of unforeseen circumstances.” Karl Wendt Farm Equip. Co. v. Int’l Harvester Co., 931 F.2d 1112, 1120 (6th Cir. 1991). Essentially, it is “an implied term which is meant to apportion risks as the parties would have had the necessity occurred to them.” Id.

The elements of frustration of purpose are: (1) the contract must be executory, at least in part; (2) both parties must have known the frustrated party’s purpose in making the contract at the time the contract was made, and (3) this intended purpose of the contract must have been frustrated by an event not reasonably foreseeable when the contract was made, the occurrence of which was not the fault of the frustrated party, and the risk of which was not assumed by the frustrated party. Flathead-Michigan I, 2011 WL 940048, at *2.

A party will not prevail on a frustration of purpose claim merely because the transaction has become less profitable, or even if the party will sustain a loss. See id.; see also Hemlock Semiconductor Corp., 2016 WL 67596, at *5 (explaining that party’s claim that it was unable to conduct business profitably is not sufficient to show frustration of purpose where there is no allegation that party can no longer provide the product, and no allegation that there is no longer a market for the product).


III. UCC provisions regarding excused performance

A. Demands for adequate assurances


Whether reasonable grounds for insecurity exist is a question of fact. See Metaldyne, 2017 WL 1395888, at *4.

B. Commercial impracticability

In Michigan, a seller may raise commercial impracticability as a defense in a sale of goods contract. MICH. COMP. LAWS § 440.2615; Cleveland-Cliffs Iron Co., 581 F. Supp. at 1151; Schneider v. Byrne, No. 253998, 2005 WL 2291707, at *2–3 (Mich. Ct. App. Sept. 20, 2005) (“Impracticability is inherently comparative in nature: it requires an unexpected deviation from the expected course of events, and that deviation must render performance much more difficult or much more expensive.”) (internal citations omitted).

A breaching seller asserting impracticability must show “1) that an unforeseeable event occurred; 2) the nonoccurrence of the event was a basic assumption underlying the agreement; and 3) the event rendered performance impracticable.” Chainworks, Inc. v. Webco Indus., Inc., No. 1:05-cv-135, 2006 WL 461251, at *9 (W.D. Mich. Feb. 24, 2006).
While performance does not need to rise to strict impossibility, it must be impracticable due to unreasonable and extreme injury, loss, difficulty, or expense. See Hemlock Semiconductor Operations LLC v. SolarWorld Industries Sachsen GMBH, 867 F.3d 692, 702 (6th Cir. 2017). The unexpected circumstance must make performance vitally different from what the parties should have reasonably contemplated at the time of entering the contract. Id.

Like the other remedies discussed herein, increased cost, without more, will not excuse performance unless the increase is the result of an "unforeseen contingency which alters the essential nature of the performance." MICH. COMP. LAWS § 440.2615 cmt. 4.

In Chainworks, for example, a seller tried to defend increasing its prices and imposing a surcharge based on unforeseen market conditions that made performance under the original contract terms allegedly commercially impracticable. 2006 WL 461251, at *9. The seller did not claim that there was a shortage of available material, or that it was unable to obtain quality material, or that it was unable to deliver product—only that its costs for material had risen significantly. Id. Thus, the defendant was not permitted to invoke commercial impracticability to excuse nonperformance "simply because it may have misread the market and entered into a contract which became a greater financial burden than originally expected." Id. at *10.

Changes in market prices are not a basis for the UCC commercial impracticability defense because the “expectation that current market conditions will continue for the life of the contract is not” a basic assumption underlying a contract. See SolarWorld Indus., 867 F.3d at 702.

Rather, the state of the market and economy “is one of the things on which the parties are gambling” when they choose to enter a contract. See Flathead-Michigan, 2011 WL 940048, at *3; SolarWorld Indus., 867 F.3d at 703 (explaining that parties contract for “goods at fixed prices because such contracts are made for the very purpose of establishing a stable price despite a fluctuating market”). Applying the doctrine of impracticability because of a market shift “would contravene the parties’ intentions regarding assumption of risk.” Id. Even when the market has fluctuated globally, permitting parties to litigate the causes of market shifts would swallow the general rule that a contract’s unprofitability does not warrant application of the impracticability defense.” Id. at 704.

Impracticability is also not an available defense for a party who, by its own conduct, creates the event causing the impracticability. See Chemetron, 381 F. Supp. at 258.

Further, the party must make every reasonable effort to avoid the alleged impracticability. Id. Once the interfering event occurs, the party “must employ any practicable alternative means of fulfilling the contract, even if it had originally expected to meet its obligations in a particular way.” Id.

A seller that has the ability to deliver part, but not all, of its supply obligations is required to allocate deliveries in a fair and reasonable manner. MICH. COMP. LAWS § 19.2615(b); In re F. Yeager Bridge & Culvert Co., 389 N.W.2d 99, 105 (Mich. Ct. App. 1986) (explaining requirement and that compliance with requirement would be a question of fact).
Minnesota

The specific words used in force majeure provisions are critical, including how they define force majeure events and what they require for how the event must affect a party’s ability to perform its contractual obligations. Minnesota also recognizes common law impossibility, defined as impracticability, and frustration of purpose. Parties with contractual force majeure provisions are not precluded from also raising common law defenses to excuse nonperformance.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

Courts applying Minnesota law recognize that force majeure provisions operate to excuse performance in the event certain unforeseen circumstances arise. Melford Olsen Honey, Inc. v. Adee, 452 F.3d 956, 963 (8th Cir. 2006). A force majeure clause is not intended to shield parties from normal risks associated with an agreement. See Pillsbury Co. v. Wells Dairy, Inc., 752 N.W.2d 430, 440 (Iowa 2008) (applying Minnesota law). “The performance to be excused is determined by the language of the clause.” United Sugars Corp. v. U.S. Sugar Co., No. 13-cv-1485, 2015 WL 1529861, at *3 (D. Minn. Apr. 2, 2015) (quoting Melford Olsen Honey, 452 3d. at 963)). Where parties do not negotiate what would constitute a force majeure event, the common law meaning of force majeure will control. See Pillsbury Co., 752 N.W.2d at 440–41 (applying Minnesota law to reject a party’s contention that a force majeure clause could cover events within a party’s control); id. at 440 (“Had the parties meant to change the common meaning of the force majeure clause, the parties should have had a discussion or negotiations regarding the definition of a force majeure event.”).

As an example of how critical the specific words used in the contract are, consider United Sugars, where a force majeure clause provided that neither party shall be liable for failure to perform where such failure arises out of any cause beyond the reasonable control of such party, and then proceeded to list a series of included events. The U.S. District Court for the District of Minnesota had to determine whether the phrase “negatively affected” applied to all of the events or just to those that preceded the term. See id. The clause stated, “Such causes shall include, without limitation, storms, floods, adverse weather or other acts of nature negatively affecting sugar beet or sugar cane crops or sugar processing or refining facilities, . . . governmental actions or regulations including sugar allotments, quotas, or allocations, and any adverse declaration or act by government agencies . . .” Id. (emphasis added). The court specifically had to determine whether the governmental action clause also must be scrutinized without regard to whether the sugar supply was “negatively affected.” The court determined that the phrase modified only the preceding events and not the government action. Id.

Force majeure provisions may only cover certain contractual obligations. For example, in Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc., an Iowa federal court interpreting Minnesota law concluded that the parties’ force majeure provision only excused the failure or delay in performance for one party: the party obligated to construct an industrial-grade dryer to be used in an egg production facility. No. C15-4248-LTS, 2017 WL 3929308, at *12–13 (N.D. Iowa
Sept. 7, 2017) (“Nor does any language in the force majeure clause suggest that it was written to apply if one party to the contract makes a unilateral decision to terminate performance of the contract for market-based reasons.”).

Unless the force majeure clause specifically resolves key issues, they likely will be questions of fact for the ultimate factfinder. For example, these include the severity of the alleged force majeure event, the extent to which the alleged force majeure event prevents performance, and the extent to which the non-performing party attempted to overcome the alleged force majeure event. See Melford Olsen Honey, 452 F.3d at 963 (finding the district court did not err in finding a force majeure clause ambiguous because “questions existed as to the severity of the drought, [the non-performing party’s] ability to meet its contractual obligations, and [the non-performing party’s] right to request additional money for honey under the June contract”); see also id. at 963 n.9 (rejecting argument by non-performing party that district court’s interpretation rendered force majeure clause meaningless, on grounds that non-performing party could justifiably stop performance if jury determined a drought occurred, but clause did not give non-performing party unilateral right to raise price of honey simply because production of honey was less than expected); Toll Bros., Inc. v. Sienna Corp., No. 06-cv-4378, 2008 WL 2986685, at *3 (D. Minn. July 30, 2008) (finding cause of delays in performance to be question of fact not appropriate for summary judgment).

B. Causation

In the United Sugars case discussed above, the buyer of sugar in fixed-price contracts argued that governmental action excused its performance. 2015 WL 1529861, at *3. Specifically, the buyer argued that the monthly World Agricultural Supply and Demand Estimate published by the U.S. Department of Agriculture failed to anticipate the price collapse in sugar in 2012, and that based on this faulty data, the USDA increased the import quota by 450,000 tons, which allowed the market to be flooded with sugar. Id.

The court concluded that even if true, that a direct correlation between the inaccurate data, the USDA’s action, and the 2012 market price did not trigger the parties’ force majeure clause. Id. The court concluded that, at most, the governmental action made the buyer’s performance unprofitable, but did not prevent or prohibit performance. Id. (“The relevant portion of the clause excuses nonperformance when the governmental action ‘prevent[s] or prohibit[s] [buyer] from . . . ordering . . . sugar products or performing’ under the contracts.”).

The court collected a number of cases from other jurisdictions where governmental action affected the profitability of a contract but did not preclude a party’s performance. See id. at *4 (citing, for example, Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1293–94 (Fed. Cir. 2002); In re Millers Cove Energy Co., 62 F.3d 155, 159 (6th Cir. 1995); Langham-Hill Petroleum, Inc. v. S. Fuels Co., 813 F.2d 1327, 1330 (4th Cir. 1987); N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 274–75 (7th Cir. 1986)). The court explained that the result could have been different had the parties included market fluctuations as a defined force majeure event. Id.

Where there is no evidence challenging the alleged cause of nonperformance, a court may grant summary judgment on this point. See, e.g., Johnson Bros. Corp. v. Rapidan Redevelopment Ltd. P’ship, 423 N.W.2d 725, 728 (Minn. Ct. App. 1988) (concluding no genuine issue of material fact that 187-day delay was force majeure event covered by contract where counterparty brought forth no evidence in support of its position).

C. Notice

Notice requirements within force majeure provisions may also involve questions of fact. For example, where a contract required a force majeure event to be declared with “prompt written notice,” the U.S. District Court for the District of Minnesota concluded that based on the factual record, whether the non-performing party issued its force majeure letter promptly required resolution of a disputed question of material fact. Toll Bros., 2008 WL 2986685, at *3.

II. Common law remedies

A. Impossibility

Even though a promise to perform becoming more difficult or expensive is not ordinarily grounds for excusing performance, “there are other decisions allowing an excuse where very greatly increased difficulty had been caused by facts not only unanticipated but inconsistent with the facts that the parties obviously assumed to exist or to be likely to continue.” Village of Minnesota v. Fairbanks, Morse & Co., 31 N.W.2d 920, 926 (Minn. 1948). The Supreme Court of Minnesota has explained that the difference is not between difficulty and impossibility given that a “man may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform.” Id.

The court has stated, “The important question is whether an unanticipated circumstance has made performance of the promise vital in different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the
promisor.” Id.; see also Powers v. Siats, 70 N.W.2d 344, 348 (Minn. 1955) (recognizing trend of defining strict impossibility as impracticability).

For example, the Supreme Court of Minnesota has excused performance on these grounds for a contractor to build an electric power plant because of government priority regulations dictated by World War II. First, because of temporary impossibility for the duration of the war, and then because following the war it would have required the contractor to render performance substantially different from what it contracted to do five years earlier because of changing costs. Village of Minnesota, 31 N.W.2d at 926–27 (“During the period from August 16, 1940, to October 1945, perhaps more unprecedented conditions arose and changes occurred throughout the world than during any similar period in history, and it would be unfair to say that defendant or any one else should have foreseen or anticipated them as early as August 16, 1940, the date the contract was made.”); see also Nat’l Farmers Union Prop. & Cas. Co. v. Fuel Recovery Co., 432 N.W.2d 788, 791 (Minn. Ct. App. 1988) (affirming trial court’s finding that fuel spill was an unforeseeable, supervening event that discharged performance because of impossibility or impracticability).

By comparison, the Supreme Court of Minnesota rejected the defense in a case asserted by a party that had contracted to ship eggs from Minnesota to New Jersey, but when the eggs arrived, the consignee rejected the shipment due to excessive temperature upon delivery. Powers, 70 N.W.2d at 347. About 60 miles into the trip, the driver noticed the temperature on the trailer thermometer registered too high of a reading, and although he took efforts to reduce the temperature, he nevertheless continued on his journey. Id. The transporter argued that such excess initial temperatures of the eggs constituted an unanticipated fact that made performance of its promise vitally different from what the parties reasonably contemplated (i.e., that the transporter would receive the eggs within the contracted-for temperature range). Id. at 348.

The court focused on the driver’s knowledge that the eggs were delivered to him at an excessively high temperature, noted his failure to contact his employer or the shipper, and took his continuing trip as assuming a calculated risk that the consignee would not reject the eggs. Id. at 348–49. The court explained, “A promisor who, after having assumed a contractual duty without then knowing or having reason to know of a fact which makes performance impossible or impracticable, subsequently acquires knowledge of such fact in time to avoid the dire consequences of nonperformance, but who despite such knowledge proceeds without taking reasonably prudent steps to avoid such consequences, cannot thereafter be heard to assert the defense of impossibility of performance.” Id. at 349 (“An absolute assumption of risk may arise by contract or by conduct of the promisor which precludes a denial of that assumption.”).

If the alleged unanticipated event was foreseeable at the time of contracting, the defense will not be available. See, e.g., First Nat’l Bank of Shakopee v. Edison Homes, Inc., 415 N.W.2d 442, 444 (Minn. Ct. App. 1987) (rejecting defense where at the time of contracting, bank knew of policy of not considering an installment contract in default until 15 days after an overdue payment).

B. Frustration of purpose

Minnesota also recognizes the doctrine of frustration of purpose, based on Restatement (Second) of Contracts § 265, which provides: “Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate to the contrary.” United Sugars, 2015 WL 1529861, at *4 (citing Viking Supply v. Nat’l Cart Co., 310 F.2d 1092, 1096 (8th Cir. 2002)).

As is true with the defense of impossibility, when the alleged frustrating event is foreseeable, the defense of frustration of purpose is not available. For example, in United Sugars, the court concluded that the purpose of a fixed price contract was not frustrated when the sugar market collapsed, causing the contract prices to far exceed market prices. Id. The court explained that a basic assumption of a fixed-price contract is market fluctuation. Id. (“With fixed-price contracts, the parties understand that the contract price could be higher or lower than the market price at any given time.”).

Whether the purpose of a contract was frustrated can implicate questions of fact. See, e.g., Rembrandt Enters., 2017 WL 3929308, at *8 (applying Minnesota frustration of purpose doctrine and concluding that genuine factual dispute about whether contract’s primary purpose was installation of dryer at specific facility or construction of dryer to be delivered to company for use in any facility); see id. at *9 (questioning specific moment when contract was allegedly frustrated, including whether it was when outbreak of Avian Flu occurred, when company’s board decided not to move forward with constructing facility, when company’s financing collapsed, or when ultimate buyer decided to reduce its dependence on egg products).
The presence of a force majeure clause in the parties' contract does not prevent a non-performing party from also attempting to rely on common law remedies, including frustration of purpose, to justify excusing nonperformance. See id.

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

When reasonable grounds for insecurity arise with respect to performance of either party, the other party may in writing demand adequate assurance of due performance, and until such assurance is received may suspend performance if commercially reasonable. MINN. STAT. § 336.2-609; Suburban Nat’l Bank v. Morlock, No. CO-88-2154, 1989 WL 32488, at *2 (Minn. Ct. App. Apr. 11, 1989) (finding no evidence that a party made a written demand for adequate assurance and concluding that the party’s performance was not excused); U.S. Salt, Inc. v. Broken Arrow, Inc., No. 07-cv-1988, 2008 WL 398818, at *4 (D. Minn. Feb. 11, 2008) (finding party breached salt contract when it stopped providing salt and failed to provide any assurance that it would honor its commitments in response to demand for adequate assurances); Tresman Steel Indus., Ltd. v. N. Steel Co., No. C6-90-215, 1990 WL 81407, at *1 (Minn. Ct. App. June 19, 1990) (finding party could not cancel agreement prior to date counterparty’s performance was due given it failed to follow statutory requirements for demanding adequate assurances of performance); Nicollet Cattle Co. v. United Food Grp., LLC, No. 08-cv-5899, 2010 WL 3546784, at *9–10 (D. Minn. Sept. 7, 2010) (finding insufficient evidence to find that a reasonable trier of fact could conclude that party did not have commercially reasonable doubts about counterparty’s performance under purchase orders).

B. Commercial impracticability

The Supreme Court of Minnesota has recognized that the UCC provision governing excuse of performance has replaced the common law requirement of impossibility of performance by a less stringent standard of commercial impracticability. Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc., 265 N.W.2d 655, 658 (Minn. 1978); MINN. STAT. § 336.2-615. The availability of the defense is a legal issue, but the jury often must determine whether the facts involved suffice to conclude that party did not have right to cancel contract based on commercial impracticability; see also Selland Pontiac-GMC, Inc. v. King, 384 N.W.2d 490, 493 (Minn. Ct. App. 1986) (noting the commercial impracticability statute requires questions of fact); Barbarossa & Sons, 265 N.W.2d at 658–60 (treating the four-factor test as four factual questions to be resolved).

In Selland Pontiac-GMC, the seller agreed to provide four school buses to a buyer, and the buyer intended to provide the buses to its customer prior to the start of the school year. 384 N.W.2d at 491. The contract specified that the buses would be manufactured at a specific plant, but that plant ceased operations before the seller could provide the buses to the buyer. Id. at 491–92. Once the specific manufacturing plant closed, the seller’s performance was determined to be impracticable, excusing the seller’s failure to deliver the buses because the court concluded that the parties presupposed that the buses would be available from the specific plant identified in the agreement. Id. at 493; see also Nutrisoya Foods, Inc. v. Sunrich LLC, 626 F. Supp. 2d 985, 993 (D. Minn. 2009) (rejecting defense where dispute did not concern the nonoccurrence of a presupposed condition outside the parties’ control).

If the factors that create the event are within the control of the party asserting commercial impracticability, then the inability to perform is the result of the party’s conduct and not the event itself. See Upsher-Smith Labs., Inc. v. Mylan Labs., Inc., 944 F. Supp. 1411, 1430 (quoting Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 150 (6th Cir. 1983)). For example, the U.S. District Court for the District of Minnesota rejected the defense where a drug company knew in advance of entering into an agreement that its orders were already nearly double its available supply, such that the shortage of raw material was a contingency it could have foreseen. Id. at 1430–31 ("Accordingly, if [the company] did commit itself to supply Cimetidine to [buyer], it did so with an indisputable awareness that the requisite raw materials might well be in short supply.").

When a seller’s performance is commercially impracticable, but the seller can satisfy some but not all of its orders, its apportionment must be "fair and reasonable." MINN. STAT. § 336.2–615(b); see also Starry Constr. Co. v. Murphy Oil USA, Inc., 785 F. Supp. 1356, 1365 (D. Minn. 1992) (explaining court could not infer from fact that seller supplied oil to a regular customer that it would have done so without a contract because statute allowed for regular customers not then under contract could be included within allocation program). Whether the apportionment system is fair and reasonable is a question of fact. See Upsher-Smith Labs., 944 F. Supp. at 1431 n.9 (citing Alimenta (U.S.A.), Inc. v. Cargill Inc., 861 F.2d 650, 654 (11th Cir. 1988)).
I. Contractual force majeure provisions

A. General requirements

In the sale of goods context, Mississippi has codified the concept of force majeure (discussed in greater detail below in Part III covering UCC-based remedies). Although parties’ agreed-upon force majeure provisions are generally broader than the statute, courts have stated that unless the parties’ contract specifically covers market fluctuations, then neither the contract nor the statute would cover such an event as an event of force majeure. See, e.g., Day v. Tenneco, Inc., 696 F. Supp. 233, 235 (S.D. Miss. 1988). In Day v. Tenneco, Inc., the U.S. District Court for the Southern District of Mississippi considered a buyer’s argument in a take-or-pay contract seeking to excuse performance based on allegedly drastic market changes. Id. at 236. The court rejected the argument: “The very reason for entering the take-or-pay contracts was to insure payment to the producer in the event of substantial change in the marketplace.” Id. The court explained that the buyer willingly accepted that risk and “[t]he fact that the unexpected happened does not excuse performance.” Id. (“Defendants accepted the risk and lost.”).

In Dunavant Enterprises, Inc. v. Ford, the Supreme Court of Mississippi considered a contract for the delivery of cotton, 294 So. 2d 788, 791 (Miss. 1974). The contract called for delivery of cotton from 1,600 acres situated in Marks, Mississippi. Id. After delivery of only 1,239 acres of cotton, which the seller claimed was all that existed, the buyer asserted that the seller had an obligation to provide it with additional cotton the seller grew from other parts of the county. Id.

The trial court disagreed, finding that the contract did not cover cotton grown in other parts of the county, and that delivery of the remainder of the 1,600 acres from the cotton from Marks, Mississippi was excused because of force majeure based on severe weather conditions. Id. at 790. The Court found no manifest injustice in that decision. Id. at 791; see Ralston Purina Co. v. Rooker, 346 So. 2d 901, 903 (Miss. 1977) (reversing trial court’s decision to excuse performance based on force majeure because evidence of testimony regarding whether soybeans were to be delivered from party’s specific crop should not have been admitted to interpret parties’ written agreement); Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 658 (Miss. 1975) (finding performance in sale of soybeans contract excused based on force majeure caused by drought conditions).

For additional discussion of force majeure issues by Mississippi-based courts, see Ergon-West Virginia, Inc. v. Dynergy Marketing & Trade, No. 3:06-cv-714, 2011 WL 765555, at *3–10 (S.D. Miss. Feb. 25, 2011) (examining Daubert review of two expert witnesses’ qualifications and proffered opinions related to force majeure clauses in oil and gas contracts governed by Texas law), and In re International Marine Development Corp., 328 F. Supp. 1316, 1330 (S.D. Miss. 1971) (applying admiralty law, finding Hurricane Camille to be “the most classic case and striking example
of what is characterized as an Act of God, finding that the crews of the three vessels in question had taken all reasonable preparations, and sustaining the defense of force majeure).

II. Common law remedies

A. Impossibility

Mississippi law has recognized common law force majeure, which its courts have explained as impossibility: "Where the law casts a duty on a party, the performance shall be excused if it be rendered impossible by the act of God." See Watkins Dev., LLC v. Jackson Redevelopment Auth., 283 So. 3d 170, 179 (Miss. 2019) (quoting Browne & Bryan Lumber Co. v. Toney, 194 So. 296, 298 (Miss. 1940)); see also Hendrick v. Green, 618 So. 2d 76, 78 (Miss. 1993). Just because a contract becomes burdensome "or even impossible" does not for that reason alone excuse performance. Watkins Dev., 283 So. 3d at 179.

For example, when a party by its own contract "creates a duty or charge upon himself he is bound to discharge it, although to do so should subsequently become unexpectedly burdensome or even impossible: the answer to the objection of hardship in all cases such being that it might have been guarded against by proper stipulation." Hendrick, 618 So. 2d at 78 (quoting Browne & Bryan Lumber, 194 So. at 298). In Hendrick, for example, the party seeking to excuse performance based on an inability to fulfill governmental requirements could not rely on the defense of impossibility where the party could have expressly stipulated in the contract to make this a condition precedent. Id. at 79.

Mississippi courts have recognized three instances where impossibility may excuse performance: (1) subsequent change in the law causing performance to become unlawful; (2) destruction, through no fault of either party, of the specified thing that is essential to continued performance of the contract; or (3) death or incapacitating illness of promisor in a contract for personal services. See Piaggio v. Somerville, 80 So. 342, 344 (Miss. 1918) (finding risk of submarine warfare did not excuse performance); Watkins Dev., 283 So. 3d at 179 (rejecting defense where building having structural faults "was surely within the foreseeability and could have been (and indeed was) dealt with by the contract").

Mississippi cases have not recognized the doctrine of impracticability. City of Starkville v. 4-Cty. Elec. Power Ass'n, 819 So. 2d 1216, 1222 (Miss. 2002). That said, the state's highest court at least has suggested that the defense of impossibility should be construed through the impracticability prism. See id. at 1224–25 (finding that performance was not impossible or impracticable where contract may prove less profitable); see also Austin Firefighters Relief & Ret. Fund v. Brown, No. 3:07-cv-228, 2008 WL 4450253, at *9–10 (S.D. Miss. Sept. 29, 2008) (rejecting defense where there was no change in the law).

B. Frustration of purpose

The doctrine of frustration of purpose excuses performance where the value of the performance and the basic rationale recognized by both parties has been destroyed by a supervening and unforeseen event. City of Starkville, 819 So. 2d at 1225 (citing 18 Williston, Contracts § 1935 (3d ed. 1978) and Restatement of Contracts § 265).

"What distinguishes frustration of purpose from the defense of impracticability is that in a true case of frustration, it is not that either party's performance has become impossible or significantly more difficult that originally contemplated. Rather the party seeking discharge on frustration grounds can still perform under the contract, but no longer has the motivation to do so which originally induced its participation in the bargain." Id. at 1225–26 (rejecting defense of frustration of purpose because party knew it was within the power of the legislature to change the law and party could have conditioned contractual performance upon this known contingency); Austin Firefighters Relief & Ret. Fund, 2008 WL 4450253, at *10–11 (rejecting defense where risk that party would not receive favorable tax treatment was disclosed and thus foreseeable).

III. UCC provisions regarding excused performance

A. Force majeure

Mississippi has codified the concept of force majeure in the sale of goods context. Specifically, Mississippi law provides, "Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent." MISS. CODE ANN. § 75-2-617. When a seller is unable to deliver the full quantity of goods, then the remainder must be allocated in an equitable manner. Id.
B. Demands for adequate assurances
Mississippi law recognizes the UCC-based right to request adequate assurances of performance where a party to a sale of goods contract has reasonable grounds for insecurity about its counterparty’s ability to perform. MISS. CODE ANN. § 75-2-609; see Weathersby v. Gore, 556 F.2d 1247, 1255 (5th Cir. 1977) (suggesting party could have demanded adequate assurances of due performance); Talon Ordnance, LLC v. Am. Firearms Mfg. Co., No. 3:14-cv-383, 2014 WL 12705072, at *2 (S.D. Miss. Nov. 17, 2014) (explaining claim for repudiation based on failure to provide demanded adequate assurances needed to be decided by arbitrator given valid arbitration provision).
“Purpose of the demand for assurances of performance by the insecure party is to gain advance knowledge of a forthcoming breach so that he may take steps to lessen his injury, or mitigate damages.” See Ross Cattle Co. v. Lewis, 415 So. 2d 1029, 1034–35 (Miss. 1982). If no assurance is provided, then the aggrieved party can treat the contract as repudiated. Id. (explaining party should have demanded adequate assurances before unilaterally treating contract as broken and selling animals covered by contract to a third party).

C. Commercial impracticability
Mississippi law also recognizes the UCC-based defense of commercial impracticability. MISS. CODE ANN. § 75-2-615; see also Day, 696 F. Supp. at 236 (rejecting defense in take-or-pay context where “a party which has specially warranted performance will not be excused because of a dramatic increase in costs”).
Missouri courts have interpreted multiple cases involving force majeure provisions. They require that any event not specifically defined be unforeseeable to excuse performance, which is also true for the state’s common law defenses of impossibility and commercial frustration. Force majeure events also must be beyond a party’s control and Missouri law enforces any contractually required notice provisions to invoke a force majeure provision’s protection.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability
   E. Notice

II. Common law remedies
   A. Impossibility
   B. Commercial frustration

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions
A. General requirements
A force majeure clause is a “contractual provision allocating the risk if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.” Clean the Uniform Co. St. Louis v. Magic Touch Cleaning, Inc., 300 S.W.3d 602, 610 (Mo. Ct. App. 2009) (quoting Black’s Law Dictionary 718 (9th ed. 2009)). Parties use these clauses to address the risk of supervening events. See id.; see also Heffeman v. Neumond, 201 S.W. 645, 647 (Mo. Ct. App. 1918) (finding that parties could have contractually protected against risk that fire could destroy the mill). Apart from defined events, parties may also use general catch-all language to encompass additional unforeseeable occurrences beyond the parties’ control. See id. (citing Corbin, Contracts § 74.19).

For events not specifically defined, they must be unforeseeable, and also must be of the type similar to those defined pursuant to the doctrine of ejusdem generis. See id. ("Neither of the specifically enumerated events in paragraph 9, strikes and lockouts, are similar in nature to the VA Hospital’s non-renewal of its contract . . . Accordingly, the principle of ejusdem generis does not allow the non-renewal to be covered by paragraph 9.").

Missouri law requires the party seeking to justify nonperformance based on a force majeure provision to come forward with the proof necessary for the court to determine the impact of the force majeure event. See Aquila, Inc. v. C.W. Mining, 545 F.3d 1258, 1265 (10th Cir. 2008) (Gorsuch, J.) (citing ASi Indus. GmbH v. MEMC Elec. Materials, Inc., No. 4:06-cv-951, 2008 WL 413819, at *4 (E.D. Mo. 2008)). Courts applying Missouri law, at least on one occasion, have also rejected a party’s fraud claim based on the veracity of statements made in a force majeure declaration where such allegations were contrary to the evidence in the record. See, e.g., Foam Supplies, Inc. v. Dow Chem. Co., No. 4:05-cv-1772, 2008 WL 3159598, at *8–9 (E.D. Mo. Aug. 4, 2008).

B. Causation
The specific causation requirements of the parties’ force majeure provision will be critical. Consider Aquila, Inc. v. C.W. Mining, in which the Tenth Circuit construed a contractual force majeure provision under Missouri law. 545 F.3d at 1263–65. The contract involved a mining company’s supply of coal to a
public utility that produced electrical power. *Id.* at 1260. The public utility argued that the mining company failed to meet its coal-supply obligations and that the utility was forced to purchase coal from other sources at higher prices than the parties’ contract. The mining company conceded nonperformance but contended that it was excused from performing because of a labor dispute that amounted to a force majeure event under the parties’ contract. *Id.*

The record showed that in addition to a labor strike in which 50 to 70 of the mining company’s 120 employees at the mine in question walked off the job, the Federal Mine Safety and Health Administration also ordered the mining company to seal its mine later in the same year after several roof collapses. At the time, the mining company believed it could continue meeting its supply obligations from other mines, but unexpected geological problems at those mines precluded such performance. *Id.* at 1261. Although the mining company invoked force majeure based on the labor strike, it did not based on any of the geological problems, and the court found that the mining company downplayed those issues and represented that they would be overcome. *Id.* at 1262. The mining company contended that the geological problems affected coal production only because the labor strike prevented the company from having sufficient resources to overcome those problems as they arose. *Id.* at 1263.

Ultimately, the district court concluded that the geological problems were the primary cause of the mining company’s inability to perform, and relied heavily on the mining company not affirmatively seeking replacement workers if the labor shortage was at the heart of the problem. *Id.* at 1263–64. The Tenth Circuit affirmed the district court’s factual finding based on the record. *Id.*

On appeal, the mining company also argued that even if the labor dispute was not solely or even primarily responsible for the deficient performance, the parties’ force majeure contract still excused performance because it covered events that “wholly or partly” excused performance. *Id.* at 1264. Based on that language, “[a] force majeure event thus need not be something that precludes a party from performing at all.” *Id.*

The court, however, focused on the fact that the parties’ force majeure provision also states a party’s obligations will be suspended by a force majeure event only to “the extent made necessary by such force majeure.” *Id.* (“[U]nder the terms of the agreement, the district court could lawfully excuse [the mining company’s] deficient performance during the life of the contract only to the extent that the partial force majeure—here, the labor dispute—caused the deficiency.”); see also *id.* at 1265 n.3 (questioning the boundaries of an argument where partial inability to perform could justify full nonperformance, including for example, a situation where an equipment breakdown causes coal production to only fall by 0.0000001%).

Because the mining company did not offer evidence on how specifically the labor strikes prevented performance, as opposed to independent geological problems, the Tenth Circuit affirmed the district court’s ruling that the force majeure clause did not, to any degree, excuse nonperformance. *Id.* (“Perhaps a reflection of the persistent optimism of miners throughout the history of the American West, [the mining company] instead adopted an ‘all or nothing’ trial strategy, asserting that all of its nonperformance should be excused under its labor-shortage-as-source-of-all-problems[sic] theory.”).

**C. Mitigation/beyond a party’s control**

In *McDonnell Douglas Corp. v. Islamic Rep. of Iran*, the U.S. District Court for the Eastern District of Missouri considered whether a force majeure provision excused an aircraft manufacturer’s contractual obligations to provide military aircraft parts to the Iranian government. 591 F. Supp. 293, 294 (E.D. Mo. 1984). The key question was whether the aircraft manufacturer was precluded from performing because of causes beyond its control. *Id.* at 298.

The court concluded the aircraft manufacturer was justified in its nonperformance. *Id.* at 298–99. The court cited the following as being beyond the control of the manufacturer: the political upheaval in Iran precluding a third-party shipper from transporting the parts and preventing communication with a responsible Iranian official to designate a new shipper, the U.S. government’s orders prohibiting the shipment of the parts based on Iranian Assets Control Regulations, and the potential loss of the manufacturer’s export license. *Id.*

Compare those circumstances to those before the Eighth Circuit in *Suburban Newspapers of Greater St. Louis, Inc. v. Kroger Co.*, in which that court affirmed a district court’s conclusion under Missouri law that a grocery store’s admission that it intentionally closed its stores compelled the conclusion that the closings were not beyond its reasonable control. 886 F.2d 1060, at 1061–62 (8th Cir. 1989) (relying on *United States v. Brooks-Callaway Co.*, 318 US 120, 122–23 (1943)).

For the party that is facing a force majeure declaration from a counterparty, accepting partial performance from the non-performing party generally will not
waive its right to full performance. See *Aquila*, Inc., 545 F.3d at 1267 ("Under the terms of the parties’ force majeure provision, *Aquila’s* obligation to accept coal was suspended only to the extent that [its counterparty’s] obligation to supply coal was suspended by the force majeure; had *Aquila* declined to accept [its counterparty’s] deficient shipments of coal, it may well have faced a suit for its own breach of contract."). The *Aquila* court also affirmed the district judge’s conclusion that the public utility mitigated its damages through its purchase of replacement coal under a new contract with a third party to account for the difference in the coal the mining company did provide versus what it was contractually required to provide. *Id.* at 1268–69.

D. Foreseeability

Unless the contract specifically states otherwise, foreseeable events will not be encompassed within any force majeure coverage, especially within any general catch-all language. See *Clean the Uniform Co.*, 300 S.W.3d at 610. The Missouri Court of Appeals, for example, has rejected a force majeure defense for events not specifically defined in the force majeure clause that were foreseeable. See *id.* ([*T]*he non-renewal of the VA Hospital contract was not only reasonably foreseeable, but actually foreseen.

In *Scullin Steel Co. v. Mississippi Valley Iron Co.*, the Missouri Supreme Court concluded that when parties failed to set out that a foreseeable event rendered the contract terminable, then such contingency would not be covered by any non-liability clause. 273 S.W. 95, 98 (Mo. 1925). In that case, the parties’ contract to deliver pig iron stated, "We shall not be liable in damages for failure to deliver caused by strikes, accidents or other causes beyond our control." *Id.* at 100.

The failure to deliver was allegedly caused by an insufficient supply of coke to manufacture the pig iron, but the court determined that the seller’s failure to procure enough coke did not fall within the force majeure clause’s scope because that failure was not the result of strikes, accidents, or other "causes which can be held to be within the terms of the contract under consideration." *Id.* at 102 ("In the case at bar, the defendant must be held to have assumed the risk of procuring in advance by contractual arrangement, from any source available, a material necessary to its purpose."); see also *Mo. Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 725 (Mo. Ct. App. 1979) ("The fact that foreseeable economic trends or developments resulted in loss of anticipated profits or, as here claimed, actual financial loss, does not prevent [the counterparty] from refusal to a modification of a price and to take advantage of a good bargain.").

E. Notice

Courts will enforce notice requirements within parties’ force majeure provisions. See, e.g., *Asi Indus. GmbH*, 2008 WL 413819, at *4 (granting summary judgment on force majeure defense where invoking party admitted that it never formally invoked clause via contractually required written notice).

In *Aquila*, the court explained the difference between a party being on notice of an event and a party being on notice that its counterparty considers that event to be an event of force majeure under the parties’ contract. 545 F.3d at 1266. For example, classifying an event of force majeure has "powerful ramifications— at the very least, receiving notice that an event is considered a force majeure allows a party to evaluate the validity of a claimed force majeure event and permits it to make other arrangements to mitigate its damages if it suspects the event is serious and will persist." *Id.* ("Simply put, notice that a party to a contract has some soon-to-be rectified problem is materially and consequentially different from notice that a party has a serious and potentially enduring problem qualifying as a force majeure event.").

II. Common law remedies

A. Impossibility


If a party wishes to excuse nonperformance in the event of contingencies arising after the formation of the contract, then the parties should draft the contract accordingly with a force majeure provision. See *Werner*, 10 S.W.3d at 577 (citing *Stein v. Bruce*, 366 S.W. 2d 732, 734 (Mo. Ct. App. 1963)); *Minor v. Rush*, 216 S.W.3d 210, 214 (Mo. Ct. App. 2007) (rejecting impossibility defense where seller should have conditioned contract on bank releasing liens on property, and assumed such risk in the contract).

The Eighth Circuit considered whether Missouri common law excuse performance based on an act of God when severe winter weather made it impossible for a seller to harvest approximately 865 acres of yellow soybeans for purposes of fulfilling a supply contract to a grain dealer. See *Bunge Corp. v. Recker*, 519 F.2d 449, 450 (8th Cir. 1975). The court
concluded the act of God defense did not excuse the farmer’s performance because the contract did not specifically identify the beans that the farmer agreed to deliver. Id. at 450–51 (“Nothing in the contract required [the farmer] to grow the beans on his own land, and, for that matter, he was not obligated to grow the beans himself or even to operate a farm.”); see also Semo Grain Co. v. Oliver Farms, Inc., 530 S.W.2d 256, 260 (Mo. Ct. App. 1975) (finding the same on similar facts).

The common law doctrine of impossibility will not excuse performance where the event causing the alleged impossibility was foreseeable at the time the parties contracted. For example, in Missouri Pacific Railroad Co. v. C.W. Terrell, a dealer in agricultural lime attempted to excuse demurrage charges in delays unloading railroad cars based on an act of God—specifically unseasonably cold temperatures. 410 S.W.2d 356, 358 (Mo. Ct. App. 1966). The court explained that an act of God “is an event in nature so extraordinary that the history of climatic variations in the locality affords no reasonable warning of their coming.” Id. (quoting Corrington v. Kalicak, 319 S.W.2d 888, 892 (Mo. Ct. App. 1959)). Here, the court explained that temperature fluctuations in Missouri were common knowledge. Id. at 360 (“These figures merely reflect what is common knowledge and corroborate an admonition attributed to Samuel Clemens that ‘If you don’t like Missouri weather, wait a minute.’”). The court reasoned that even though freezing temperatures may have caused inconvenience or even additional expense, it did not equate to legal impossibility sufficient to excuse performance. Id. at 360.

B. Commercial impracticability
The doctrine of commercial impracticability is close to but distinct from the impossibility of performance defense. Werner, 10 S.W.3d at 577 (citing Howard v. Nicholson, 556 S.W.2d 477, 482 (Mo. Ct. App. 1977)). In the context of commercial impracticability, performance remains possible “but the expected value of performance in the party seeking to be excused has been destroyed by the fortuitous event which supervenes to cause an actual but not literal failure of consideration.” Id. (citing Howard, 556 S.W.2d at 482); see also Kassebaum v. Kassebaum, 42 S.W.3d 685, 699 (Mo. Ct. App. 2001) (rejecting commercial impracticability defense where value of the contracted-for performance nor the object or purpose of the contract was destroyed or nearly destroyed). For a thorough discussion of the defense, including its historical origins, see the Howard v. Nicholson case. 556 S.W.2d at 480–84 (finding contractual performance excused based on bankruptcy of party, which made long-term lease’s objective unattainable and destroyed the value of the contract’s contemplated performance).

Where the event was foreseeable at the time of contracting, the defense of commercial impracticability will be unavailable. See Werner, 10 S.W.3d at 577–78 (rejecting defense where foreseeable at time of contracting that third party could enter a change order that could impair performance under non-performing party’s contract); see also Scullin Steel Co. v. Paccar, Inc., 708 S.W.2d 756, 762 (Mo. Ct. App. 1986) (rejecting frustration of purpose defense where total stoppage of the requirement of railroad cars occurring three years into agreement may not have been anticipated, but was foreseeable such that the buyers assumed that risk at the time of contracting); Corlton Grp., Inc. v. City of St. Louis, 980 S.W.2d 37, 40–41 (Mo. Ct. App. 1998) (declining commercial impracticability defense where structural problems in a 100-year building were foreseeable); Shop ‘N Save Warehouse Foods, Inc. v. Soffer, 918 S.W.2d 851, 863 (Mo. Ct. App. 1996) (agreeing instruction on commercial impracticability was not warranted where foreseeable to lessor that supermarket chain to which he leased property may bring action to enforce one-mile radius restriction in lease to bar him from leasing property across the street to another supermarket chain); Adbar, L.C. v. New Beginnings C-Star, 103 S.W.3d 799, 802 (Mo. Ct. App. 2003) (rejecting commercial impracticability defense based on city’s rejection of daycare’s application for an occupancy permit).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances
Missouri law recognizes the UCC-based right to demand adequate assurances from a counterparty based on reasonable grounds for insecurity about the counterparty’s ability to perform. MO. REV. STAT. § 400.2-609; Paccar, Inc., 708 S.W.2d at 761 (finding party breached contract by failing to provide adequate assurances). Whether a party has reasonable grounds to demand adequate assurances of performance will generally be a question of fact. See, e.g., Structural Polymer Grp., Ltd. v. Zoltek Corp., No. 4:05-cv-321, 2006 WL 8445566, at *4 (E.D. Mo. Sept. 14, 2006).

B. Commercial impracticability
Missouri law recognizes the UCC-based commercial impracticability defense, which is similar to the state’s commercial frustration common law defense. See MO. REV. STAT. § 400.2-615; Am. Laminates, Inc. v. J.S. Latta Co., 980 S.W.2d 12, 20–21 (Mo. Ct. App. 1998) (rejecting defense where non-performing party
had failed to establish impracticability and explaining that the mere suffering of a loss is not sufficient); *Engel Indus., Inc. v. First Am. Bank, N.A.*, 798 F. Supp. 9, 12–13 (D.D.C. 1992) (applying Missouri law and finding the commercial impracticability defense to be inapplicable where Iraqi asset freeze did not prohibit defendants from meeting payment obligations); *Structural Polymer Grp.*, 2006 WL 8445566, at *5 (rejecting defense where alleged impracticability was foreseeable); *Mo. Pub. Serv. Co.*, 583 S.W.2d at 726–28 (rejecting multiple reasons why contract had become commercially impracticable, including because of the foreseeable Arab oil embargo).
Montana

Courts applying Montana law will enforce force majeure clauses where the alleged events are beyond a party’s control. Montana recognizes the defense of impossibility in its statutory law, and although courts have applied a strict impossibility interpretation to the defense, the boundaries of strict impossibility versus impracticability in Montana are open for debate.

The key cases are broken down as follows:

I. Contractual force majeure provisions
II. Common law remedies
   A. Impossibility
III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

Montana courts interpret contractual provisions so “as to give effect to the mutual intention of the parties as it existed at the time of the contracting, so far as the same is ascertainable and lawful.” State ex rel. Bullock v. Philip Morris, Inc., 217 P.3d 475, 480 (Mont. 2009) (quoting MONT. CODE ANN. § 28-3-301)). The purpose of force majeure clauses is to relieve parties of harsh consequences for nonperformance when circumstances beyond their control render performance untenable. See Edington v. Creek Oil Co., 690 P.2d 970, 973 (Mont. 1984).

In Reconstruction Finance Corp. v. Chromium Products Corp., the Ninth Circuit considered a force majeure provision’s applicability under Montana law. 202 F.2d 664 (9th Cir. 1953). Specifically, a federal act of June 25, 1940 created and authorized the Metals Reserve Company to produce, acquire, and carry strategic and critical materials defined by the President for purposes of national defense at the onset of the Second World War Id. at 665. The Metals Reserve Company entered into a lease with a company for its chromium ores, essential to the hardening and rust-proofing of steel used in munitions by all of the Armed Forces. Id.

The Metals Reserve Company was to pay royalties on the chromium ore it mined, including a minimum amount per year. Id. Under the lease’s force majeure provision, Metals Reserve Company could stop mining but continue the lease without payment of royalties depending on certain situations, including for “any requirement, regulation, restriction or other act of any government which is beyond the control of the lessee or which delays or interferes with the performance of this agreement.” Id. at 665–66 (construing “any” to mean “any” and not make it nugatory by confining it to a single kind of restriction).

In late 1943, the Chairman of the War Production Board decided that the individuals mining the chromium ore needed to be redeployed to assist with the production of more critically needed war materials such as copper and zinc. Id. at 667. The Ninth Circuit opinion stated, “Such a Presidential restriction of the miners’ operations so diverting them to the production of the ‘critically needed’ war materials of copper and zinc is as much a governmental operation as a Presidential order that soldiers should be removed from one field of battle to another.” Id.

The court agreed that the government order delaying further operations at the mine properly excused the royalty payment until operations resumed pursuant to the force majeure provision. Id. But see id. at 670 (Pope, J., dissenting) (“The majority opinion’s effort to inflate this statement of an additional reason to stop, into a ‘governmental operation’ by allusions to ‘critically needed’ war materials and moving soldiers from ‘one field of battle to another’ while it adds emotional content and patriotic flavor to the opinion, cannot alter what was really the fact, namely, that the [] order was but the initiation of a simple act of non-performance.”).
When the alleged event of force majeure is not beyond the control of the party seeking to excuse performance, courts will hold the party to its contractual obligations. See, e.g., Edington, 690 P.2d at 974 (rejecting force majeure defense where action of government to shut in well was brought about by wrongful and improper action of party attempting to excuse performance). The Supreme Court of Montana has explained in the oil and gas lease context, “The force majeure clause is not an escape way for those interruptions of production that could be prevented by the exercise of prudence, diligence, care, and the use of those appliances that the situation or party renders it reasonable that he should employ.” Id. (citing Jutte v. The George Shiras, 61 F. 300 (3d Cir. 1894)).

Other cases applying Montana law where force majeure declarations occurred but any dispute did not have to be resolved in reported decisions include Sociedad Aeronautica de Santander S.A. v. Weber, No. 09-cv-103, 2010 WL 2803044, at *8 n.9 (D. Mont. May 20, 2010) (not needing to address arguments as to whether the government’s seizure of funds in escrow constituted force majeure in purchase agreement for helicopter), and Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 838 (9th Cir. 1986) (indicating company invoked force majeure provision to defer or terminate coal purchase obligations based on structural damage to Illinois plant and a cracked turbine rotor at Indiana plant).

II. Common law remedies
A. Impossibility
The boundaries of the defense of impossibility or impracticability are not fully settled in Montana.

Through the 1990s, the Supreme Court of Montana described the defense as one of strict impossibility. For example, in 1980, the court observed that “impossibility of performance is a strict standard that can only be maintained where the circumstances truly dictate impossibility. The general rule is that, where a party to a contract obliges himself to a legal and possible performance, he must perform in accordance with the contract terms.” Barrett v. Ballard, 622 P.2d 180, 184 (Mont. 1980). The court reiterated that standard in a 1996 case when it described that standard as the “starting point” for the analysis of impossibility of performance. See 360 Ranch Corp. v. R & D Holding, 926 P.2d 260, 263 (Mont. 1996).

The Montana Code also allows for rescission of a contract based on impossibility: “Where a contract has but a single object and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly ascertainable, the entire contract is void.” MONT. CODE ANN. § 28-2–603; see also Smith Eng’g Co. v. Rice, 102 F.2d 492, 497–98 (9th Cir.), cert. denied, 307 US 637 (1938) (construing Montana statute on impossibility to depart from the English common law that existed as of 1864 when Montana was organized as a territory, which renders promisor’s having knowledge or reason to know of impossibility at time of contracting to be irrelevant).

In Smith Engineering, the Ninth Circuit concluded that the Montana statute excused a contractor from constructing an oil refinery where impossible to obtain the contract-specified yield of gasoline, whether or not the contractor knew or should have known of such impossibility at the time of contracting. Id. (“We think it is apparent that here the object was the construction of a complete oil refinery which would produce specified yields from Oregon Basin crude oil. It was impossible to obtain such yields from that charging stock, and therefore the contract and supplemental contract are, we think, void under Sec. 7501.”); see also Voit v. Mertz, DA 13-0443, 2014 WL 1328421, at *1–2 (Mont. May 13, 2014) (excusing performance based on statute where subdivision of property was prohibited by state and county regulations and thus unlawful).

In Cape-France Enterprises v. Estate of Peed, the Supreme Court of Montana confronted the boundaries of the defense. 29 P.3d 1011 (Mont. 2001). While the court cited Barrett and 360 Ranch, the court also cited a decision that preceded those cases suggesting that impossibility encompassed not only strict impossibility but impracticability based on extreme and unreasonable difficulty or expense. See id. at 1014–15 (citing Smith v. Zepp, 567 P.2d 923, 927 (Mont. 1977)). The court went on to discuss the “broadening scope of the doctrine” and relied on cases from other jurisdictions, including Opera Co. of Boston v. Wolf Trap Foundation, 817 F.2d 1094, 1098 (4th Cir. 1987). Id. at 1015.

The court extended the impossibility doctrine to situations of impracticability. Id. (“While the doctrine of impossibility or impracticability is not set in stone, it is applied by courts where, aside from the object of the contract being unlawful, the public policy underlying the strict enforcement of contracts is outweighed by the senselessness of requiring performance.”). The court had to determine whether the spread of groundwater contamination and the potential liability with drilling a well made a buy-sell agreement for a parcel of land unenforceable. Id. at 1014–16. Specifically, after the agreement was entered, the state and local regulatory authorities required water drilling and testing, and concluded
that the property was located within a groundwater contamination site making the buyer liable for any pollution spread if drilling took place. *Id.* at 1014–15. The court explained that if the buyers drilled a well on the property, they could be exposed to financial liability of an unquantifiable nature. *Id.* at 1016. The court reasoned that even apart from any economic consequences, “environmental degradation with consequences extending well beyond the parties’ land sale is also a real possibility.” *Id.* The court excused performance: “The record reflects that in order for [the buyer] to proceed further with the subdivision and zoning issues it would be forced to expose itself, not only to substantial and unbargained-for economic risks but, as well, the public would be exposed to potential health risks and possible environmental degradation.” *Id.*; see also *Cline v. Kralich*, DA 16-0216, 2017 WL 3263081, at *2 (Mont. Aug. 1, 2017) (relying on *Cape-France Enterprises* to find party excused from contractual obligation based on impracticability).

Two dissenting opinions in *Cape-France Enterprises* took issue with the majority’s expansion of the impossibility doctrine: “the majority, in my view, unnecessarily expands the doctrine of contract impossibility, in contravention to our case law, and fails to use the abundant caution necessary when applying a rule which allows a party to cancel its contractual obligations.” *Id.*; see also *Cline v. Kralich*, DA 16-0216, 2017 WL 3263081, at *2 (Mont. Aug. 1, 2017) (relying on *Cape-France Enterprises* to find party excused from contractual obligation based on impracticability).

It is important to note that where a party performs to the best of its ability, the defense of impossibility will not be available. As the Supreme Court of Montana explained, “impossibility is a defense to performance, it is not a defense to a claim alleging poor quality of performance.” *See* CNJ Distrib. Corp. v. D & F Farms, Inc., 309 P.3d 1002, 1009 (Mont. 2013).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Montana law recognizes the UCC-based right to request adequate assurances of performance where a party to a sale of goods contract has reasonable grounds for insecurity about its counterparty’s ability to perform. MONT. CODE ANN. § 30-2-609; see also *Morin Bldg. Prods. Co. v. Volk Constr., Inc.*, 500 F. Supp. 82, 88 (D. Mont. 1980) (finding party’s refusal to proceed with performing contract in face of counterparty’s request for adequate assurance by a specified delivery date to be an unwarranted repudiation and material breach of the contract).

B. Commercial impracticability

Likewise, Montana law recognizes the UCC-based defense of commercial impracticability, but courts applying Montana law have had few opportunities to apply it. See MONT. CODE ANN. § 30-2-615; see also *Morin Bldg.*, 500 F. Supp. at 89 (finding defense unavailable to excuse failure to deliver based on problems with party’s supplier where party should have contemplated that it could experience issues with its subcontractors and suppliers).
Nebraska

Nebraska caselaw is sparse on force majeure disputes, but in addition to contractual force majeure defenses, Nebraska law recognizes common law defenses of impossibility and business necessity to excuse performance in certain situations.

The key cases are broken down as follows:

I. Contractual force majeure provisions

II. Common law remedies

A. Impossibility

B. Business necessity

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

B. Commercial impracticability

C. Substituted performance

I. Contractual force majeure provisions

Force majeure provisions allocate the risks of performance becoming impossible or impracticable as a result of an unforeseen event beyond a party’s control. See Blue Creek Farm, Inc. v. Aurora Coop. Elevator Co., 614 N.W.2d 310, 312 (Neb. 2000). These events are not necessarily limited to acts of God, but the parties can include additional triggering events within the ambit of the force majeure provision. See, e.g., First Data Res., Inc. v. Int’l Gateway Exch., LLC, No. 8:03-cv-137, 2004 WL 2187566, at *7 (D. Neb. Sept. 28, 2004).

Consider First Data, where the U.S. District Court for the District of Nebraska considered a “very broad” force majeure clause that excused performance for reasons “similar or dissimilar to” acts of God. See id. at *8. The court excused performance where the non-performing party established that the conduct of a third party frustrated the essential purpose of the service agreement in question, and that such conduct was beyond the control of the non-performing party. Id. at *8–9.

The court explained the situation fit squarely within the parties’ force majeure clause and that the party would also be excused under the common law of business necessity, which is recognized by Nebraska law. See id. at *9 (“The broad language of the clause as well as the circumstances of the case show that [the non-performing] party did not assume the allocation of any risk, via the force majeure clause, that would constrain or negate the applicability of the business necessity defense.”); see also Big Horn Coal Co. v. Commonwealth Edison Co., 852 F.2d 1259, 1265–66 (10th Cir. 1988) (reviewing case in which jury had found an event of force majeure based on conveyor breakdown in coal mine, and in which same jury found an I-beam failure was not a force majeure event under a different contract, but parties resolved force majeure disputes prior to the appeal to the Tenth Circuit).

II. Common law remedies

A. Impossibility

The event the non-performing party claims makes the contract impossible to perform must be unforeseeable at the time of contracting. See Young v. Tate, 442 N.W.2d 865, 869 (Neb. 1989) (rejecting defense where the possibility of not being successful bidder on an Illinois resort was well within the parties’ contemplation when entering into agreement).

Where the hardship from an unforeseen event is self-inflicted or caused through inexcusable neglect (i.e., within the control of a party), contractual performance will not be excused. See Mohrlang v. Draper, 365 N.W.2d 443, 447 (Neb. 1985) (citing Derwell Co. v. Apic, Inc., 278 A.2d 338 (Del. Ch. 1971)).
B. Business necessity

Under Nebraska law, business necessity, or frustration of purpose, also can excuse performance. See First Data, 2004 WL 2187566, at *7. Nebraska courts have applied these defenses in a similar manner to their approach to impossibility or extreme impracticability. See Cleasby v. Leo A. Daly Co., 376 N.W.2d 312, 318 (Neb. 1985) (“Business necessity is sometimes called impossibility of performance, extreme impracticability, frustration of contract, or implied condition in the promise.”).

A supervening act may render the business necessity defense applicable. See id. (citing Cleasby v. Daly, 376 N.W.2d 312, 318 (Neb. 1985)). Like the other defenses described herein, the party asserting the defense bears the burden of proving that it justifies excusing performance. See id.

In Cleasby, a company that was party to an overseas services agreement argued that its employees who were to work in Saudi Arabia had to be approved by the Saudi government and that the party could not replace its personnel at will, and that this prevented the company from returning the plaintiff to work in Saudi Arabia. 376 N.W.2d at 318. The company, in defense of its decision to replace plaintiff with another manager, cited the plaintiff’s illness, the fact that it had an urgent need for a manager like the plaintiff, that the plaintiff could not return to Saudi Arabia until obtaining the express consent of a specific Saudi doctor, and that the consent could not be obtained for several weeks. Id. at 319. The court agreed that this constituted a business necessity to excuse performance of the company’s agreement with the plaintiff. Id.

If a contract has been fully performed, the Supreme Court of Nebraska has explained that the defense of business necessity does not apply. See Turbines Ltd. v. Transupport, Inc., 825 N.W.2d 767, 776–77 (Neb. 2013).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances


Whether a party has reasonable grounds for insecurity, and whether requested assurances are adequate or constitute grounds for repudiation, are questions of fact. See, e.g., Blue Creek Farm, 614 N.W.2d at 313 (finding no intent of counterparty not to perform its obligations under the contract such that the contract was not repudiated); Infousa.com, 2005 WL 2648955, at *14 (“The question of whether [a party] repudiated the [contract] by failing to provide assurances is a factual one.”).

B. Commercial impracticability

Nebraska law recognizes the UCC-based defense of commercial impracticability in the sale of goods context. NEB. U.C.C. § 2–615; see also Turbines Ltd., 825 N.W.2d at 776 (indicating defense not available where no breach of contract existed and where contract had been fully performed).

The Supreme Court of Nebraska has rejected the defense in cases where a seller has argued that a partial failure of a seller’s source of supply is the reason for the deficient performance. See, e.g., Lambert v. City of Columbus, 496 N.W.2d 540, 542–43 (Neb. 1993) (finding that contract did not excuse performance if supply of dirt was diminished and commercial impracticability defense not available because contract allocated this risk to the seller).

Similarly, the defense is not available to excuse a seller’s performance where the seller’s supply is not identified with particularity. For example, in a contract for the sale of corn, where the contract did not specifically reference the corn that would be supplied, the seller had an obligation to deliver corn from any source regardless of what occurred to the seller’s crop. See ConAgra, Inc. v. Bartlett P’ship, 540 N.W.2d 333, 337–38 (aggregating cases holding similarly from other jurisdictions).

Generally the defense of commercial impracticability will present questions of fact. See Crowder v. Aurora Co-op Elevator Co., 393 N.W.2d 250, 258 (Neb. 1986).
Nevada

Courts have rarely had to apply Nevada law to force majeure issues but have enforced defenses to nonperformance involving common law impossibility, impracticability, and commercial frustration. In those cases, only unforeseeable contingencies that parties should not have contemplated at the time of contracting will operate to excuse performance.

The key cases are broken down as follows:

I. Contractual force majeure provisions
II. Common law remedies
   A. Impossibility
   B. Commercial frustration
III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability
   C. Substituted performance

I. Contractual force majeure provisions
There are few cases applying Nevada law to force majeure disputes, but Nevada courts will enforce contractual provisions excusing performance that are broader than the common law defense of impossibility as long as the contract provides for such contingency. See Baroi v. Platinum Condo. Dev., LLC, 874 F. Supp. 2d 980, 984 (D. Nev. 2012) (citing Nebaco, Inc. v. Riverview Realty Co., 482 P.2d 305, 307 (Nev. 1971)); 6 Williston, Contracts § 1968.

In Aristocrat Technologies, Inc. v. Young, the U.S. District Court for the District of Nevada excused a seller’s delay in shipment of gaming devices on the basis of a force majeure provision. No. 2:09-cv-348, 2012 WL 5064961, at *2 (D. Nev. Oct. 17, 2012). The court concluded that inquiries by the Nevada State Gaming Control Board, “and circumstances beyond the control of [the seller] occurring in the country of Serbia where [the supplier’s supplier] was located, caused the delay,” and thus fell within the coverage of the parties’ force majeure provision. Id.

Courts applying Nevada law have also held that the presence of a contractual force majeure clause does not render a promise to complete the development of a property within a designated time to be illusory so long as the force majeure clause is triggered only by events beyond the developer’s control. See Baroi, 874 F. Supp. 2d at 984–86 (citing Atteberry v. Maumelle Co., 60 F.3d 415, 420 (8th Cir. 1995)) (“While theoretically a fire, explosion, or labor dispute could be within Defendants’ control, the contract does not allow an extension of time of performance unless the reason is beyond Defendants’ control.”); see also Goodman v. Platinum Condo. Dev., LLC, No. 2:09-cv-957, 2012 WL 1190827, at *2 (relying on Stein v. Paradigm Mirasol, LLC, 586 F.3d 849 (11th Cir. 2009)).

II. Common law remedies

A. Impossibility
The defense of impossibility is available generally where a promisor’s performance is rendered impossible or highly impracticable by the occurrence of unforeseen contingencies. See Nebaco, 482 P.2d at 307 (relying on Restatement of Contracts § 354 (1932)). The defense may apply to partial performance that becomes impracticable yet still possible in certain situations. See Helms Constr. & Dev. Co. v. Nevada, 634 P.2d 1224, 1225 n.2 (quoting Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 n.1 (D.C. Cir. 1966)) (“A rule making non-performance a condition precedent to recovery would unjustifiably encourage disappointment of expectations.”).

If the unforeseen contingency was foreseeable at the time of contracting, however, the defense is not available. See Nebaco, 482 P.2d at 307 (citing Restatement of Contracts § 357 (1932)). For example, “[w]ho contracts to render a performance for which government approval is required assumes the
duty of obtaining such approval and risk of its refusal is on him.” *Id.* (citing *Sec. Sewage Equip. Co. v. McFerren*, 237 N.E.2d 898 (Ohio 1968)).

In *Nebaco*, the Supreme Court of Nevada rejected an impossibility defense based on nonperformance caused by a failure to obtain clearance for an investment from the Regional Administrator of National Banks. See *id.* The court concluded that the defense of impossibility was unavailable because such contingency should have been foreseen as possible and provided for in the contract. *Id.*

For unforeseen costs to rise to the level of impracticability, the increase “must be more than merely onerous or expensive, it must be positively unjust to hold the parties bound.” See *Helms Constr.*, 634 P.2d at 1225 (quoting *E. Air Lines Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 438 (S.D. Fla. 1975)). The Supreme Court of Nevada, for example, has rejected the defense where cost changes equated to 0.6 of 1% of the total contract value. *Id.* (“Such cost overruns do not render performance of the contract commercially impracticable.”).

Objective impossibility or impracticability is required to excuse nonperformance. See *Carcione v. Clark*, 618 P.2d 346, 348 (Nev. 1980) (declining to excuse nonperformance where party’s refusal to clear the lis pendens by posting a bond or other methods was analogous to subjective impossibility).

B. Commercial frustration

Nevada also recognizes the similar doctrine of commercial frustration, which applies to discharge a party’s contractual obligation when “[p]erformance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration.” *Graham v. Kim*, 899 P.2d 1122, 1124 (Nev. 1995) (quoting *Lloyd v. Murphy*, 153 P.2d 47, 50 (Cal. 1944)).

In *Graham v. Kim*, the Supreme Court of Nevada reversed a district court’s application of this defense. The district court had discharged the buyer’s contractual obligation to sellers for the purchase of a business property after a fire, caused by violence erupting following the announcement of the first Rodney King verdict, which destroyed the property. *Id.* at 1123–24. The court concluded that because the buyer had purchased fire insurance for the property, the buyer foresaw the possibility that a fire could occur, precluding the defense of commercial frustration. *Id.* at 1224.

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Nevada law recognizes that either contractual party may demand adequate assurances in writing if reasonable grounds for insecurity about the counterparty’s ability to perform arise. NEV. REV. STAT. § 104.2609; see also *JSH Sec. Indus. D.C.S. Ltd. v. Bartech Sys. Int’l Inc.*, 2:07-cv-277, 2008 WL 11388608, at *6 (D. Nev. Oct. 6, 2008) (explaining that a party “may” demand adequate assurances but is not required to do so by statute).

In *Coker Equipment Co. v. Wittig*, the Ninth Circuit concluded that the district court did not err by finding that a buyer of a crane had reasonable grounds for insecurity about the seller’s ability to perform. 366 Fed. App’x 729, 732 (9th Cir. 2010). The court pointed to the fact that the crane lacked proper safety certification when delivered to the jobsite, remained inoperable for three weeks, and the seller’s failure to provide monthly maintenance as evidence of the seller’s “repeated delinquencies,” which were “cumulative” in determining that the buyer had reasonable grounds to demand adequate assurances. See *id.*

B. Commercial impracticability

When performance is made impracticable in a contract for the sale of goods, and is caused by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made, Nevada law can excuse performance. See *WuMac, Inc. v. Eagle Canyon Leasing, Inc.*, No. 2:12-cv-926, 2015 WL 995095, at *8 (D. Nev. Mar. 5, 2015) (quoting NEV. REV. STAT. § 104.2615(1)) rejecting party’s argument that FAA certification delay was valid excuse for failure to tender aircraft by a certain date, where party still could have performed once certification occurred).

Nevada courts have explained that this UCC-based defense is not available in performance contracts, but only in the context of the sale of goods. See *Helms Constr.*, 634 P.2d at 1225.
I. Contractual force majeure provisions

A. General requirements


In Tommy Hilfiger, the clothing retailer entered into a long-term commercial lease with a developer that planned to build a retail outlet shopping center. The developer failed to complete construction of the shopping center by the deadline specified in the lease because the developer had not obtained the necessary zoning permits. The zoning decision was subject to an automatic stay pending appeal. The clothing retailer brought a declaratory judgment action to determine whether the developer was entitled to invoke a force majeure clause in the lease excusing any delay in completing construction caused by “governmental restrictions.” Id. at *2–4.

The court applied the “standard rules of contract interpretation” to determine whether the term “governmental restrictions” encompassed the delay in zoning due to the automatic stay in the zoning case. The clothing retailer argued, “the only reasonable way to construe the governmental restrictions term is to limit it to unforeseeable governmental restrictions.” Id. at *5. The retailer relied on force majeure case law holding that force majeure clauses only act to excuse unforeseeable events. Id. at *6 (citing, for example, URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1273–74 (D.R.I. 1996)).

The court, however, disagreed with the retailer, and concluded that “in the absence of contract language or extrinsic evidence suggesting that a more limited meaning was intended, a stay of a necessary approval that automatically goes into effect by operation of law when an appeal is taken is a limitation on [the developer’s] ability to build that reasonably can be viewed as a governmental restriction.” Id.

II. Common law remedies

A. Impossibility

New Hampshire recognizes the doctrine of impossibility, which requires that there be “complete and permanent impossibility” of performing contractual obligations to excuse performance. See Bower v. Davis & Symonds Lumber Co., 406 A.2d 119, 122 (N.H. 1979).

“[T]o justify the termination of a contract on account of impossibility of performance, the impossibility must be complete and permanent.” Perry v. Champlain Oil Co., 114 A.2d 885, 887 (N.H. 1955) (citing Black, Rescission of Contracts § 208, and Williston, Contracts
§ 670). Lost value alone, however, does not represent impossibility. See id.; see also Bower, 406 A.2d at 122 (“In the present case, the conveyance of marketable title was neither impossible nor unobtainable.”).

B. Frustration

New Hampshire courts also recognize the doctrine of commercial frustration, which assumes the possibility of literal performance, but excuses performance when supervening events essentially destroy the purpose of the contract. See Gen. Linen Servs., Inc. v. Smirnioudis, 897 A.2d 963, 966 (N.H. 2006).

Here, frustration is relative, and the defense is available only where the contract’s main purpose is not obtainable. See id. The inquiry is highly factual, and “the degree of frustration is the decisive factor.” See Perry, 114 A.2d at 888; Bower, 406 A.2d at 122 (rejecting commercial frustration defense as well as impossibility defense).

Under the doctrine, “a contract is to be considered subject to the implied condition that the parties shall be excused in case, before breach, the state of things constituting the fundamental basis of the contract ceases to exist without default of either of the parties.” Gen. Linen Servs., 897 A.2d at 966 (emphasis in original). For the doctrine to apply, the supervening event must occur before the party seeking its protection otherwise breaches the contract. Id. (holding doctrine of frustration of purpose did not apply where party breached agreement before event allegedly frustrating purpose of agreement occurred).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Article 2 of the Uniform Commercial Code (UCC) provides a right to demand adequate assurance of due performance “[w]hen reasonable grounds for insecurity arise” and declaring a failure to provide such assurance within a reasonable time to be a repudiation of the contract. See N.H. REV. STAT. § 382–A.2–609.

This provision of the UCC “has been considered so effective in bridging the doctrinal, exceptional and operational gap related to the doctrine of anticipatory breach that some States have imported the complementary regimen of demand for adequate assurance to common-law categories of contract law, using UCC 2–609 as the synapse.” See McNeal v. Lebel, 953 A.2d 396, 401 (N.H. 2008) (quoting Norcon Power Partners v. Niagara Mohawk Power, 705 N.E.2d 656, 660 (N.Y. 1998)).

In McNeal, the Supreme Court of New Hampshire recognized the right to demand adequate assurances under general contract law. The court explained that the principle is “closely related to the duty of good faith and fair dealing in the performance of the contract,” which has “long been an integral component of our common law of contracts.” McNeal, 953 A.2d at 401 (citing Restatement (Second) of Contracts § 251 cmt. a).

B. Commercial impracticability

Although the New Hampshire version of the UCC includes the section covering sellers facing commercial impracticability, no court has interpreted or commented on that New Hampshire statute. N.H. REV. STAT. § 382-A.2-615.
New Jersey

In addition to generally enforcing force majeure clauses as written, New Jersey recognizes common law remedies of impossibility and impracticability to excuse contractual performance under certain circumstances. In interpreting contractual force majeure provisions, New Jersey courts have looked to the common law framework for impracticability defenses.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability
   E. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

Force majeure clauses provide a means by which parties may anticipate a condition that will make performance of a contract impossible or impracticable. See Facto v. Pantagis, 915 A.2d 59, 61–62 (N.J. Super. Ct. App. Div. 2006) (citing 8 Corbin, Contracts § 31.4). Such clauses condition the party’s duty to perform upon the nonoccurrence of an event beyond the party’s control and serious enough to materially interfere with the contract’s performance. Id.

Under New Jersey’s common law, force majeure events are those that can be neither anticipated nor controlled, and include but are not limited to acts of nature such as extreme weather. See Corestar Int’l Pte. Ltd. v. LPB Commc’ns, Inc., 513 F. Supp. 2d 107, 120 n.8 (D.N.J. 2007); N.J. Dept of Envtl. Prot. v. Bayshore Reg’l Sewerage Auth., 773 A.2d 1215, 1216 n.1 (N.J. Super. Ct. App. Div. 2001) (“The term ‘force majeure’ (a superior force) applies to an event or effect that can neither be anticipated nor controlled. It can include both acts of nature and humans.”).

New Jersey courts also have interpreted force majeure as including broader swaths of unforeseeable events, encompassing “all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent. . . .” Meyer Bros. Hay & Grain Co. v. Nat’l Malting Co., 11 A.2d 840, 841 (N.J. 1940).

New Jersey courts have been reluctant to find force majeure defenses available, in the absence of contractual terms otherwise, when events lack a natural component and are entirely caused by human agency. Consider Behring International, Inc. v. Imperial Iranian Air Force, in which the Iranian Air Force attempted to excuse its breach of a storage contract pursuant to force majeure. 475 F. Supp., 396, 401 (D.N.J. 1979). The court found that the purported events causing the breach—including “political turmoil and violent revolutionary struggles in Iran, a breakdown in the military chain of command, lack of fuel, airfields closed by strikes and/or government decrees, and denial of over-flight permission by third countries”—were controlled by human factors and could not qualify as force majeure events. Id.

Force majeure clauses generally are interpreted like any other contractual provision, in light of “the contractual terms, the surrounding circumstances, and the purpose of the contract.” Facto, 915 A.2d at 62 (citing Marchak v. Claridge Commons, Inc., 633 A.2d 531, 535 (N.J. 1993)). New Jersey courts will interpret any catch-all language within force majeure provisions narrowly to encompass “only events or things of the same general nature or
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The non-performing party bears the burden of proof to demonstrate that the force majeure event should excuse performance, and the party must show what actions it took to try to overcome the force majeure event. See Corestar Int’l Pte., 513 F. Supp. 2d at 121.


B. Causation
For a force majeure event to excuse performance, the force majeure event must prevent the party’s performance. See Gulf Oil Corp. v. FERC, 706 F.2d 444, 455 (3d Cir. 1983).

For example, where the party’s business decisions—and not the force majeure event specifically—cause the party’s inability to perform, courts are unlikely to excuse performance. See Corestar Int’l Pte., 513 F. Supp. 2d at 121 (finding force majeure clause did not excuse party’s performance where production delays were caused by party’s decision to prioritize production for government and not unavailability of raw materials); Seitz, 510 A.2d at 321–22 (concluding that disability of employee was not force majeure event where party could pursue outside vendor to complete work under contract albeit at higher cost).

Where a specifically covered event of force majeure does cause the party’s failure to perform, New Jersey courts will enforce the clause and excuse performance. See Facto, 915 A.2d at 62 (enforcing force majeure provision to excuse venue’s obligation to provide a wedding reception due to a blackout where force majeure clause specifically listed “power failure” as force majeure event, regardless of whether the power failure was caused by circumstances other than a natural event).

C. Mitigation/beyond a party’s control
Unless the contract says otherwise, a party’s reason for nonperformance as a basis for a force majeure argument must be beyond the party’s control, and not be caused by any fault or negligence of the party. See id. at 61–62.

The non-performing party must also take steps to mitigate the effect of any force majeure event. See Gulf Oil Corp., 706 F.2d at 452 (requiring the party to “show that it exercised due diligence to overcome the effects of the specific force majeure events” and “did everything in its control to prevent or minimize its happening”); Corestar Int’l Pte., 513 F. Supp. 2d at 121 (same); CSX Transp., Inc. v. Ports Am., Inc., No. 13-4434, 2017 WL 5515908, at *6 (D.N.J. Feb. 10, 2017) (finding damage caused by Hurricane Sandy did not fall within the force majeure clause where the defendant was on notice of potential damage from the storm and did not take commercially reasonable steps to avoid or mitigate damage).

For example, where a contract did not specifically provide that a supplier supply a specific source of natural gas, the seller was on the hook for finding replacement sources of gas following an interruption in its primary source and a force majeure defense did not excuse performance. See Hess Corp. v. ENI Petroleum US, LLC, 86 A.3d 723, 728 (N.J. Super. Ct. App. Div. 2014) (applying New York law, but nothing herein suggests the result would be different under New Jersey law).


D. Foreseeability
An event of force majeure generally must be unforeseeable at the time of contracting in order to excuse performance. See Corestar Int’l Pte., 513 F. Supp. 2d at 121 n.3.

Absolute unforeseeability of an event, however, is not required. See Facto, 915 A.2d at 62–63 (citing Opera Co. of Boston, Inc. v. Wolf Trap Found. for Performing Arts, 817 F.2d 1094, 1100–01 (4th Cir. 1987)).

In Facto v. Pantagis, a case concerning nonperformance of an event contract due to loss of power, the court found that the fact that a power failure was not absolutely unforeseeable during hot summer months did not preclude the applicability of the force majeure clause to excuse the party’s performance. See id. (“In this case, the [party] sought to eliminate any possible doubt that the availability of electricity was a ‘specific thing necessary’ for the wedding reception by specifically referring to a ‘power failure’ as an example of an ‘act of God’ that would excuse performance” in the force majeure provision.”).
E. Notice
Some force majeure clauses may contain notice provisions requiring a party to provide notice of the occurrence of a force majeure event affecting performance.

While there is limited guidance from New Jersey courts interpreting these provisions, the Third Circuit has found that failure to give adequate notice pursuant to an applicable provision is fatal to a claim of force majeure. See, e.g., United States v. Wheeling–Pittsburgh Steel Corp., 818 F.2d 1077, 1088 (3d Cir. 1987) (failure to give adequate notice of force majeure rendered that defense unavailable to defendant); see also Norfolk S. Ry. Co. v. N.Y. Terminals, LLC, No. 2:14-cv-07664, 2017 WL 4005158, at *5 (D.N.J. Sept. 12, 2017) (holding failure to adhere to notice provision in force majeure clause rendered force majeure defense unavailable).

However, where not material, failure to give written notice of force majeure within the time frame prescribed by a notice provision may not always result in waiver of the defense where the other party was on notice by other means of the event’s occurrence. See United States v. Sunoco, Inc., (R&M), No. 03-cv-4625, 2007 WL 1652266, at *4 (D.N.J. June 7, 2007) (citing Toyomenka Pac. Petroleum v. Hess Oil Virgin Islands Corp., 771 F. Supp. 63, 66–68 (S.D.N.Y. 1991)).

II. Common law remedies
A. Impossibility

Impossibility and impracticability are not defenses, however, “where the difficulty is the personal inability of the promiser to perform” or where other foreseeable events are the cause of nonperformance. See, e.g., Connell, 604 A.2d at 627 (holding a party could not claim impossibility or impracticability where the breach was caused by the party’s inability to obtain financing for home purchase); Howard Johnson Int’l, Inc. v. M.D.1, LLC, No. 11-cv-2593, 2012 WL 5199634, at *3 (N.D. Ill. Oct. 19, 2012) (applying New Jersey law and holding licensee could not claim impossibility or impracticability due to inability to secure financing where financing contingencies could have, but were not, included in contract); Seitz, 510 A.2d at 323 (“[F]or impossibility to operate as an excuse, it must be objective (‘the thing cannot be done’) rather than subjective (‘I cannot do it.’”) (internal citations omitted).

B. Frustration of purpose
To invoke a defense of frustration of purpose under New Jersey law, it is not enough that the individual advantage a party may have under the contract is lost; rather, the common object of both parties must be frustrated, changing the nature of the parties’ overall bargain. See Edwards v. Leopoldi, 89 A.2d 264, 271 (N.J. Super. Ct. App. Div. 1952) (observing that the frustration doctrine pertains to situations in which the parties’ “common object” has been frustrated by “destruction or cessation [that] demolishes the attainment of the vital and fundamental purpose of the contracting parties”); J.B. Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Assocs., Inc., 67 A.3d 702, 709–10 (N.J. Super. Ct. App. Div. 2013) (finding that frustration of purpose doctrine may excuse performance under a pool maintenance contract where the pool was closed by the state due to mold).

A key facet of the frustration of purpose doctrine is that “relief from performance of contractual obligations on this theory will not be lightly granted.” Id. (quoting A–Leet Leasing Corp. v. Kingshead Corp., 375 A.2d 1208, 1214 (N.J. Super. Ct. App. Div. 1977)). The evidence satisfying the doctrine’s requirements “must be clear, convincing and adequate.” Id.

III. UCC provisions regarding excused performance
A. Demands for adequate assurances

The reasonableness of a party’s insecurity, the propriety of a demand of assurances, and the adequacy of assurance tendered present questions of fact to be resolved by the ultimate fact finder. See Rocheux Int’l, 741 F. Supp. 2d at 672.

The failure of the counterparty to provide adequate assurance results in repudiation of the contract. See Vasaturo Bros., 2011 WL 3022440, at *4 (finding failure to provide adequate assurance of performance after
previous deliveries did not conform with contract specifications constituted repudiation of contract).

B. Commercial impracticability


New Jersey courts generally analyze commercial impracticability under the UCC through the same lens as common law impracticability. See id. (noting application of common law impracticability doctrine to UCC).

Price fluctuations may excuse performance only if they arise out of “a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like.” Id. (quoting N.J. STAT. ANN. § 12A:2–615). However, “[i]ncreased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance.” Id. (quoting N.J. STAT. ANN. § 12A:2–615, cmt. 4).
New Mexico

New Mexico law requires force majeure events to be unforeseeable unless the parties specifically define the event, in which case unforeseeability is not required. Where a contract calls for alternative means of performance, such as a take-or-pay contract, nonperformance of the contract is excused only where the force majeure event renders both alternative means of performance impracticable. New Mexico recognizes common law impossibility, interpreted as impracticability, as a defense to nonperformance, and although New Mexico recognizes frustration of purpose, the caselaw is limited.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Foreseeability
   D. Notice

II. Common law remedies
    A. Impossibility
    B. Frustration of purpose

III. UCC provisions regarding excused performance

I. Contractual force majeure provisions

A. General requirements
The types of events that constitute force majeure depend on the specific language of the parties’ contractual clause. *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626, 636 (N.M. 2003) (acknowledging that as of 2003, New Mexico had no cases interpreting force majeure clauses). When a list of specific events is followed by a general clause such as “other cause beyond the control” of the parties, the general words are not construed in their widest extent “but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned.” *Id.* (quoting *State v. Foulenfont*, 895 P.2d 1329, 1332 (N.M. Ct. App. 1995)); see also *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 709 P.2d 649, 653 (N.M. 1985) (applying *ejusdem generis* when interpreting contractual terms).


Courts recognize parties’ freedom to contract and they can contract around the basic notions of the common law of impracticability. *See Medite Corp. v. Pub. Serv. Co. of N.M.*, No. 96-cv-929, 1998 WL 36030323, at *5–6 (D.N.M. Sept. 29, 1998) (rejecting argument that every aspect of the law of impracticability is automatically grafted into every force majeure clause or else the purpose of such clauses would be rendered useless).
B. Causation

In *International Minerals & Chemical Corp. v. Llano, Inc.*, the Tenth Circuit considered a buyer’s attempt to excuse its performance to pay for natural gas under a take-or-pay contract requiring the party to either take the minimum purchase obligation of natural gas (and pay), or pay the minimum bill. 770 F.2d 879, 885 (10th Cir. 1985). The court noted that it was settled law that when a promisor can perform a contract in either of two alternative ways, the impracticability of one alternative does not excuse the promisor if performance by means of the other alternative remains practicable. *Id.* (citing *Ashland Oil & Refining Co. v. Cities Serv. Gas Co.*, 462 F.2d 204, 211 (10th Cir. 1972)).

In the particular contract before the court, however, the contract also contained a “minimum bill” provision affording the buyer additional protection. Specifically, it provided that in the event the buyer is “unable to receive gas . . . for any reason beyond the reasonable control of the parties,” a corresponding adjustment to the minimum purchase requirements is required. *Id.* at 886. This provision essentially meant that a force majeure event preventing the buyer from taking gas could also reduce a buyer’s minimum pay obligation. *Id.*

The court concluded that because the buyer was unable to take its minimum gas consumption due to new regulations by the New Mexico Environmental Improvement Board limiting emissions from certain submerged combustion evaporators, a corresponding reduction in the minimum purchase amount was required because the event was beyond the buyer’s control pursuant to the minimum bill provision. *Id.* at 887 (also rejecting seller’s argument that buyer should not have come into compliance with the new regulations early and should instead have waited until full compliance was required).

Other oil and gas lease disputes have caused questions about the effect of force majeure provisions in New Mexico. In *Maralex Resources, Inc. v. Gilbreath*, a lessee brought suit seeking a declaratory judgment that an oil and gas lease expired after lessees’ well failed to produce for a certain time period. 76 P.3d 626 at 629. Among other reasons, the lessees argued that the force majeure clause prevented termination of the lease on the grounds that production ceased because of a problem beyond their control with the pipeline pressure. *Id.*

The court, after concluding that the party raising the force majeure defense bore the burden of proving it, affirmed the trial court’s grant of summary judgment to the lessor because the lessees failed to come forward with sufficient evidence supporting their claim. *Id.* at 636–37 (finding party did not present evidence establishing that cessation of production was caused by problem with third party pipeline beyond party’s control in lieu of it being caused by insufficient well pressure within the party’s well, which would not be beyond the party’s control); see also *King v. Estate of Gilbreath*, 215 F. Supp. 3d 1149, 1177–78 (D.N.M. 2016) (finding similarly because party asserting force majeure defense offered only conclusory allegations rather than identification of evidence relating to specific, relevant time periods).

C. Foreseeability

Courts have recognized that where parties use generic and vague force majeure provisions, then the common law will help interpret them. For example, where a risk is foreseeable at the time of contracting and the parties merely recite a boilerplate force majeure provision, courts will presume that the parties assumed the realization of that foreseeable risk. *See Medite Corp.*, 1998 WL 36030323, at *6–7 (citing *United States v. Winstar Corp.*, 518 U.S. 839 (1996)). Where the parties have carved out a specific risk and included that risk to excuse nonperformance within the coverage of the force majeure provision, unforeseeability will not be required. *See id.* (finding parties specifically contemplated the possibility that either party would be prevented from operating by an inability to obtain necessary permits or other governmental authorization).

D. Notice

Although limited, at least one court interpreting New Mexico law has indicated that the failure to follow a contractually required notice provision to invoke force majeure renders the defense inapplicable. *See Int’l Minerals & Chem. Corp.*, 770 F.2d at 885 (“Adequate notice was required to trigger the protections of the [force majeure] provision.”).

II. Common law remedies

A. Impossibility

The doctrine of impossibility, which is interpreted in New Mexico as impracticability, applies in situations where performance by a party “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.” *See Summit Props., Inc. v. Pub. Serv. Co. of N.M.*, 118 P.3d 716, 727 (N.M. Ct. App. 2005) (quoting *In re Estate of Duncan*, 50 P.3d 175 (N.M. Ct. App. 2002)).

The party asserting the defense cannot be at fault for creating the impossibility to arise. *See id.* (citing *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 842 (2d Cir. 1975) (noting that party pleading defense of impossibility must show that “it took virtually every
action within its powers to perform its duties under the contract*). For example, the New Mexico Court of Appeals rejected the defense where the asserting party entered into a contract with a third party to have certain facilities constructed and then entered into an agreement with the City to sell the facilities. See id.

The court explained that the party could not create the impossibility of performing under the contract with the third party by entering into an agreement with the City to sell the facilities and then hide behind the impossibility that it helped create. See id. (also rejecting the defense even if the third party acquiesced in the creation of the impossibility); see also Woodmont Paseo, LLC v. N.M. Utils., Inc., No. A-1-CA-35611, 2019 WL 4419621, at *4 (N.M. Ct. App. Aug. 23, 2019) (rejecting defense where court found lack of evidence that agreement was based on assumption that condemnation of deeded property would not occur, or that parties should not have foreseen risk and adequately contracted for its occurrence).

B. Frustration of purpose

Few New Mexico cases have examined the doctrine of frustration of purpose in New Mexico. For a thorough examination of how the doctrine originated and how courts applied “commercial frustration” theories including as to its applicability to real property disputes, see Wood v. Bartolino, 146 P.2d 883, 886–90 (N.M. 1944).

III. UCC provisions regarding excused performance

Although reported New Mexico cases have not discussed either section in detail, New Mexico law recognizes the right to demand adequate assurances and the defense of commercial impracticability in the sale of goods context. See N.M. STAT. ANN. § 55-2-609 (adequate assurances); § 55-2-615 (commercial impracticability).
New York

Given that New York law governs many commercial contracts, there is more caselaw interpreting force majeure and other contractual nonperformance issues in New York than in most other U.S. jurisdictions. New York law enforces force majeure provisions narrowly, but seeks to enforce parties’ agreements according to their terms. New York recognizes common law remedies of impossibility and frustration of purpose, but generally these pose higher bars in seeking to excuse nonperformance than contractual force majeure provisions.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability
   E. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability
   C. Substituted performance

I. Contractual force majeure provisions
A. General requirements

Force majeure clauses are intended “to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties.” See United Equities Co. v. First Nat. City Bank, 383 N.Y.S.2d 6, 9 (N.Y. App. Div. 1st Dep’t 1976) (citing 3A Corbin, Contracts § 642 (1960)). A force majeure clause cannot provide a party a greater profit than that for which the party contracted. See id. (rejecting attempt from party to an exchange futures contract to use force majeure clause to obtain greater profit as opposed to limiting its damages).


The specific descriptions used in the force majeure clause are critical. For example, on March 3, 2020, the Southern District of New York confirmed a final arbitration award that rejected application of a force majeure clause where the non-performing party claimed force majeure because local authorities failed to issue an export permit, but the clause only covered “withdrawal by the local authorities of any required export permit.” Pioneer Navigation Ltd. v. Chem. Equip. Labs, Inc., No. 1:19-cv-2938, 2020 WL 1031082, at *3 (S.D.N.Y. Mar. 3, 2020) (emphasis added).

New York courts construe any catch-all language, such as “and other similar causes beyond the parties’ control,” narrowly and will confine events covered by such language to the same types of events as the events specifically defined. See Kel Kim, 519 N.E.2d
at 296–97 (citing 18 Williston, Contracts ¶ 1968, at 209 (3d ed. 1978)) (rejecting force majeure clause applicability where failure to procure and maintain public liability insurance was not specifically listed as a force majeure event, and was materially different from the listed events, which all related to a party’s ability to conduct day-to-day commercial operations).

For example, the breakdown in negotiations with a counterparty does not constitute force majeure, regardless of interference by third parties, where the force majeure clause does not specifically provide for such event. See Wuhan Airlines v. Air Alaska, Inc., No. 97-cv–8924, 1998 WL 689957, at *3 (S.D.N.Y. Oct. 2, 1998); see also Carrollton Bank v. Fujitsu Transaction Sols., Inc., 56 Fed. App’x 603, 607 (4th Cir. 2003) (applying New York law and finding that theft by subcontractor was materially different from listed force majeure events such as natural disasters and thus force majeure clause did not apply).

The party unable to perform bears the burden of proving the force majeure provision’s applicability, and the party must demonstrate its efforts to perform its contractual obligations to overcome the force majeure event. See Rochester Gas & Elec. Corp., 2009 WL 368508, at *7 (citing Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd., 782 F.2d 314, 319 (2d Cir. 1985)).

B. Causation

Even if an event is a “force majeure event” as defined in the parties’ agreement, the alleged force majeure event must prevent the non-performing party from performing the contractual obligation in question. See Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199, 210 (N.D.N.Y. 2012) (drilling companies not prevented from drilling because of Governor’s directive banning certain types of drilling where contracts did not require the companies to drill, and companies had not yet started any drilling).

For example, where a party’s performance is prevented not by the alleged force majeure event, but by the party’s business decisions due to financial considerations, courts are unlikely to enforce the force majeure provision because such decision is not beyond the control of the parties. See, e.g., Macalloy Corp. v. Metallurg, Inc., 728 N.Y.S.2d 14, 14–15 (N.Y. App. Div. 1st Dep’t 2001) (concluding that force majeure provision could not excuse party’s performance where party’s decision to shut down plant was voluntary and thus not beyond its control, even though based on environmental regulations that negatively impacted the plant’s finances); Wizard v. Clipper Cruise Lines, No. 06-cv–2074, 2007 WL 29232, at *5 n.3 (S.D.N.Y. Jan. 3, 2007) (upholding arbitrator’s ruling that even if force majeure clause was potentially in play for a tour company following 9–11 attacks, it would not excuse a contractual payment where performance has merely become economically inadvisable “even if the economic conditions were the result of a force majeure event”).

Consider the case of a transformer manufacturer that contracted to supply multiple transformers but informed the buyer that due to the manufacturer’s supplier not guaranteeing core steel production, the manufacturer had to declare force majeure based on the “world-wide severe shortage of raw materials.” See Rochester Gas & Elec. Corp., 2008 WL 368508, at *8. The force majeure clause did not specifically list an increase in the price for steel used to build the transformers as a force majeure event, so the court had to consider whether the world-wide shortage of steel and consequent rise in steel prices was covered by the provision’s “catch-all” clause that covered any other event “beyond the reasonable anticipation and control of the Party.” Id. The court found the force majeure provision inapplicable. Even though the manufacturer’s contractual undertaking may have become more burdensome as a result of subsequent, perhaps unanticipated, developments, such economic necessity did not prevent contractual performance. Id. at *9–10 (citing Canfield v. Reynolds, 631 F.2d 169, 177 (2d Cir. 1980)).

Similarly, a party’s subjective fear or belief was not grounds for excusing performance where a company cancelled an event contract with a hotel after the Department of Homeland Security raised the domestic threat level and the force majeure clause did not include a “heightened threat of terrorism” as a listed event of force majeure. See L’Oreal USA, Inc. v. PM Hotel Associates, L.P., 2006 WL 90854, at *1–2 (N.Y. Civ. Ct. Mar. 13, 2006) (“There is no suggestion that travel to New York City was impossible or even counseled against by public authorities; the citizens were warned to be alert, not absent.”).


Certain government directives have constituted excusable nonperformance when covered by force majeure clauses under New York law. See, e.g., Harriscom Svenska, AB v. Harris Corp., 3 F.3d 576, 580 (2d Cir. 1993) (enforcing force majeure defense
to excuse performance where party prevented from selling goods to Iran because of government ban on sale of military goods to Iran where force majeure clause covered “governmental interference”). For example, when the Town of Hempstead passed an ordinance restricting the location of off-track betting parlors, an off-track betting corporation was excused from payment of rent under a preexisting contract for rent of property that was to be used for “legalized betting and ancillary uses.” See Burnside 711, LLC v. Nassau Regional Off-Track Betting Corp., 67 A.D.3d 718, 719 (N.Y. App. Div. 2d Dep’t 2009) (excusing betting corporation’s breach and declaring agreement discharged because the reasonable expectations of the parties to use the premises as an off-track betting parlor had been frustrated due to circumstances beyond their control and force majeure provision specifically included “governmental action or inaction”).

Similarly, a court enforced a force majeure provision covering “governmental prohibitions” where the Supreme Court of New York had issued a temporary restraining order prohibiting the continuation of a landlord’s construction, which constituted governmental action beyond the control of the landlord. See Reade v. Stoneybrook Realty, LLC, 882 N.Y.S.2d 8, 8–9 (N.Y. App. Div. 1st Dep’t 2009); see also Castor Petroleum v. Petroterminal De Panama, 968 N.Y.S.2d 435, 436 (N.Y. App. Div. 1st Dep’t 2013) (excusing party’s performance in a transportation and storage agreement following attachment of the counterparty’s oil by a Panamanian court, which the force majeure clause’s inclusion of “government embargo or interventions or other similar or dissimilar event or circumstances” covered).

Whether an alleged event of force majeure precludes a party’s performance is generally a question of fact for the ultimate factfinder. See, e.g., Lofraco Belgium v. Mateo Prods., Inc., 29 N.Y.S.3d 312, 312–13 (N.Y. App. Div. 1st Dep’t 2016) (concluding whether performer Akon’s failure to perform a concert was caused by “sickness or accident,” as defined in the force majeure clause, was a question of disputed fact for the jury).

C. Mitigation/beyond a party’s control

Generally the party invoking the force majeure clause to excuse performance must attempt to perform, or in other words, attempt to overcome the impediment caused by the alleged force majeure event.

Some force majeure provisions expressly include this mitigation requirement. For example, the Southern District of New York considered the force majeure provisions within a contract for delivery of crude oil following the refinery’s inability to take delivery during a period following Hurricane Hugo. Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp., 771 F. Supp. 63, 65–66 (S.D.N.Y. 1991). The contract provided, “The affected party shall use reasonable diligence to remove the force majeure situation as quickly as possible.” Id. at 67. Specifically, the Hurricane damaged the refinery and delayed the refinery from taking product from a contracted-for charter vessel for twelve days, and the refinery owner invoked the force majeure clause to excuse demurrage payments for the delay. The vessel owner challenged the argument and claimed that post-Hurricane congestion, and not the Hurricane itself, caused the refinery owner’s delay, and that the refinery took other suppliers’ delivery of earlier arriving cargoes during the period of delay. The court concluded that the vessel owner introduced no controverted facts sufficient to defeat a grant of summary judgment to the refinery owner, including on the specific factual issue as to whether the refinery had attempted to overcome the event. Id. (relying on affidavits from the refinery owner, “By taking delivery of cargoes as they arrived, [the refinery] used reasonable diligence”).

Even where the contract does not specifically contain a required mitigation provision, most courts require the party seeking to excuse performance to attempt to overcome the alleged reason for nonperformance. For example, in the wake of flooding from Hurricane Sandy, a court rejected, at least for purposes of establishing as a matter of law that the force majeure provision was enforceable, that a real estate company should be excused from requisite baseline payments where company could not establish that the missed payments were an unavoidable result of the storm, including whether the company could have restored tenants to their space earlier. See Constellation Energy Svc. of NY, Inc. v. New Water Street Corp., 146 A.D.3d 557, 558 (N.Y. App. Div. 1st Dep’t 2017). Another court rejected an argument that a pro hockey team, in a contract for rent with its home arena, could have controlled the league-wide lockout from occurring to overcome the alleged force majeure event. Bouchard Transp. Co. v. N.Y. Islanders Hockey Club, LP, 40 A.D.3d 897, 898 (N.Y. App. Div. 2d Dep’t 2007) (rejecting said argument from landlord reasoning that team was only one of thirty teams and could not mitigate League Commissioner’s ordered lockout, and enforcing force majeure clause that included “labor disputes”).

Chronicling the specific steps a party takes to overcome alleged force majeure events will be important when considering their enforceability. See, e.g., Babcock & Wilcox Co. v. Allied–General Nuclear Servs., 555 N.Y.S.2d 313, 313–15 (N.Y. App. Div. 1st Dep’t 1990) (enforcing force majeure provision and excluding
performance where party attempted to overturn Nuclear Regulatory Commission ruling that precluded contractual performance as a good-faith effort to overcome the alleged force majeure event’s impediment to performance).

D. Foreseeability
An event of force majeure generally must be unforeseeable at the time of contracting to excuse performance. See, e.g., Team Mktg. USA Corp. v. Power Pact, LLC, 839 N.Y.S.2d 242, 245–46 (N.Y. App. Div. 3d Dep’t 2007) (rejecting force majeure defense covering party’s action in rescheduling and cancelling a promotion schedule, which was specifically contemplated and thus foreseeable given other contractual terms including the cancellation clause). For example, the Southern District of New York has explained that unanticipated mechanical breakdowns at a factory could be an enforceable force majeure event, but that breakdowns occurring with greater frequency would be foreseeable and thus removed from a force majeure clause’s coverage. See Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl, 720 F. Supp. 312, 318–20 (S.D.N.Y. 1989) (noting parties agreed force majeure event needed to be unforeseeable for force majeure clause to apply under New York law and citing United States v. Brooks-Callaway Co., 318 US 120, 122–23 (1943)). Whether an event was foreseeable at the time of contracting will generally be a fact issue not appropriate for summary judgment. See id. at 319–20.

Even for a force majeure clause that specifically stated it covered government orders regardless of whether the orders were unforeseeable, a New York court still interpreted the clause to require unforeseeability and that the event be outside of the party’s control. See Goldstein v. Orensanz Events LLC, 146 A.D.3d 492, 492–93 (N.Y. App. Div. 1st Dep’t 2017) (determining that government order telling party to vacate premises was potentially foreseeable, and presented disputed question of fact, given evidence of party’s failure to maintain building). But see Starke v. United Parcel Serv., Inc., 898 F. Supp. 2d 560, 568–69 (E.D.N.Y. 2012), aff’d, 513 Fed. App’x 87 (2d Cir. 2013) (avoiding reading an unforeseeability requirement into a force majeure clause silent as to the foreseeability of triggering events).

E. Notice
New York courts have rarely needed to interpret specific notice clauses contained within force majeure provisions, but at least one New York court has reasoned that a party would have to materially breach the notice requirement to preclude reliance on a force majeure defense. See Toyomenka Pac. Petroleum, 771 F. Supp. at 67–68 (“The notice requirement is properly construed as a duty to be performed under the contract rather than as a condition precedent to a force majeure defense.”). In this case, the parties’ contract required written notice within 48 hours of the occurrence of an alleged event of force majeure, and the oil refinery gave notice eight days after the end of Hurricane Hugo. Id. The court concluded that the refinery owner had not materially breached the provision because it made a reasonable effort to notify its counterparty as soon as possible and was in regular contact with the counterparty in the interim, and the counterparty alleged no harm or prejudice from the late notice. Id. at 68 (citing Unigard Sec. Ins. Co. v. N. River Ins. Co., 762 F. Supp. 566 (S.D.N.Y. 1991) (party asserting defense of late notice must show material breach or prejudice from the inadequate notice)).

II. Common law remedies
A. Impossibility
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. The impossibility must be caused by an unanticipated event that could not have been foreseen or guarded against in the contract. See 407 E. 61st Garage v. Savoy Fifth Ave. Corp., 244 N.E.2d 37, 41–42 (N.Y. 1968) (“[P]erformance by [hotel of 5-year contract with parking garage] was at all times possible, although unprofitable, since the hotel could simply have remained in business.”); Ogdenburg Urban Renewal Agency v. Moroney, 345 N.Y.S.2d 169, 170–71 (N.Y. App. Div. 3d Dep’t 1973) (rejecting impossibility defense where party knew at the time it entered into the agreement that it would need federal approval of funds, and could have included contractual language to cover this foreseeable possibility in the event it did not occur); Kel Kim, 519 N.E.2d at 296 (“plaintiff’s predicament is not within the embrace of the doctrine of impossibility … [because the] inability to procure and maintain requisite coverage could have been foreseen and guarded against when it specifically undertook that obligation in the lease . . . ”); Ahlstrom Mach. Inc. v. Associated Airfreight Inc., 675 N.Y.S.2d 161, 162–63 (N.Y. App. Div. 3d Dep’t 1998) (concluding that although a January snowstorm was unanticipated, a January snowstorm in the northeast was not an unforeseeable event in a contract that called for mid-winter delivery); Bende & Sons Inc. v. Crown Recreation, Inc., 548 F. Supp. 1018, 1022 (E.D.N.Y. 1982) (concluding seller’s failure to deliver was not excused by impossibility following a train derailment that destroyed the goods because even though the parties may not have specifically contemplated a train
derailment, such an event was reasonably foreseeable and the risks could have been allocated in the contract).

Where party attempted to claim that a change in the law made contractual performance impossible, a New York court rejected the argument because the parties’ contract specifically contemplated a change in the law and thus it was foreseeable. Montgomery-Otsego-Schoharie Solid Waste Mgmt. Auth. v. Cty. of Otsego, 671 N.Y.S.2d 545, 547–48 (N.Y. App. Div. 3d Dep’t 1998) (“change in law” was an express exception to the parties’ force majeure clause, so non-performing party also attempted, albeit unsuccessfully, to argue common law impossibility of performance).

New York courts have also generally rejected attempts to claim that regulatory changes affecting contracts give rise to an impossibility defense because of foreseeability. See, e.g., Pleasant Hill Developers, Inc. v. Foxwood Enter., LLC, 885 N.Y.S.2d 531, 534 (N.Y. App. Div. 2d Dep’t 2009) (explaining sophisticated developers claiming impossibility based on amended zoning regulations prohibiting planned development could have foreseen and guarded against possibility of amended zoning regulations in the contract); Rooney v. Slomowitz, 784 N.Y.2d 189, 193 (N.Y. App. Div. 3d Dep’t 2004) (finding difficulty in obtaining government permits necessary for constructing road was foreseeable); Beardslee v. Infection Energy, LLC, 904 F. Supp. 2d 213, 221 (N.D.N.Y. 2012), aff’d, 798 F.3d 90 (2d Cir. 2015) (concluding regulatory changes regarding hydraulic fracturing were foreseeable); Drummond Coal Sales, Inc. v. Kinder Morgan Operating LP “C”, No. 2:16-cv-345, 2017 WL 3149442, at *5 (N.D. Ala. July 25, 2017) (reasoning that as a matter of New York law, sophisticated parties could have anticipated new environmental regulations that could affect the market for imported coal).


An example of a court finding contractual impossibility involved a contract to deliver timber from a specific parcel of land where fire substantially destroyed spruce trees and the destruction of the trees was not caused by the negligence or fault of the party. See Int’l Paper Co. v. Rockefeller, 146 N.Y.S. 371, 372 (N.Y. App. Div. 3d Dep’t 1914). Likewise, where government action closing a landfill created a “substantially unjust situation totally outside the contemplation of the parties,” a court excused a contractor from performing a waste-collecting agreement based on the common law of impossibility (construed more as impracticability). See Moyer v. City of Little Falls, 510 N.Y.S.2d 813, 815 (N.Y. Sup. Ct. 1986) (explaining performance would have required a six-fold increase in costs).

Like the force majeure cases, when raising impossibility of performance, parties must have made bona fide attempts to perform. See Dezsofi v. Jacoby, 36 N.Y.S.2d 672, 674 (N.Y. Sup. Ct., N.Y. Cty. 1942) (considering whether presidential executive order rendered contractual performance impossible and finding party could have applied for license to the Secretary of the Treasury pursuant to regulations to attempt to perform contract).

B. Frustration of purpose

To invoke frustration of purpose, “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.” See Warner v. Kaplan, 892 N.Y.S.2d 311, 314–15 (N.Y. App. Div. 1st Dep’t 2009) (quoting 22A N.Y. Jur. 2d, Contracts § 375) (rejecting frustration of purpose argument based on tenant’s death because contract explicitly contemplated death of either party, which rendered that event foreseeable); Sage Realty Co. v. Jugobanka, D.D., No. 95-cv-323, 1998 WL 702272, at *3 (S.D.N.Y. Oct. 8, 1998) (rejecting frustration of purpose defense to avoid payment of rent where the imposition of sanctions on Yugoslavian entities with assets in the United States was reasonably foreseeable at the time of contracting given the public chronicling of deteriorating US/Yugoslavian relations).

Like the doctrine of impossibility, frustration of purpose is not available as a defense where market conditions render financial disadvantage to one party. Gen. Elec. Co., 741 N.Y.S.2d at 220 (“to the contrary, [the market changes] constituted an instance of the
very market instability whose prospect induced the contract in the first instance); see also 407 E. 61st Garage, 244 N.E.2d at 42 (concluding purpose of contract for hotel/parking garage to provide garage services to hotel guests was not frustrated by unanticipated circumstances when hotel made business decision to close hotel); Pettinelli Elec. Co. v. Bd. of Ed. of City of New York, 56 A.D.2d 520, 521 (N.Y. App. Div. 1st Dep’t 1977) (rejecting argument that, in wake of financial emergency, business decision by City to continue certain construction projects and discontinue others frustrated the purpose of the discontinued contracts).

“In short, the applicable rules do not permit a party to abrogate a contract, unilaterally, merely upon a showing that it would be financially disadvantageous to perform it.” 407 E. 61st Garage, 244 N.E.2d at 42; see also Health-Chem Corp. v. Baker, 915 F.2d 805, 810 (2d Cir. 1990) (explaining that the subsequent decline in a party’s stock price may have made contract performance more onerous but did not establish a basis for a defense of frustration of purpose or commercial impracticability).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Under the New York Uniform Commercial Code, a party may suspend performance and seek “adequate assurance of performance” if “reasonable grounds for insecurity arise” with respect to the counterparty’s ability to perform. PT Kaltim Prima Coal v. AES Barbers Point, Inc., 180 F. Supp. 2d 475, 482–83 (S.D.N.Y. 2001); N.Y.U.C.C. § 2–609. See also Health-Chem Corp. v. Baker, 915 F.2d 805, 810 (2d Cir. 1990) (explaining that the subsequent decline in a party’s stock price may have made contract performance more onerous but did not establish a basis for a defense of frustration of purpose or commercial impracticability).

Whether reasonable grounds for insecurity exist generally is a question of fact, and is determined by commercial standards. See BAlI Banking Corp. v. UPG, Inc., 985 F.2d 685, 702 (2d Cir. 1993) (explaining that although a question of fact, there are circumstances when the issue may be resolved as a matter of law); Phibro Energy, 720 F. Supp. at 322; see also Edward G. Coyne Enters., Inc. v. Union Carbide Corp., 89 A.D.2d 545, 545 (N.Y. App. Div. 1st Dep’t 1982) (finding trial necessary to determine appropriateness of party’s conduct including whether reasonable grounds for insecurity existed); Daelim Trading Co. v. Giagni Enters., LLC, No. 10-cv-2944, 2014 WL 6646233, at *10 (S.D.N.Y. Nov. 12, 2014) (“Even though the standard is high for a finding of insecurity as a matter of law, the ‘sole fact’ that Corporate Defendants owed [the party] more than $2 million is enough to find [the party] had a reasonable ground for insecurity as a matter of law.”).

The failure of the other party to provide adequate assurance within a reasonable time results in repudiation of the contract. N.Y.U.C.C. § 2–609(4); see Daelim Trading Co., 2014 WL 6646233, at *10 (explaining that demands for adequate assurances do not have to track the language of the UCC provision verbatim).

Where a seller declares force majeure, however, the buyer does not need to seek adequate assurances. N.Y.U.C.C. § 2–616 (buyer has right to terminate by notice its reciprocal obligations to take and pay for seller’s performance once seller declares force majeure); see PT Kaltim Prima Coal, 180 F. Supp. 2d at 483 (explaining that a seller’s failure to perform one month of a long-term supply agreement could give rise to a demand for adequate assurances from the buyer as to future performance, but buyer did not have to demand assurances before refusing to take the next contractually required delivery once seller declared force majeure); id. at 484 (distinguishing that buyer could not assume, however, that the force majeure declaration would remain indefinite as to deliveries beyond the following month where contract contemplated monthly notice provisions and excused performance only while force majeure event lasted).

N.Y.U.C.C. § 2–610 provides for anticipatory repudiation of a contract whereby the non-breaching party may resort to any remedy for breach when the other party repudiates the contract with respect to a performance not yet due, the loss of which will substantially impair the value of the contract to the other. See, e.g., DiFolco v. MSNBC Cable LLC, 622 F.3d 104, 111–12 (2d Cir. 2010).

B. Commercial impracticability

For a seller to avail itself of the UCC defense of commercial impracticability in a sale of goods contract, New York UCC Section 2–615 requires the non-performing seller to show (1) the occurrence of an unforeseen contingency, (2) that the impracticability of performance is a consequence of the occurrence of that contingency, and (3) that the nonoccurrence of the contingency was a basic assumption of the contract. Canusa Corp. v. A & R Lobosco, Inc., 986 F. Supp. 723, 731 n.6 (E.D.N.Y. 1997).
Comment 4 to this New York UCC section contemplates circumstances under which a party could invoke this section, including “a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a market increase in cost or altogether prevents the seller from securing supplies necessary to his performance.” See, e.g., Dell’s Maraschino Cherries Co. v. Shoreline Fruit Growers, Inc., 887 F. Supp. 2d 459, 478–79 (E.D.N.Y. 2012).

An example of a finding of commercial impracticability involved a company’s compliance in good faith with a government’s informal requirements not to continue sales to Iran. See Harriscom Svenska, 3 F.3d at 580 (citing N.Y.U.C.C. § 2–615 & cmt. 10).

Like the common law remedies discussed herein, a commercial impracticability defense is not available for contingencies that are foreseeable “because the party disadvantaged by fruition of the contingency might have protected himself in his contract.” See Cliffstar Corp. v. Riverbend Prods., Inc., 750 F. Supp. 81, 84 (W.D.N.Y. 1990) (internal citations omitted). In Maple Farms v. City School District of City of Elmira, for example, a milk seller sought a declaratory judgment of commercial impracticability after rising costs increased the cost of delivering milk to defendant by more than ten percent over the contractual price. 352 N.Y.S.2d 784, 790 (N.Y. Sup. Ct. 1974). Because the seller had entered into a fixed price contract, the purpose of which was to allow both parties to guard against fluctuation of milk prices, the court held that the risk of “substantial or abnormal” price increases was allocated to the seller, and thus a commercial impracticability defense was not available. Id.

But the Southern District of New York has explained that non-foreseeability is not an absolute requirement to the defense: “After all, as Williston has said, practically any occurrence can be foreseen but whether the foreseeability is sufficient to render unacceptable the defense of impossibility is ‘one of degree . . . .’” Cliffstar Corp., 750 F. Supp. at 84 (quoting Opera Co. of Boston v. Wolf Trap Found. for the Performing Arts, 817 F.2d 1094, 1101–02 (4th Cir. 1987)). Accordingly whether the contingency is foreseeable such that it precludes the defense of commercial impracticability is generally a question of fact unlikely to be resolved at the summary judgment stage. See id. at 85 (explaining genuine issue of material fact exists as to whether tomato crop shortage was foreseeable at time parties entered into supply agreement for more than three million pounds of tomato paste).

If the unexpected contingency causing impracticability affects only part of the seller’s capacity to perform, then the seller must allocate goods among customers in a “fair and reasonable” manner. N.Y.U.C.C. § 2–615(b); see Exelon Generation Co. v. Gen. Atomics Techs. Corp., 559 F. Supp. 2d 892, 902 (N.D. Ill. 2008) (citing N.Y.U.C.C. § 2–615(b)); Cliffstar Corp., 750 F. Supp. at 84–85 (finding unresolved question of fact for the jury as to whether company’s allocation of its contracted-for supply across various customers was “fair and reasonable” where counterparty received 31% of its order yet some of seller’s other customers received 85% or even 100% of theirs); see also N.Y.U.C.C. § 2–615 cmt. 11 (“Save for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller.”). The seller must also “seasonably” notify its counterparty of the need to allocate supply and the amount the counterparty is to receive under the allocation. N.Y.U.C.C. § 2–615(c).


For a commercial impracticability defense, a party seeking to excuse performance must not only show that performance can yield only a loss but also that the loss “will be especially severe and unreasonable.” La. Power & Light Co., 517 F. Supp. at 1324 (quoting Gulf Oil Corp. v. Fed. Power Comm’n, 563 F.2d 588, 600 (3d Cir. 1977)). This Louisiana court, for example, in applying New York law, rejected a commercial impracticability defense where a party’s cost of performance would have increased only 38% from the original contract price because relief for such a situation required that “performance can only be had at an excessive and unreasonable cost.” Id. (quoting Transatlantic Fin. Corp. v. US, 363 F.2d 312, 319 (D.C. Cir. 1966)).

C. Substituted performance

The Southern District of New York considered the substituted performance issue in the context of economic response to the Avian bird flu in determining whether to confirm an arbitration award. See Macromex SRL v. Globex Int’l, Inc., No. 08–cv–114, 2008 WL 1752530, at *1 (S.D.N.Y. Apr. 16, 2008). On June 2, 2006, the Romanian government declared that to combat the Avian bird flu, no chicken could be imported into Romania after June 7, 2006 unless the chicken was properly certified. Id. at *1 & n.4. Party A had a contract to sell a Romanian company 112 containers of chicken parts. As of June 7, 2006, 42 containers remained unshipped because of the government’s ban. Party A raised a force majeure
defense, and although the arbitrator found that the chicken ban was the cause of Party A’s failure to perform, the arbitrator concluded that Party A could have reasonably overcome the impediment by accepting Party B’s request to ship the chicken parts to a port in the nearby country of Georgia. Id. at *1–2. The court confirmed the award. See id. at *4–5 (explaining the arbitrator correctly looked to the UCC for guidance in clarifying the U.N. Convention for International Sale of Goods, which governed).
North Carolina

North Carolina courts have not resolved many disputed questions of force majeure, but have applied the common factors used in other states when interpreting contractual force majeure provisions. If no force majeure contractual provision is available, North Carolina’s common law remedies represent a high bar to excuse performance, given that impossibility means impossibility and not impracticability.

The key cases are broken down as follows:

I. Contractual force majeure provisions
II. Common law remedies
   A. Impossibility
   B. Frustration of purpose
III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

Where a force majeure provision expressly provides that certain specific events will excuse performance, parties may not be excused from other contractual provisions that contain no such express language. See, e.g., Certainteed Gypsum NC, Inc. v. Duke Energy Progress, LLC, No. 17 CVS 395, 2018 WL 4199077, at *24 (N.C. Super. Ct. Aug. 28, 2018) (explaining that party’s argument that performance was inconsistent with its contractually defined primary purpose as a public utility did not excuse performance because, unlike the force majeure provision, it did not expressly provide for excusal).

The party seeking to have its contractual performance excused bears the burden of demonstrating the applicability of the force majeure event. See In re McAlpine Grp., LLC, No. 3:12-cv-822, 2013 WL 594314, at *3 (W.D.N.C. Feb. 15, 2013) (holding that the non-performing party failed to prove its force majeure defense by relying on mere speculation).

Where a party’s performance is prevented not by the alleged force majeure event but by some other reason, courts are unlikely to enforce the force majeure provision, because performance is not beyond the party’s control.

For example, in Crabtree Avenue Investment Group, LLC v. Steak & Ale of North Carolina, Inc., a party argued that the force majeure provision excused nonpayment of rent. 611 S.E.2d 442, 444–45 (N.C. Ct. App. 2005). Specifically, the party claimed that its counterparty’s delay in providing W-9 payment information prevented payment because of the party’s internal business policies requiring that information prior to payment. Id. at 445. The court, however, explained that “[a]n internal accounting policy of [a party] mandating receipt of this information prior to releasing the rent monies is not an event beyond the [party’s] control.” Id. Force majeure accordingly could not excuse the party’s nonperformance.

Given the lack of force majeure precedent in North Carolina, it may be helpful to look to the U.S. Court of Appeals for the Fourth Circuit, which encompasses North Carolina. Notably, the Fourth Circuit has held that “[a] force majeure clause is not intended to buffer a party against the normal risks of contract.” See Langham-Hill Petroleum Inc. v. S. Fuels Co., 813 F.2d 1327, 1330 (4th Cir. 1987) (citing N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 275 (7th Cir. 1986)).

In Langham-Hill, the parties entered into a fixed-price contract for the purchase of petroleum. Id. at 1329. During the contract term, Saudi Arabia attempted to regain its share of the world oil market, which resulted in a significant depreciation of oil prices. Id. The purchasing party attempted to invoke the contract’s force majeure provisions to excuse further performance under the contract. Id. The purchasing party argued that Saudi Arabia’s actions were outside its control and noted that the force majeure provision included “any act or omission beyond the control of the party having the difficulty.” Id.
Relying on the premise that force majeure provisions are not intended to buffer against the normal risks of contract, the court found that “[t]he normal risk of a fixed-price contract is that the market price will change.” *Id.* at 1330 (citations omitted). For that reason, despite the relatively open-ended language of the force majeure clause, the court found that Saudi Arabia’s actions did not fall within the scope of the force majeure provision.

**II. Common law remedies**

**A. Impossibility**

Where the parties do not have a force majeure provision, North Carolina law recognizes impossibility of performance as a common law remedy to excuse performance if the subject matter of the contract is destroyed without fault of the party seeking to be excused from performance. See *Brenner v. Little Red Sch. House, Ltd.*, 274 S.E.2d 206, 209 (N.C. 1981) (citing *Sechrest v. Forest Furniture Co.*, 141 S.E.2d 292 (N.C. 1965)).

In *Brenner*, a party sought a refund of advance tuition paid to an elementary school pursuant to a contract. *Id.* at 208. Prior to his child’s enrollment at the school, the party divorced his wife and lost custody of the child. *Id.* Subsequently, the party’s former spouse refused to allow the child to attend the school. *Id.* Plaintiff argued that the doctrine of impossibility should be applied to rescind the tuition contract. *Id.* at 209. The court, however, rejected the argument and held that the former spouse’s refusal to send the child to the school did not destroy the subject matter of the contract. *Id.* As the court noted, “it was still possible for the child to attend the school.” *Id.*

The doctrine of impossibility is difficult to invoke. See *Brevard Tannin Co. v. J.F. Mosser Co.*, 288 F. 725, 727 (4th Cir. 1923) (denying defendant’s impossibility defense centered on a government embargo and war conditions where the contract was without exception or condition, the contract was made during the war, and the government embargo only disrupted delivery for a few days).

There is no sign in North Carolina caselaw that courts would apply a more liberal view of impossibility such as impracticability, as is the case in some states.

**B. Frustration of purpose**

“Although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration for performance. Under it performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance.” *Brenner*, 274 S.E.2d at 209 (quoting 17 Am.Jur.2d Contracts § 401 (1964)).

“If the frustrating event was reasonably foreseeable, the doctrine of frustration is not a defense.” *Id.* Further, “if the parties have contracted in reference to the allocation of the risk involved in the frustrating event, they may not invoke the doctrine of frustration.” *Id.* (citing 17A C.J.S. Contracts § 463(2) (1963)).

Returning to the facts of *Brenner*, the court held that the doctrine of frustration of purpose also did not apply to the tuition contract because there was no substantial destruction of the value of the contract. *Id.* at 210.

The court explained that after receiving the advance tuition payment, the school reserved a space for the child, made preparations to teach the child, and kept a spot open for the child for the entire school year. *Id.* The court determined that this was sufficient consideration. *Id.* In other words, while a party may receive consideration less than the full consideration contemplated by the contract, such limited consideration may be sufficient to avoid application of the doctrine of frustration of purpose. *Id.*

The court in *Brenner* found the doctrine of frustration of purpose inapplicable for an additional reason. The court explained that while the parties could not have been expected to foresee the exact actions that led to the child not attending the school, the possibility that the child might not attend was foreseeable and the contract expressly allocated this risk. *Id.* Because the contract stated that tuition was due before the first day of school and was nonrefundable, the risk that the child would not attend was allocated to the family paying the tuition. *Id.* Under such circumstances, where the parties have contracted in reference to the allocation of the risk involved in the frustrating event, the doctrine of frustration of purpose is inapplicable. *Id.*

“Essentially, there must be an implied condition to the contract that a changed condition would excuse performance; this changed condition causes a failure of consideration or the expected value of performance; and that the changed condition was not reasonably foreseeable.” *Faulconer v. Wysong & Miles Co.*, 574 S.E.2d 688, 691 (N.C. Ct. App. 2002). Foreseeability is a difficult hurdle to overcome.

In *Faulconer*, a party refused to pay retirement benefits because of a precipitous decline in the metalwork machine manufacturing industry. *Id.* at 689–90. The court declined to apply the doctrine of frustration of purpose because it was reasonably foreseeable that the manufacturing business could
suffer a distinct period of decline and the parties could have reasonably protected themselves. *Id.* at 692.

A more recent case takes the principles espoused in *Brenner* and *Faulconer* and applies them to a case where a law school sought to excuse performance under a lease. In *South College Street, LLC v. Charlotte School of Law, LLC*, the law school argued that its ability to operate a law school on the premises was an implied condition of the lease and that several regulatory actions, which culminated in the expiration of the school’s state license, resulted in a failure of consideration and destruction of the expected value of the lease. No. 18 CVS 787, 2018 WL 3830008, at *4 (N.C. Super. Ct. Aug. 10, 2018).

The court, however, determined that the lease expressly contemplated additional uses of the premises, including general office space and other legally permitted uses. *Id.* As such, the court determined there was no implied condition in the lease that the law school’s inability to operate a law school on the premises should excuse performance. *Id.*

The court additionally held that because the law school could use the premises for other uses, there was not a “total destruction of the expected value of performance.” *Id.* at *5; see also *Tucker v. Charter Med. Corp.*, 299 S.E.2d 800, 803–04 (N.C. Ct. App. 1983) (concluding that the frustration of purpose doctrine was not a defense to a party’s obligation to pay rent under a valid lease when the lease provided that the party could use the premises for any lawful purpose and there was no evidence that uses other than the party’s intended use of a building as a hospital had been frustrated or prohibited).

**III. UCC provisions regarding excused performance**

**A. Demands for adequate assurances**

Under North Carolina law, “[w]hen reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.” *BonWorth, Inc. v. Runway 7 Fashions, Inc.*, No. 17 CIV. 9712 (PAE), 2019 WL 3202930, at *10 (S.D.N.Y. July 16, 2019) (quoting N.C. GEN. STAT. ANN. § 25-2-609(1)).

The reasonableness of grounds for insecurity “shall be determined according to commercial standards.” *Id.* (quoting N.C. GEN. STAT. ANN. § 25-2-609(2)). “A failure to provide adequate assurances of performance within 30 days of a justified demand constitutes repudiation of the contract.” *Id.* (citing N.C. GEN. STAT. ANN. § 25-2-609(4)). Whether or not the assurances offered are adequate, according to commercial standards and under the circumstances, is a question of fact. *Id.* (citations omitted).

A demand for adequate assurances must be clear. In *BonWorth*, the court determined that a demand for adequate assurances did not exist because the requestor’s email could not be understood as a “‘clear demand [for assurances] so that all parties [were] aware that, absent assurances, the demanding party [would] withhold performance.’” *Id.* at *11 (quoting *In re Pac. Gas & Elec. Co.*, 271 B.R. 626, 642 (N.D. Cal. 2002)).

**B. Commercial impracticability**

In 1965, North Carolina adopted the Uniform Commercial Code and codified commercial impracticability. See N.C. GEN. STAT. ANN. § 25-2-615. In order to be excused under the statute, a seller of goods must establish the following elements: (1) performance has become impracticable; (2) the impracticability was due to the occurrence of some contingency that the parties expressly or impliedly agreed would discharge the promisor’s duty to perform; (3) the promisor did not assume the risk that the contingency would occur; and (4) the promisor reasonably notified the promisee of the delay in delivery or that delivery would not occur at all. *Alamance Cty. Bd. of Educ. v. Bobby Murray Chevrolet, Inc.*, 465 S.E.2d 306, 310 (N.C. Ct. App. 1996) (citing Thomas R. Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under U.C.C.* § 2–615, 54 N.C. L. REV. 545, 549 (1976)).

When an exclusive source of supply is specified in a contract or may be implied by circumstances to have been contemplated by the parties, failure of that source may excuse the promisor from performance. See *id.* A seller of goods may limit its liability by inclusion of a “single source clause,” which expressly indicates the seller has only one source of supply, and should that specific source be unable to supply the seller, the seller would be relieved of liability under the contract. *Id.* at 311.

If the source of supply was contemplated by the parties as the exclusive source of supply, but the failure of that source of supply was foreseeable, the seller will nonetheless be charged with assuming the risk, thereby precluding application of commercial impracticability. *Id.* Foreseeability is an objective standard. *Id.* Further, there is no excuse unless the seller has employed all due measures to assure himself that his source will not fail. *Id.*
Generally, governmental regulations do not excuse performance under a contract where a party has assumed the risk of such regulation. *Id.* at 312 (citing William H. Henning & George I. Wallach *The Law of Sales Under the Uniform Commercial Code*, ¶ 5.10, 5.33 (1994 Supplement)).

Increased cost alone, or changes in market conditions, will not satisfy the requirements of this defense. See *D.S. Simmons, Inc. v. Steel Grp.*, LLC, No. 5:06-CV-363-BR, 2008 WL 488845, at *2 (E.D.N.C. Feb. 19, 2008). However, “a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like” will suffice. *Id.* (quoting N.C. GEN. STAT. ANN. § 25-2-615, cmt. 4).

In *D.S. Simmons*, a seller agreed to provide structural and steel products in exchange for a fixed price. *Id.* at *1. After contracting, the price of steel substantially increased and the seller ceased performance. *Id.*

Applying the above principles, the court denied the seller’s commercial impracticability defense because (1) the seller did not produce facts indicating the parties expressly or impliedly agreed that a significant rise in the price of steel would discharge the seller’s performance, (2) the seller did not come forward with a satisfactory reason behind the price increase (for example, war) and it appeared that a mere market fluctuation was the reason behind the increase, and (3) the seller could have protected itself from such a price increase by inserting certain provisions into the contract, such as a price ceiling. *Id.* at *3.*
North Dakota

The concept of force majeure is common knowledge in North Dakota. In the movie *Fargo*, Steve Buscemi (Carl) tells William H. Macy (Jerry): *Circumstances have changed, Jerry.*

Jerry: *Well, what do ya’ mean?*

Carl: *Things have changed. Circumstances, Jerry. Beyond the . . . acts of God, force majeure . . . Blood has been shed. We’ve incurred risks, Jerry.*

The key cases are broken down as follows:

I. Contractual force majeure provisions

II. Common law remedies

A. Impossibility

B. Frustration of purpose

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

B. Commercial impracticability

I. Contractual force majeure provisions

Generally, North Dakota cases have examined force majeure assertions in the context of liability for negligence and liability in cases where no clause was present in the parties’ contract. See *Entzel v. Moritz Sport & Marine*, 841 N.W.2d 774, 778 (N.D. 2014). The North Dakota Supreme Court has quoted *Black’s Law Dictionary*’s definition of a force majeure clause as “a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.” *Id.* (quoting *Black’s Law Dictionary* 718 (9th ed. 2009)).

The types of events that constitute force majeure within the framework of a parties’ agreement depend on the specific language included in the agreement. *Id.* (citing *Williston, Contracts* § 77.31, at 364 (4th ed. 2004)); see also *Pennington v. Cont’l Res., Inc.*, 932 N.W.2d 897, 902 (N.D. 2019) (indicating that an oil and gas lease would not terminate if delay occurs due to the circumstances covered by the force majeure clause).

The party relying on the force majeure clause to excuse performance bears the burden of establishing that the event was beyond its control and without its fault or negligence. *Entzel*, 841 N.W.2d at 778. “An express force majeure clause in a contract must be accompanied by proof that the failure to perform was proximately caused by a contingency and that, in spite of skill, diligence, and good faith on the promisor’s part, performance remains impossible or unreasonably expensive.” *Pennington*, 932 N.W.2d at 902–03 (quoting *Entzel*, 841 N.W.2d at 778) (finding disputed question of fact about party’s diligence and good faith, and finding not appropriate for summary judgment).

In *Entzel*, the North Dakota Supreme Court considered a force majeure clause that provided, “The LANDLORD will not be responsible for delays in hauling, launching, winter lay-up or commissioning, occasioned by inclement weather or any other circumstances beyond its control.” 841 N.W.2d at 778–79. The court affirmed the district court’s conclusions that the landlord’s demand that a party remove her boat from the marina was due to Missouri River flooding, and that although the party was not advised she could return the boat, other boats returned and were able to use the marina during the parties’ contract period such that it should have been obvious to her that her boat could return. *Id.* at 779.

The court concluded that the delay in the case was attributable to the City of Mandan’s instructions in light of an impending flood to clear the marina, that this event was beyond the landlord’s control, and was not due to the landlord’s fault or negligence. *See id.* Thus the landlord’s nonperformance was a not a breach of contract. *Id.* But see *City of Moorhead v. Bridge Co.*, 867 N.W.2d 339, 344 (N.D. 2015) (rejecting force majeure argument where counterparty did not allege party was in breach of contract given clause only applied “during the continuance of such inability” to perform).
II. Common law remedies

A. Impossibility

The North Dakota Supreme Court has cited the Restatement (Second) of Contracts § 261 for the doctrine of impossibility or impracticability: “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.” Red River Wings, Inc. v. Hoot, Inc., 751 N.W.2d 206, 226 (N.D. 2008) (emphasis added by court); see also Sandry v. Brooklyn Sch. Dist. No. 78 of Williams Cty., 182 N.W. 689, 690 (N.D. 1921) (excusing school from paying bus drivers while school was closed during influenza epidemic).

The doctrine does not apply if the party seeking to excuse performance causes the alleged impossibility. See id. at 226–27 (citing Cavalier Cty. Mem’l Hosp. Ass’n v. Kartes, 343 N.W.2d 781, 784 (N.D. 1984) (“There is an implied condition of every contract not to prevent the other party from performing and not to render performance impossible.”)). The North Dakota Supreme Court has reasoned similarly that a third party that causes the impossibility (or frustration) of a contract cannot rely on those defenses in an action for intentional interference with the contract. Id. at 227.

B. Frustration of purpose

The North Dakota Supreme Court has explained that the doctrine of frustration of purpose is closely related to the doctrine of impossibility. Red River Wings, 751 N.W.2d at 226. Frustration of purpose occurs when “after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.” See id. (citing Tallackson Potato Co. v. MTK Potato Co., 278 N.W.2d 417, 424 n.6 (N.D. 1979)); see also Tallackson Potato Co., 278 N.W.2d at 424 n.6 (rejecting impossibility and frustration defenses where non-occurrence of cooperative continuing to honor payment schedule not a basic assumption on which contract was made).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

North Dakota recognizes the UCC-based remedy of demanding adequate assurances from a counterparty about that counterparty’s ability to perform when a party has reasonable grounds for insecurity. N.D. CENT. CODE § 41-02.1-42; Urbana Farmers Union Elevator Co. v. Schock, 351 N.W.2d 88, 89 (N.D. 1984) (citing party’s written demand for adequate assurances pursuant to statute).

B. Commercial impracticability

North Dakota recognizes the UCC-based defense of commercial impracticability based on unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting. N.D. CENT. CODE § 41-02.1-46.

When a seller is relying on the defense of commercial impracticability, the seller must notify the buyer seasonably once nondelivery becomes impracticable. See, e.g., Red River Commodities, Inc. v. Eidsness, 459 N.W.2d 805, 809 (N.D. 1990). In Red River Commodities, the seller delivered all of the sunflowers he did produce under a contract to the buyer, and notified a party believed to be the buyer’s agent about the supervening impracticability caused by drought on the rest of the crop. The North Dakota Supreme Court determined that key questions about whether the perceived agent was the actual agent for purposes of notice persisted, and had not been resolved by the trial court in order to weigh the propriety of the defense. Id. at 810–11; see also Red River Commodities, Inc. v. Eidsness, 459 N.W.2d 811, 816–17 (N.D. 1990) (deciding same day as previously cited case, but finding that seller did not seasonably notify buyer of problems and seller made no effort to perform rendering defense inapplicable).
Ohio

Ohio courts seek to interpret force majeure provisions as the parties intended. The event of force majeure must actually prevent the non-performing party’s performance and be beyond the party’s reasonable control to excuse performance. Ohio recognizes the common law defenses of impossibility and frustration of purpose.

The key cases are broken down as follows:

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I. Contractual force majeure provisions

A. General requirements


Force majeure clauses are included in commercial contracts to provide flexibility against unanticipated risks. “Mistaken assumptions about future events or worsening economic conditions, however, do not qualify as a force majeure.” *Id.* A party cannot be excused from performance merely because performance may prove more difficult, burdensome, or economically disadvantageous. *See id.*

To use a force majeure clause as an excuse for nonperformance, the non-performing party bears the burden of proving that the event was beyond the party’s control and without its fault or negligence. *Id.* Although force majeure has been characterized by courts as a defense that has some overlap with the common law defenses of impossibility or impracticability, “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.*, 67 N.E.3d 845, 850 (Ohio Ct. App. 2016).

B. Causation

For force majeure to excuse a party’s nonperformance, the force majeure event must actually cause the nonperformance. Where a party’s performance is prevented not by the alleged force majeure event, but by other factors, such as economic conditions, Ohio courts are unlikely to excuse performance. Consider *Stand Energy*, in which an electricity broker sought a declaratory judgment finding that force majeure prevented it from delivering power to a customer as contracted. 760 N.E.2d at 457.

Unseasonably hot temperatures resulted in record demand for power and unprecedentedly high hourly rates for electric power. *Id.* Accordingly, the broker was forced to purchase power at a higher market price than it was receiving under the contract with the defendant. *Id.* The president of the broker testified that she relied upon force majeure to preserve the company and save the jobs of 50 employees. *Id.* But the trial court concluded that the broker’s nonperformance was caused by economic hardship—not by an event of force majeure. *Id.* Accordingly, the force majeure clause did not excuse the party’s nonperformance. *Id.* at 458.

C. Mitigation/beyond a party’s control

To use a force majeure clause as an excuse for nonperformance, a non-performing party bears the burden of proving that the event was beyond the party’s control and without its fault or negligence.
Stand Energy, 760 N.E.2d at 457. The Ohio Court of Appeals has explained that “force majeure is a term from the French law and literally means a superior force. It is commonly defined as an event or effect that can be neither anticipated nor controlled.” Haverhill Glen, 67 N.E.3d at 850.

Accordingly, where the claimed basis for nonperformance is within the control of the party seeking to be excused from performance, the court is not likely to enforce a force majeure clause. For example, in Stand Energy, discussed above, the court concluded that “the inability to purchase a commodity at an advantageous price is not a contingency beyond a party’s control” and may not subsequently constitute a force majeure. Id.; see also Cleveland Indus. Square, Inc. v. City of Cleveland, No. 67068, 1995 WL 106149, at *3 (Ohio Ct. App. Mar. 9, 1995) (rejecting argument that denial of zoning permits constituted a force majeure under the purchase money mortgage contract because compliance with applicable zoning ordinances and denial of permits was within the party’s control).

The court reached a similar conclusion in Dunaj v. Glassmeyer, 580 N.E.2d 98, 100 (Ohio Ct. C.P. 1990). In Dunaj, a hotel manager sought to excuse nonperformance based on certain cash flow projections under a management agreement caused by the development of competing hotels nearby and incorrect expense projections. Id. The force majeure provision detailed specific events that would excuse performance such as fire, war, strikes, and acts of God—dramatic unforeseen events beyond a party’s control that could cause the hotel to shut down. Id.

The court rejected the hotel manager’s argument because unfavorable economic conditions or inaccurate projections concerning performance did not constitute a dramatic unforeseen event that could cause the hotel to be shut down or partially shut down. Id. The court explained that “mistaken assumptions about future events or bad economic conditions do not qualify as a ‘force majeure.’” Id. at 101. Accordingly, the hotel managers were not excused from performing under the management agreement. Id.

In contrast, in United Arab Shipping Co., the court held that a work stoppage was encompassed by the force majeure provision in the contract that included a strike as an example of an event beyond a party’s control. United Arab Shipping Co., v. PB Express, Inc., No. 96162, 2011 WL 3860639, at *2 (Ohio Ct. App. Sept. 1, 2011). Specifically, the clause provided that “In the event [carrier] is unable to [transport the containers] within the free time as a result of Acts of God, war, insurrections, strikes, fire, flood or any like causes beyond [carrier’s] control, shall be exempted from the per diem charges to the extent of, and for the duration of, the condition that prevented the redelivery of the [containers].” Accordingly, the court found that the carrier was excused from performance when the party’s independent contractors refused to respond to work orders which made no drivers available to transport the containers. Id. The court reasoned that the force majeure clause covered the carrier’s nonperformance because evidence showed the work stoppage was beyond the party’s control. Id.

Ohio courts will look to the scope of the force majeure clause in determining whether the situation is beyond the party’s control. In Haverhill Glen, the broadly written force majeure clause provided that when drilling or other operations on the leased premises were prevented or delayed by the inability to obtain necessary access or easements or “any other cause not reasonably within the Lessee’s control,” the primary term of the lease was tolled. Haverhill Glen, 67 N.E.3d at 850. When attempting to access the property to stake a well site, the lessee’s employees were denied access and physically threatened. Id. The court upheld the trial court’s conclusion that this was precisely the situation the force majeure provision intended to cover. Id. Because the lessee could not control being physically excluded from the leased premises, the force majeure provision tolled the lease. Id.

D. Foreseeability

An event of force majeure generally must be unforeseeable at the time of contracting to excuse performance. Indeed, “[a] force majeure clause in a contract defines the scope of unforeseeable events that might excuse nonperformance by a party.” Stand Energy Corp., 760 N.E.2d at 457. If the parties unambiguously allocate the risk of a specified event, there should be no room for an Ohio court to inquire into the event’s foreseeability. But Ohio courts are likely to inquire into foreseeability to determine whether a force majeure clause’s catch-all language captures events that are not specifically listed. Of course, catch-all language does not normally encompass foreseeable events as courts expect parties to expressly set those out to excuse performance.

II. Common law remedies

A. Impossibility

Impossibility of performance occurs when, after the contract commences, an unforeseen event arises that renders performance impossible. Leon v. State Farm Fire & Cas. Co., 98 N.E.3d 1284, 1289 (Ohio Ct. App. 2017) (finding policyholder’s performance under insurance contract was not impossible) (citing Truetried
Serv. Co. v. Hager, 691 N.E.2d 1112 (Ohio Ct. App. 1997)).
To assert this basis for relief, performance must be rendered impossible: (1) without the party’s fault; and (2) where the event or difficulties could not have reasonably been foreseen. TrueTried, 691 N.E.2d at 1112 (holding governmental approval of a liquor license transfer and parking difficulties associated with zoning requirements were not unforeseeable events).
Where government regulations make performance under a contract impossible, both parties’ obligations likely will be discharged. See Edward Maurer Co., Inc. v. Tubeless Tire Co., 272 F. 990, 992–93 (N.D. Ohio 1921). In Edward Maurer, the parties entered into two contracts for the supply of rubber to be delivered in equal monthly installments throughout an agreed-upon period. Id. A clause in the first contract provided that:

This contract is subject to all the rules and regulations imposed by the United States government. This contract is made subject to the rules of the Rubber Association of America, Incorporated. This contract is subject to force majeure, strikes, and other causes and delays beyond seller’s control. Any import duty or tax imposed by the United States government on crude rubber to be for account of buyer.

Id. At the inception of the first contract, the parties knew that the government, through the War Industries Board, contemplated fixing a maximum price and restricting the importation of rubber from overseas, and that such regulations might be announced at any time. Id. at 991. Those regulations were implemented and required the parties to have allocation certificates for rubber in order to import or receive the material, which disrupted the delivery and acceptance of the quantities as called for in the parties’ contracts. Id.

As soon as the regulations lifted, the seller tendered the remaining amounts under the contract but delivery was refused. Id. At that time, the price of rubber had dropped 22 cents lower per pound than the contract price. Id. The court found that the “regulations were the creation by the law of a condition which made performance impossible while they were in force.” Id. at 992. The court went on to reject the plaintiff’s contention that the regulations merely delayed the parties’ performance obligations, reasoning that the entirety of the contract—not just the deliveries—were subject to both force majeure and the rules and regulations of the United States. Id.

“If performance is made impossible by a subsequent valid act of law or governmental authority, both parties are discharged.” Id. at 993.

B. Frustration of purpose

The doctrine of frustration of purpose is a common law concept related to impossibility, but it is not widely accepted in Ohio. See Atelier Dist., L.L.C. v. Parking Co. of Am., No. 07AP-87, 2007 WL 4564304, at *7 (Ohio Ct. App. Dec. 31, 2007), cause dismissed sub nom. Atelier Dist., LLC v. Parking Co. of Am., 880 N.E.2d 923 (2008). “Frustration 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.” Am. ’s Floor Source, L.L.C. v. Joshua Homes, 946 N.E.2d 799, 808 (Ohio Ct. App. 2010) (noting the doctrine’s sparse acceptance in Ohio and explaining that party’s claim of frustration of purpose could actually be described as a form of breach of contract).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Pursuant to O.R.C. § 1302.67 (UCC § 2-609), if a party develops reasonable grounds for insecurity, it has a right to demand, in writing, “adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.” Am. Aluminum Extrusions of Ohio, LLC v. Nebraska Plastics, Inc., No. 5:09-cv-763, 2010 WL 2342485, at *3 (N.D. Ohio June 8, 2010).


Ohio courts have held that a party’s demand for adequate assurances was not reasonable when that party waited too long after grounds for insecurity arose to send such demand. See Doral Steel, Inc. v. Gray Metal Prods., Inc., 672 F. Supp. 2d 798, 801 (N.D. Ohio 2009) (party waited too long to exercise its rights under O.R.C. § 1302.67).
A party can only utilize O.R.C. § 1302.67 if it has not already received the agreed-upon return. Consider American Aluminum, in which the court rejected the party’s efforts to use O.R.C. § 1302.67 as a defense to a breach of contract claim at the summary judgment stage. 2010 WL 2342485, at *3. The parties had entered a supply and distribution agreement regarding certain aluminum products. Id. at *1. After performing pursuant to the contract for nearly two years, concerns developed regarding the quality of some of the products and warranty claims arose. Id.

In responding to these issues, the distributor stopped payment on its open accounts with the manufacturer and the manufacturer sued for breach of contract. Id. The distributor claimed that its failure to pay for the aluminum products it had already received was excused pursuant to O.R.C. § 1302.67. Id. at *3. First, the court explained that § 1302.67 was not available to the distributor because it had failed to demand adequate assurances in writing. Id. Section 1302.67 was not available to the party for the additional reason that the party withheld performance despite having already received the agreed-upon return. Id. Accordingly, § 1302.67 did not excuse the party’s failure to pay for the goods it had already received.

B. Commercial impracticability

If the contract is silent on force majeure, a court’s decision whether to excuse an impacted party’s performance depends largely on the foreseeability of the event under applicable statutory or common law. Generally, a party asserting the defense of commercial impracticability must prove that an unforeseeable event occurred, that the non-occurrence of the event was a basic assumption underlying the agreement, and that the event rendered performance impracticable. Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 149 (6th Cir. 1983) (citing O.R.C. § 1302.73(A) (U.C.C. § 2-615(a))).

“To successfully assert the affirmative defense of commercial impracticability, the party must show that the unforeseeable event upon which excuse is predicated is due to factors beyond the party’s control.” Roth Steel, 705 F.2d at 149. “[I]f the factors which create the event are within the control of the party asserting commercial impracticability, then the inability to perform is the result of the party’s conduct rather than the event itself.” Id. at 150.

The Ohio statutory provision governing commercial impracticability is O.R.C. § 1302.73(A) (U.C.C. § 2-615(a)). It provides in part, that:

Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . .

O.R.C. § 1302.73(A). A seller whose performance becomes partially impracticable must allocate production and deliveries in a “fair and reasonable” manner before contractual obligations is excused under O.R.C. § 1302.73(B). Among other factors, the statutory provision requires seller to limit participation in the allocation system to customers under contract and regular customers.

Accordingly, “an allocation system which includes participants other than customers under contract and regular customers is unreasonable.” Roth Steel, 705 F.2d at 151 (rejecting party’s claim under O.R.C. § 1302.73 where it failed to allocate production and deliveries in a fair and adequate manner). The statute further requires that the seller seasonably notify the buyer that there will be delay or non-delivery. O.R.C. § 1302.73(C). “An action is taken seasonably when it is taken at or within the time agreed or, if no time is agree, at or within a reasonable time.” O.R.C. § 13001.10(C).

In Roth Steel, Sharon Steel raised the affirmative defense of commercial impracticability, arguing that demand for steel far surpassed its decreasing production capabilities and excused its breach of an oral contract to supply quantities of steel. 705 F.2d at 149. Specifically, Sharon claimed that the oral contract was based upon the presupposed condition that raw materials sufficient to meet Sharon’s contractual obligations would be available, and because sufficient raw materials were not available, strict performance of the contract is excused under O.R.C. § 1302.73. Id.

The Sixth Circuit found evidence that substantiated a raw materials shortage occurred, but that Sharon failed to demonstrate that its alleged inability to perform was caused by the existing raw materials shortage. Id. Instead, the record demonstrated that Sharon continued to accept an unprecedented amount of purchase orders even though it knew raw materials were in short supply. Id. at 150. Based on those facts, the court concluded that the inability to perform was not beyond Sharon’s control and thus its claim of commercial impracticability failed. Id. The court also rejected Sharon’s argument that increased production costs supported its commercial impracticability defense, noting that, absent more, increases in production costs do not generally support the defense. Id. at n.34.
In *Athens Bone*, the court rejected the seller’s argument that performance of a contract to sell an x-ray machine was rendered impracticable under O.R.C. § 1302.73 by good faith compliance with governmental regulations. *Athens Bone & Joint Surgery, Inc. v. Mgmt. Consulting Grp., Inc.*, No. 02-CA-24, 2003 WL 21152871, at *5 (Ohio Ct. App. Mar. 25, 2003). After the parties had entered a contract for the sale of the x-ray machine, the seller’s representative visited the buyer’s office and expressed concerns regarding whether the room satisfied safety specifications. *Id.* The seller apparently experienced a delay in receiving the machine from the refurbisher and ultimately did not deliver the machine nor provide a notice of non-delivery by the agreed-upon delivery date. *Id.* Instead, the seller told the buyer it could not deliver the machine until the buyer provided safety specifications. *Id.* The seller argued that its performance had been rendered impracticable by a good faith effort to comply with governmental regulations under O.R.C. § 1302.73(A), which provides, in part, that a breach may be excused if performance was made impracticable by “compliance in good faith with any applicable . . . governmental regulation or order whether or not it later proves to be invalid.” *Id.* The court concluded that the seller’s performance was not excused because compliance with government regulations was not a term or condition of the contract. *Id.* “[G]overnmental interference cannot excuse unless it truly supervenes in such a manner as to be beyond the seller’s assumption of risk.” *Id.* at *6.
Oklahoma

Much of the Oklahoma law on force majeure and excusing contractual performance has arisen out of the oil and gas industry, as buyers sought to escape contract obligations that became onerous when market prices shifted. In these cases, theories of contractual force majeure, impossibility, commercial impracticability, and frustration of purpose have tended to overlap in their proof and application.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Foreseeability

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance

I. Contractual force majeure provisions

A. General requirements

“A force majeure clause is a provision in a contract excusing performance by a party under specified circumstances. . . . [It] defines the areas of unforeseeable events that might excuse nonperformance within the contract period.” Burkhart Petroleum Corp. v. ANR Pipeline Co., No. 87-C-257-C, 1988 WL 157249, at *4 (N.D. Okla. July 5, 1988).

The leading Supreme Court of Oklahoma case on force majeure is Golsen v. ONG Western, Inc., 756 P.2d 1209 (Okla. 1988), which stands for the proposition that a force majeure provision cannot overturn the “basic premises” of a contract. Golsen involved a “take or pay” agreement, which required a buyer of natural gas to either take at least a minimum amount of gas, or pay for that minimum amount even though it did not take delivery. The agreement contained a force majeure clause that excused performance in the event of “failure of gas supply or markets.” Id. at 1211.

When consumer demand for gas declined and supply increased, prices dropped, the buyer’s sales decreased significantly, and it could not sell at a profit, so the buyer sought to avoid its obligation to take or pay for any gas. Id. at 1212. The Supreme Court of Oklahoma held that a force majeure provision could not be interpreted in such a way as to “frustrate[] the basic premises of the contract virtually entirely.” Id. at 1213. Applying that proposition to the specific contract at issue, the court held, “To allow force majeure to excuse performance under the contract clause containing the phrase ‘failure of markets’ . . . allows three isolated words to alter the entire character of a lengthy and detailed contract which provides for the exact situation here encountered in this cause.” Id. at 1214.

The court concluded that the force majeure clause did not suspend the buyer’s contractual obligation, as such an interpretation would be “contrary to the general purpose of the contract.” Id. at 1214, 1220; see also Kaiser-Francis Oil Co. v. Producer’s Gas Co., 870 F.2d 563, 566 (10th Cir. 1989) (“The change in the general or relative resale price of gas does not constitute a ‘partial failure of gas demand’ which would relieve PGC of its obligation to take or pay. The force majeure provision cannot substitute for a price redetermination or market-out provision . . . .”); Robert N. Barnes & Randall J. Wood, The Allocation of Risk in Gas Purchase Contracts After Golsen v. ONG Western, Inc., 13 OKLA. CITY U.L. REV. 503, 534 (1988) (“The lesson of the Golsen case is clearly that the nonperforming party has the burden of showing that the force majeure claim is not repugnant to the allocation of risks established by the principal purpose and intent of the entire contract.”).

Courts have interpreted specific language in force majeure clauses to determine whether an event is a force majeure event:

- “Laws, orders, rules, regulations, acts or restraints of any government or governmental body or authority, civil or military” include FERC regulations and the oil and gas rules of the Oklahoma Corporation Commission. Burkhart Petroleum, 1988 WL 157249,

- A “failure of gas supply or markets” or a “partial or entire failure of gas supply or demand” is not established by an inability to sell gas at or above the contract price. Goslen, 756 P.2d at 1213; Kaiser-Francis Oil, 870 F.2d at 566.

- A rainfall event causing a creek to widen is the type of event contemplated by a force majeure clause referring to flooding, acts of God, and similar events. See Grindstaff v. Oaks Owners’ Ass’n, Inc., 386 P.3d 1035, 1045 (Okla. Civ. App. 2016) (construing force majeure clause in bylaws of homeowners’ association).

On the other hand, an event cannot constitute force majeure if it is not one of a set of specific events listed in the force majeure clause. See Kennedy & Mitchell, Inc. v. Internorth, Inc., No. 86-C-404-C, 1989 WL 433016, at *10–11 (N.D. Okla. Apr. 10, 1989) (finding that defendant’s reasons for failing to perform were not among specific contingencies listed in force majeure clause, and so defendant was not entitled to suspend performance).

If a force majeure clause requires that a party be rendered unable to perform, the party will not be excused from performance if it can still perform despite the force majeure event. Sabine Corp., 725 F. Supp. at 1170 (rule implemented by state agency was act of governmental body or authority under force majeure clause, but it did not render buyer unable to perform obligations). Importantly, “unable to perform” does not mean “unable to perform except at a loss.” Id. at 1172.

B. Foreseeability

While force majeure clauses generally deal with unforeseeable events outside a party’s control, the specific language of the contract provision will govern. Thus, under Oklahoma law, if a contract does not specify that a force majeure event must be unforeseeable, then a foreseeable event can still qualify as an event of force majeure. See Sabine Corp., 725 F. Supp. at 1170 (rejecting argument that event of force majeure must always be unforeseeable).

C. Notice

“The failure to give proper notice is fatal to a defense based upon a force majeure clause requiring notice.” Sabine Corp., 725 F. Supp. at 1168. Thus, for example, where the force majeure provision requires written notice within five business days after the occurrence of an alleged force majeure event, notice occurring four months after the occurrence and not containing requisite information will be insufficient. See Three RP Ltd. P’ship v. Dick’s Sporting Goods, Inc., No. CIV-18-003-RAW, 2019 WL 573413, at *6 (E.D. Okla. Feb. 12, 2019).

II. Common law remedies

A. Impossibility


In an early “harsh” case, the Supreme Court of Oklahoma held, “[d]ifficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance.” Berry v. Wells, 141 P. 444, 447 (Okla. 1914) (quoting The Harriman, 76 US 161, 172 (1869)). The court rejected an impossibility defense because the contract could have been performed, notwithstanding potential “difficulty and obstacles tending to hinder or prevent” its performance. Id.

In later cases, however, the Supreme Court of Oklahoma has relaxed the standard, and excused performance where fulfillment of contractual obligations becomes merely impracticable. For example, in Kansas, Oklahoma & Gulf Railway Co. v. Grand Lake Grain Co., 434 P.2d 153 (Okla. 1967), a railroad right of way was to be flooded by the building of a dam, preventing the railroad from furnishing shipping facilities. The railroad was entitled to present a defense that relocating the track was “totally impractical,” even if it was not wholly impossible. Id. at 157, 159.

Still, the excuse of supervening impossibility is not absolute. “The duty of a promisor is not discharged by the mere fact that supervening events deprived him of the ability to perform, if they are not such as to deprive other persons similarly situated of the ability to so perform.” See Okla. Gas & Elec. Co. v. Pinkerton’s Inc., 742 P.2d 546, 548 (Okla. 1986). Thus, where a security guard stole some property that he was charged with protecting, the security company could not claim supervening impossibility; the theft was not so sophisticated that no security guard could reasonably be expected to prevent it. Id. at 548–49. Nor does a hurricane in Florida support an impossibility defense, as its non-occurrence would not be a basic assumption of the agreement of the parties. Thrifty Rent-A-Car, 2005 WL 8175935, at *4 (applying Oklahoma law).
B. Frustration of purpose
To invoke frustration of purpose as a defense to performance, a party must show that (1) the principal purpose of the contract was frustrated, (2) the frustration was substantial, and (3) the non-occurrence of the frustrating event was a basic assumption on which the contract was made. See Sabine Corp., 725 F. Supp. at 1178 (citing Restatement (Second) of Contracts § 265 cmt. a).
A dwindling customer base will generally not suffice to meet the first and second elements of the defense where the party seeking to avoid performance still has some customers (i.e., the principal purpose of the contract still exists) and loss of customers was one of the risks assumed under the contract (i.e., any frustration was not substantial). Id. at 1179; see also Thrifty Rent-A-Car, 2005 WL 8175935, at *6 (finding that where purpose of contract was to operate rental car locations, hurricane that did not damage cars); Kennedy & Mitchell, 1989 WL 433016, at *15 (finding that collapse in gas market, “resulting in a less lucrative venture,” did not excuse performance under frustration of purpose doctrine).

III. UCC provisions regarding excused performance
“[T]he doctrine of commercial impracticability provides a defense to a seller for a delay in delivery or nondelivery of promised goods if performance has been made impracticable by a contingency, the non-occurrence of which is an assumption of the contract.” Thrifty Rent-A-Car, 2005 WL 8175935, at *5. The defense arises from Section 2-615 of the Uniform Commercial Code, codified by Oklahoma statute, but in Oklahoma its application largely overlaps with common-law doctrines of impossibility and frustration of purpose, discussed above. Okla. Stat. tit. 12A § 2-615.
To raise the defense of commercial impracticability, a party must “establish that 1) it did not, by the terms of its contract, assume a greater obligation than is ordinary; . . . 2) its performance was made impracticable by the occurrence of a contingency or condition, the non-occurrence of which was a basic assumption of the contract;” and 3) the occurrence making performance impracticable was unforeseeable. Sabine Corp., 725 F. Supp. at 1174. Having contracted to take on the risk rendering its performance impracticable, a party cannot defend on the ground that the degree of risk was more than it bargained for; nor can it assert that an increase in its cost of performance alters the essential nature of the performance. Id. at 1177; see also Brewer v. J-Six Farms, L.P., 350 P.3d 420, 426 (Okla. Civ. App. 2015) (rejecting commercial impracticability defense because, among other things, fall in prices was not unforeseen, and buyer did not demonstrate inability to pay floor price); Kennedy & Mitchell, 1989 WL 433016, at *15 (finding that collapse in gas market, “resulting in a less lucrative venture,” did not excuse performance under UCC).
Oregon

Oregon courts have rarely had to confront disputed force majeure provisions, but require unforeseeability and that the event be beyond the non-performing party’s control. Oregon recognizes common law impossibility and frustration of purpose defenses, but construes impossibility more strictly than some states.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements
In Oregon, a general force majeure clause, without specifically enumerated events, could be enforceable if the alleged event is beyond the control of the non-performing party and was unforeseeable at the time of contracting. See Water Power Co. v. PacificCorp, 781 P.2d 860, 863 (Or. Ct. App. 1989) (examining broad force majeure clause that defined force majeure as “unforeseeable causes beyond the reasonable control of and without the fault or negligence of the party claiming” force majeure).


B. Causation
To invoke a force majeure clause, the force majeure event must cause the party’s nonperformance or delayed performance. See Sause Bros. Ocean Towing Co., Inc. v. Gunderson, Inc., 510 P.2d 541, 547 (Or. 1973) (finding force majeure inapplicable where delaying event “might have caused a delay in transporting to cargo to the unloading dock” but did not cause “a delay in the discharge process itself”); see also Schwaner v. Kerr, 170 F. 92, 97 (D. Or. 1909) (“Fundamentally, the law looks to the immediate cause conducing to a particular result, and does not concern itself with causes of causes, or those which are remote and not directly consequential.”).

C. Mitigation/beyond a party’s control
A party that fails to use available alternatives to satisfy a contractual requirement or mitigate a delaying condition will not be excused from performance. See, e.g., Fleishman v. Meyer, 80 P. 209, 211 (Or. 1905) (finding that party’s failure to deliver product was not excused by an act of God rendering the original route un navigable where alternative routes were available).

D. Foreseeability
To invoke a force majeure clause, particularly when relying on generic language, the event must be unforeseeable at the time of contracting. See Water Power Co., 781 P.2d at 865 (finding that failure to sign agreement before specified date, which the contract contemplated in a separate section, was foreseeable and not a force majeure event).

II. Common law remedies

A. Impossibility
Impossibility may excuse performance of a contract that is “obviously impossible on its face.” Learned v. Holbrook, 170 P. 530, 532 (Or. 1918) (internal citations omitted). A supervening impossibility might also arise if, after entering the contract, “facts that a promisor had no reason to anticipate, and for the occurrence
of which he is not in contributing fault, render performance of the contract impossible.” Savage v. Peter Kiewit Sons’ Co., 432 P.2d 519, 522 (Or. 1967) (citing prohibition by court order as a supervening event that “in a proper case may excuse performance”). However, unexpected expenses or difficulties, regardless of the cause, will not automatically or necessarily excuse contract performance. Id.

A party that enters “a valid contract, for a sufficient consideration, to do a lawful thing, possible in itself,” may not rely on impossibility to excuse performance that would be merely unprofitable. Learned, 170 P. at 532; see also Portland Section of Council of Jewish Women v. Sisters of Charity of Providence in Or., 513 P.2d 1183, 1188 (Or. 1973) (though “law on the subject of impossibility or hardship is unclear since much of the area is a matter of discretion,” claims of “increased expense” are the most disfavored).

In Learned v. Holbrook, for example, a party tried to invoke impossibility to excuse its failure to construct a sawmill. 170 P. at 531. The court found that the party was not excused from performance because it was not actually impossible to build the sawmill. The party was only able to prove that it “could not be profitably operated without control of a larger piece of land and without the vacation of certain streets which intersect the property.” Id. at 532. Because “impossible” is not merely a synonym for “impracticable” in Oregon, the party was not excused from its contractual obligation to build the agreed-upon sawmill. Id.

In rare situations, an unexpected expense or challenge “may approach such an extreme that a practical possibility exists.” Portland Section of Council of Jewish Women, 513 P.2d at 1188 (internal citations omitted). To reach this level, “the hardship must be so extreme as to be outside any reasonable contemplation of the parties.” Id.; see also Schafer v. Sunset Packing Co., 474 P.2d 529, 530 (Or. 1970) (finding that extra expense of hiring substitutes after expected workers failed to arrive did not rise to the level of impossibility).

The hardship must also be unforeseen. See Rose City Transit Co. v. City of Portland, 525 P.2d 1325, 1351 (Or. Ct. App. 1974) (“If the occurrence is reasonably foreseeable, courts normally take the position that the promisor has assumed the risk of impossibility or frustration.”) (internal citations omitted).

Impossibility can act as both a shield and a sword. A party’s voluntary, affirmative act that “renders substantial performance of his contractual duties impossible, or apparently so” will constitute a total breach of the contract, and “warrants a suit seeking cancellation and restitution.” See Mohr v. Lear, 395 P.2d 117, 120 (Or. 1964).

B. Frustration of purpose

Frustration of purpose occurs if, after contract formation, “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.” Chang v. PacificCorp, 157 P.3d 243, 255 (Or. Ct. App. 2007) (internal citations omitted). The frustration must not only be substantial, but also must be “so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense.” Id.

The doctrine of frustration of purpose “relies extensively on the “assumptions” of the parties, as well as the “allocation” of risks.” Id. at 248 n.8. Thus, even though the frustrated purpose does not need to “be mutually held, it must be mutually understood.” Id. at 255. If the occurrence of the risk was “reasonably foreseeable,” courts will generally find that the contracting party has assumed the risk such that the defense does not excuse performance. Rose City Transit, 525 P.2d at 1351 (internal citations omitted).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

If reasonable grounds for insecurity arise, a party may make a written demand for adequate assurance of due performance. OR. REV. STAT. § 72.6090; see also Nat’l Farmers Org. v. Coast Trading Co., 488 F. Supp. 944, 951 (D. Or. 1977) (finding that no reasonable grounds for insecurity existed where buyer had already paid more than $3 million to seller in six months, and paid an additional $100,000 “on a moment’s notice”).

Either party may also suspend performance if “reasonable grounds for insecurity as to the other’s performance” arise, and a written demand for adequate assurances is not met. See Nw. Lumber Sales, Inc. v. Cont’l Forest Prods., Inc., 495 P.2d 744, 749 (Or. 1972). However, suspending performance without giving the other party a chance to provide assurances is not permitted. Id. at 750 (finding party’s failure to ship “order without a prior request for guarantee of payment was not justified”).

B. Commercial impracticability

In Oregon, pursuant to Section 2-615 of the Uniform Commercial Code, a seller may raise impracticability as a defense to excuse a delayed delivery or non-delivery of goods. OR. REV. STAT. § 72.6150(1). This defense is available if performance has become impracticable “by the occurrence of a contingency the nonoccurrence of which was a basic assumption
on which the contract was made.” *Id.* Good faith compliance with “any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid” can also render performance commercially impracticable and be excused. *Id.*

The seller must “seasonably” notify the buyer that there will be a delay or non-delivery. OR. REV. STAT. § 72.6150(3). Whether notice was given seasonably and whether performance has been rendered impracticable are questions of fact. See Glassner *v. Nw. Lustre Craft Co.*, 591 P.2d 419, 421 (Or. Ct. App. 1979).

If the cause of impracticability impacts “only a part of the seller’s capacity to perform, the seller must allocate production and deliveries among customers.” OR. REV. STAT. § 72.6150(2). The seller may choose to “allocate in any manner that is fair and reasonable.” *Id.*

In a contract that contemplates an agreed source for goods to be sold, a seller claiming commercial impracticability must show that it “employed ‘all due measures’ to assure that the agreed seller would perform.” Zidell Expls., *Inc. v. Conval Intern., Ltd.*, 719 F.2d 1465, 1472 (9th Cir. 1983) (internal citations omitted). The seller must also “have turned over to the aggrieved buyer its rights against the supplier corresponding to the seller’s claim of excuse.” *Id.*
Pennsylvania

Pennsylvania law excusing contractual performance—whether based on contractual force majeure provisions, the common law, or the Pennsylvania Commercial Code—generally follows overarching principles of foreseeability and require the alleged reasons for nonperformance to be beyond a party’s control. Of note is a recent Supreme Court of Pennsylvania case finding the COVID-19 pandemic to be a “natural disaster” for purposes of authorizing government emergency powers.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability
   E. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

Force majeure provisions are intended to relieve a party from contractual duties when forces beyond the party’s control prevent contractual performance. *Rohm & Haas Co. v. Crompton Corp.*, No. 215 NOV. TERM 2001, 2002 WL 1023435, at *3 (Pa. Ct. Com. Pl. Apr. 29, 2002). The party’s control over its inability to perform will be central to any contested force majeure declaration. *Id.*; see also *Martin v. Dep’t of Envtl. Res.*, 548 A.2d 675, 678 (Pa. Commw. Ct. 1988) (non-performing party has burden to show that excuse is beyond its control and show the acts taken to attempt to perform despite the excuse).

The application of a force majeure provision depends on the parties’ specific contractual language. “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. 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. Mfrs. & Traders Tr. Co.*, No. CIV.A. 03-CV-4707, 2004 WL 2579613, at *5 (E.D. Pa. Nov. 10, 2004); see also *STI Oilfield Servs., Inc. v. Access Midstream Partners*, No. 3:13-CV-02923, 2017 WL 889541, at *12 (M.D. Pa. Mar. 6, 2017) (reasoning that while a hurricane could be a force majeure event, where contractual clause identified only “acts of God” and “action of the elements” as force majeure events, provision was ambiguous as to whether Hurricane Sandy should be included and left matter for trier of fact).

Force majeure provisions often include catch-all clauses that cover additional events beyond those specifically listed. “A ‘catchall’ provision in a force majeure clause is limited to things of the same kind and nature as the particular events mentioned . . . [where enumerated events are unforeseeable]. An event covered by the catchall provision must also be unforeseeable.” *Morgantown Crossing*, 2004 WL 2579613, at *5.

of the winter of 2014 fall within this definition, particularly in light of the enumerated examples.

The Supreme Court of Pennsylvania has held that the COVID-19 pandemic constitutes a “natural disaster,” which authorized the Governor’s Executive Order under review. *Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, at *12 (Pa. Apr. 13, 2020). The court’s liberal interpretation of “natural disaster” could have implications for determining whether the COVID-19 pandemic and resulting government action fall within the list of specified events in parties’ force majeure provisions. See *id.* (“The COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions. Its presence in and movement through Pennsylvania triggered the Governor’s authority under the Emergency Code.”)

### B. Causation

A force majeure event cannot excuse past due performance because the force majeure event must cause the nonperformance. See *Wartsila Diesel, Inc. v. Sierra Rutile, Ltd.*, No. CIV. A. 95-2958, 1996 WL 724929, at *10 (E.D. Pa. Dec. 16, 1996) (holding that a rebellion in Sierra Leone could not excuse failure to provide milestone payment for work completed on construction site before rebellion).

### C. Mitigation/beyond a party’s control

Under Pennsylvania law, a party’s response to a force majeure event and whether the event was within its control are interrelated.

Whether the alleged event was beyond the control of the party seeking to avoid performance is critical in Pennsylvania. See *Rohm & Haas Co.*, 2002 WL 1023435, at *3. In *Rohm & Haas Co.*, a supplier sought declaratory relief excusing it from performance for reasons of force majeure and commercial impracticability following the entry of a consent decree that required the supplier’s facility to adopt certain environmental practices. *Id.* at *1.

The supplier claimed that the cost of bringing the facility into compliance was so extraordinary that it constituted a force majeure event. *Id.* The court disagreed, finding that the supplier had substantial control over the negotiations of the consent decree that its subsidiary entered into in good faith. *Id.* at *4 (finding the event was within the supplier’s reasonable control).

The court also noted that the supplier failed even to attempt compliance with the contract after the consent decree was entered, which separately precluded the force majeure defense. *Id.*; see also *Allegheny Energy Supply Co., LLC v. Wolf Run Min. Co.*, 53 A.3d 53, 61–63 (Pa. Super. Ct. 2012) (explaining that inability to find gas wells, construction failures, and the regulatory climate were not outside control of party where issues were caused by negligence of party or were known to party at the time of contracting).


A party’s performance will be excused by force majeure where the party does not have control over the event that otherwise meets the contractual requirements for declaring force majeure. See *Lovering v. Buck Mtn Coal Co.*, 54 Pa. 291, 291 (Pa. 1867) (coal seller was excused from performance where flood destroyed railroad because flood was act of God and railroad owner, not coal seller, could have provided against flood damage).

To excuse performance, the non-performing party must show “that it tried to overcome the results of the events’ occurrences by doing everything within its control to prevent or to minimize the event’s occurrence and its effects.” *Gulf Oil Corp. v. FERC*, 706 F.2d 444, 454 (3d Cir. 1983).

However, “doing everything required” does not include putting people at risk for their health or safety in order to perform. See, e.g., *Shenango Inc. v. Massey Coal Sales Co.*, No. CIV. 08-199, 2009 WL 2901296, at *3 (W.D. Pa. Sept. 10, 2009) (holding party may be excused from performance after stopping work because of labor shortage where necessary to protect the health and safety of workers even though work could continue).

For example, in *Bristol Township School District v. Ryder Transportation Services*, the plaintiff school district argued that an intervening bus driver labor strike did not excuse the defendant from providing school bus services because it could have, from an economic perspective, yielded to the labor demands. CIV.A. 93-5983, 1995 WL 116673, at *4 (E.D. Pa. Mar. 20, 1995). The U.S. District Court for the Eastern District of Pennsylvania rejected this argument and interpreted the force majeure provision to include the labor strike because, like the enumerated events, the labor strike implicated safety and not just “economic impracticability.” *Id.* at *3.

In contrast, in *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, a New York court applying Pennsylvania law held that the 2008 economic crisis did not excuse defendant’s performance because, though the state of the economy was not within its control, its decision to allocate funds elsewhere instead of performing under the contract in an attempt to cope with the financial
downturn was within its control. 931 N.Y.S.2d 436, 438 (N.Y. App. Div. 2011) (“Defendant made a calculated choice to allocate funds to the payment of its debts rather than to perform under the subject lease.”).

Similarly, the Supreme Court of Pennsylvania held that a seller was not excused from performance due to a supply shortage because it could have stockpiled its supply when it had the contracted-for amount, even though later events reduced the amount of supply it could provide to the buyer. Frank B. Bozzo, Inc. v. Elec. Weld Div. of Ft. Pitt Bridge Div. of Spang Indus., Inc., 423 A.2d 702, 708 (Pa. Super. Ct. 1980); aff’d sub nom. 435 A.2d 176 (Pa. 1981); see also Sunseri v. Garcia & Maggini Co., 148 A. 81, 83 (Pa. 1929) (explaining performance is not excused merely because performance becomes more expensive).

**D. Foreseeability**


Even if the force majeure event is unforeseeable, the damage or delay caused by the event must also be unforeseeable and, therefore, damage that should be repairable through ordinary maintenance would not excuse performance. See Gulf Oil Corp., 706 F.2d at 453 (under warranty contract supplier must show availability and delivery were effected by force majeure event because it must have had surplus to comply with warranty).

Further, an event may be initially unforeseeable and then, because of the regularity of its occurrence, become predictable enough to take it outside of the realm of excusing nonperformance. Id. at 454 (“The element of uncertainty that defines unforeseeability is negated by the regularity with which the events occurred.”).

**E. Notice**

The amount of notice required under a force majeure provision depends on the contract terms, and compliance is generally a question of fact for the jury. See Combustion Sys. Servs., 1993 WL 523713, at *4; Martin, 548 A.2d at 679 (explaining that failure to notify as provided in contract precluded force majeure defense).

Specific actions by the parties may negate the necessity of formal notice even where a contract provides for formal notice of force majeure. See Alstom Power, Inc. v. RMF Indus. Contracting, Inc., 418 F. Supp. 2d 766, 775–76 (W.D. Pa. 2006) (finding disputed issue of facts regarding whether party provided sufficient notice based on consistently informing counterparty of difficulties with project, and whether counterparty may have waived right to formal notice based on acknowledgement of party’s claims and impacts).

**II. Common law remedies**

**A. Impossibility**


Consider In re Conneaut Lake Park, where a federal bankruptcy court held that a property manager could not invoke impossibility of performance following a fire where the warranty and indemnity provisions in the property management contract allocated risk to the manager, as further evidenced by the manager’s insuring of the property. 564 B.R. at 509.

The court explained that it was not unfair or unconscionable to hold the property manager liable for fire damage because the manager bargained for the huge risk when it promised to return the property “free of damage” in exchange for the management contract. Id.; see also Liddle v. Scholze, 768 A.2d 1183, 1185 (Pa. Super. Ct. 2001) (affirming trial court conclusion that buyer of two breeding emus could not regain purchase money on basis of inability of emus to breed, where contract specifically covered this possibility: “The learned trial court, in well reasoned words, held [the buyer’s] case was flightless as the birds, and her appeal in turn we now must find as barren as the breeders here maligned.”).

**B. Frustration of purpose**

To invoke frustration of purpose, the party seeking to avoid performance must show “[t]he non-existence of a condition or subject matter essential to the continuance of the agreement.” Ellwood City Forge Corp. v. Fort Worth Heat Treating Co., 636 A.2d 219, 222 (Pa. Super. Ct. 1994) (citing Greek Catholic Congregation v. Plummer, 12 A.2d 435, 439 (Pa. 1940)).
To be an essential condition or subject matter, it must be a “basic assumption on which the contract was made.” Id. (concluding that jury should have been instructed to determine if failure to deliver furnace should absolve party from performance based on frustration of purpose instruction); see also Ollum v. Old Home Manor, 459 A.2d 757, 762 (Pa. Super. Ct. 1983) (applying Restatement (Second) of Contract § 261 and finding that, in the absence of special language stating otherwise, that each party in coal lease assumed the risk that the coal was not useable).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Under the Pennsylvania Commercial Code, when a seller reasonably feels insecure about a buyer’s ability to pay, the seller may demand in writing adequate assurances of payment. 13 PA. CODE § 2609(a). Until receiving such assurances, the seller may suspend performance, and if thirty days elapse, the seller is excused from performance. Id. § 2609(d); see Amco Ukrservice & Prompriladamco v. Am. Meter Co., No. Civ.A.00-2638, 2005 WL 154029, at *6 (E.D. Pa. June 29, 2005) (allowing amendment to add affirmative defense of adequate assurances).

Whether a party had reasonable grounds for insecurity to request adequate assurances and whether the counterparty provided sufficient assurances are questions of material fact for the jury, though may be concluded as a matter of law when conduct is clearly egregious or innocent. See QVC, Inc. v. MJC Am., Ltd., No. CIV.A. 08-3830, 2011 WL 2790156, at *9 (E.D. Pa. July 18, 2011).

The adequacy of assurance is determined by commercial standards and varies depending on the circumstances. Traffic Safety Devices, Inc. v. Safety Barriers, Inc., No. 3:02-CV-636, 2006 WL 2709229, at *15 (E.D. Tenn. Sept. 20, 2006) (applying Pennsylvania law, and finding offer to replace defective barriers or to reimburse prior to demand was adequate assurance); see also Allied Erecting & Dismantling Co., Inc. v. United States, 726 Fed. App’x 279, 286 (6th Cir. 2018) (applying Pennsylvania law, and concluding inability to construct manufacturing facility was repudiation requiring return of advance notwithstanding nonrefundable language).

B. Commercial impracticability

The Pennsylvania Commercial Code provides that a seller’s delay or failure to deliver is not a breach 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.” 13 PA. CODE § 2615(1).

The seller must allocate production and deliveries among its customers in a fair and reasonable manner, id. § 2615(2), and seasonably notify the buyer of the delay or non-delivery, and of the quota available to the buyer if allocation of supply is necessary. Id. § 2615(3); see Record Corp. v. Logan Constr. Co., 22 Pa. D. & C. 3d 358, 363 (Pa. Ct. Com. Pl. 1982) (concluding that seller did not seasonably notify buyer to avail itself of commercial impracticability defense where delay in notification of labor strike occurred six months after strike began).

The event or circumstance that makes performance commercially impracticable must have been unforeseen. See id. at 363 (finding labor strike by a domestic supplier foreseeable and that risk could have been allocated in contract). If the event pre-dated the agreement, then the event was foreseeable and this defense is unavailable. See Rohm & Haas Co., 2002 WL 1023435, at *6–7.

The U.S. District Court for the Western District of Pennsylvania discussed the contours of the impracticability defense in Specialty Tires of America. The court adopted a “risk exposure” analysis, as opposed to a foreseeability analysis, to determine whether the event was a “contingency the non-occurrence of which was a basic assumption underlying the contract,” meaning the court considered whether the risk’s degree of likelihood was such that the promisor should have protected itself. 82 F. Supp. 2d at 439.

The court held that the seller could assert the impracticability defense because the risk of whether a third party in possession of the goods would refuse to deliver was not one the seller should have been expected to contract against. Id. at 441. Loss, destruction, or a major price increase cannot excuse nonperformance for fungible goods, but unavailability is an excuse where specific goods are identified by the contract. Id. at 440. The court further noted that impracticability is only a defense for as long as the impracticability lasts and for a reasonable time after. Id. at 442.

Increased cost of performance alone is not an excuse, and neither is a collapse in the market, because those risks can be covered by the contract. See Rohm & Haas Co., 2002 WL 1023435, at *5–6 (explaining that consent decree that made cost of production too high did not make contract commercially impracticable).

Courts have excused performance where government action, not contemplated by the parties, made performance impracticable or impossible. See, e.g., Adcock Bros., Inc. v. Brielle Motors, Inc., CIV. A. No.
Puerto Rico

In Puerto Rico, the concept of force majeure is codified in the statutory law, and the analysis focuses in large part on foreseeability. Under the common law, concepts of impossibility or impracticability are often wrapped up in the doctrine of *rebus sic stantibus*, which allows a court to reform or rescind a contract if strict compliance with the contract becomes unfair for unforeseeable reasons.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability

II. Common law remedies: *rebus sic stantibus*

III. UCC provisions regarding excused performance

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I. Contractual force majeure provisions

A. General requirements

   Force majeure is “an unforeseeable event that prevents performance,” such as a natural disaster or a war. *La Carpa Corp. v. Am. Spaceframe Fabricators, LLC*, No. 09-2014 (DRD/BJM), 2014 WL 12889278, at *6 (D.P.R. Jan. 25, 2014). Unlike in most states, the concept of force majeure is codified under Puerto Rico law.

   “No one shall be liable for events which could not be foreseen, or which having been foreseen were inevitable, with the exception of the cases expressly mentioned in the law or those in which the obligation so declares.” P.R. LAWS ANN. tit. 31, § 3022. To determine whether an event constitutes force majeure, a court will consider “the frequency or probability of the event, whether the event was unusual, and whether precautions were taken in anticipation of the event.” *La Carpa*, 2014 WL 12889278, at *6.

   In general, a party will not be liable for nonperformance or damage if the occurrence causing the nonperformance or the damage “cannot be foreseen, or which having been foreseen, cannot be prevented.” *Rivera v. Caribbean Home Constr. Corp.*, 100 P.R. Dec. 106 (1971). For example, a widespread electrical outage affecting the entire northern part of the country has excused a one-day-late court filing. *Office of Gov’t Ethics v. Rivera Santos*, 153 P.R. Dec. 184 (2001).

   On the other hand, natural phenomena such as heavy rainfall will not relieve a party from liability in all circumstances; the phenomenon must be unexpected or unforeseeable as well as unavoidable. *Rivera*, 100 P.R. Dec. 106.

B. Causation

   To excuse liability, a force majeure event must cause the nonperformance. If the party can still perform, notwithstanding a force majeure event, then the event will not abrogate the contract. For example, where a shipper’s fleet was requisitioned, but it could have chartered other vessels to perform its obligation, the court declined to find the shipping contract abrogated by force majeure. *Societe Anonyme des Sucreries de St. Jean v. Bull Insular Line, Inc.*, 276 F. 783, 784, 786 (1st Cir. 1921) (“The fact that performance had become more costly was no legal reason for holding the contract ended.”).

C. Mitigation/beyond a party’s control

   If a party can take measures to prevent the supposed force majeure event, then the event is unlikely to relieve a party of liability. For example, in *Rivera*, a contractor sought to avoid liability for flooding in a development it had built, claiming that heavy rainfall constituted a force majeure event. The court found that installing additional sewer inlets or installing a larger pipe would have prevented the flooding.
problems; therefore, the contractor was held liable. _Rivera_, 100 P.R. Dec. 106; see also _Vidal & Co. v. Am. R.R. Co._, 28 P.R. Dec. 204 (1920) (carrier was liable where it could not show that fire was unpreventable).

D. Foreseeability

An event must be unforeseeable to allow the excuse of force majeure. For example, a fire is not always a force majeure event: “Although a fire may be considered a fortuitous event or _vis major_, yet all fires have not that character, but only those which could not have been foreseen or prevented.” _Vidal & Co._, 28 P.R. Dec. 204. Thus, where the cause of the fire that burned merchandise delivered to a rail carrier for transportation is unknown, the carrier cannot claim force majeure “because it cannot be determined whether or not it could have been foreseen or prevented.” _Id._ (citing railroad regulations); see also _Mejías v. Metro. Packing & Warehousing Co._, 86 P.R. Dec. 3 (1962) (following _Vidal & Co._).

An economic recession, such as the one that occurred in 2008, was not unforeseeable; “[e]conomic recessions and their attendant consequences are facts of life every business must deal with.” _La Carpa_, 2014 WL 12889278, at *7. Thus, a recession, by itself, cannot excuse a party’s failure to perform. _Id._ On the other hand, where an economic crisis might be serious and unforeseeable enough to give rise to force majeure, such as the crisis in Venezuela, then a force majeure defense may have more weight. In a case raising that defense on those facts, however, there was no evidence it affected the parties, which were in Florida. _Bancrédito Int’l Bank Corp. v. Data Hardware Supply, Inc._, No. 18-1005CCC, 2019 WL 4458839, at *2 (D.P.R. Sept. 13, 2019).

Unforeseeability is subjective rather than objective; that is, one with specialized knowledge or expertise must use that knowledge in order to be relieved from liability. An engineer seeking to avoid liability for a building’s collapse “must prove that the collapse-causing event was absolutely unforeseeable and inevitable within the scope of the prevailing professional techniques and know-how at the time the project was carried out.” _Rosello Cruz v. García_, 116 P.R. Dec. 511, 16 P.R. Offic. Trans. 626, 639 (1985); see also _Casera Foods, Inc. v. Puerto Rico_, 108 P.R. Dec. 850, 8 P.R. Offic. Trans. 914, 922 (1979) (foreseeability of papaya shortage to food processor specializing in papayas).

II. Common law remedies: _rebus sic stantibus_

Puerto Rico courts have recognized the doctrine of _rebus sic stantibus_, which is similar to an impracticability defense. “Broadly stated, _rebus sic stantibus_ is a clause deemed implicit in contracts and that serves to adjust the debtor’s obligation or rescind the contract when unforeseeable circumstances render strict compliance with the contract unfair.” _Lopez Morales v. Hosp. Hermanos Melendez Inc._, 460 F. Supp. 2d 288, 291 (D.P.R. 2006). This is an “extraordinary” remedy, “which should be employed only in exceptional instances requiring a judicious and scrupulous moderating judicial discernment.” _Casera Foods_, 108 P.R. Dec. 850, 8 P.R. Offic. Trans. at 922.

For a court to apply _rebus sic stantibus_, a party seeking to avoid its obligation must show each of the following elements: (1) an executory contract (i.e., performance is at least partly in the future); (2) a change in circumstances arising after the parties entered the agreement; (3) unforeseeability and indefinite duration of the change; (4) extraordinary difficulty for the performing party in complying with its obligation because of the change; and (5) a petition to the court for relief. _William L. Bonnell Co. v. Gandara_, 714 F. Supp. 2d 272, 275 (D.P.R. 2010) (finding grounds to reform agreement).

All of the elements must be met. Thus, if a party should have reasonably foreseen and anticipated the change in the contract, _rebus sic stantibus_ will not apply. _Casera Foods_, 108 P.R. Dec. 850, 8 P.R. Offic. Trans. at 922–23 (food processor who specialized in papayas could and should have foreseen shortage in papaya market); _La Carpa_, 2014 WL 12889278, at *7 (recession); _Lopez Morales_, 460 F. Supp. 2d at 292 (hospital could have foreseen death of child whose injuries were subject of settlement agreement hospital sought to avoid). Likewise, the doctrine will not apply if a party cannot show inability to continue under the contract. _Medina & Medina v. Country Pride Foods Ltd._, 631 F. Supp. 293, 301 (D.P.R. 1986) (finding that company wishing to terminate contract could not show price relief was necessary).

If _rebus sic stantibus_ applies to a partially performed contract, and the performing party is free from fault in the performance, then the performing party will be able to recover in _quantum meruit_ for its work. _Rodriguez López v. Municipality of Carolina_, 75 P.R. Dec. 479 (1953).

III. UCC provisions regarding excused performance

Puerto Rico has not adopted Article 2 of the Uniform Commercial Code.
Rhode Island

Rhode Island cases have enforced parties’ force majeure provisions and have relied on guidance from New York courts to construe them narrowly. Rhode Island recognizes impossibility and frustration of purpose at common law, and applies an impracticability (as opposed to strict impossibility) standard.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Foreseeability

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance

I. Contractual force majeure provisions

A. General requirements

Force majeure provisions in contracts are both well recognized and respected under Rhode Island law. According to one court, “neither the Governor, nor anyone else, should be permitted to escape the consequences of the violation of a lawful obligation."


The rule and reasoning of *URI Cogeneration Partners, L.P. v. Board of Governors for Higher Education* is particularly instructive. 915 F. Supp. 1267, 1286 (D.R.I. 1996). Here, the U.S. District Court for the District of Rhode Island considered a force majeure clause in an energy services agreement and land lease. The plaintiff contended that its inability to secure an amendment to the zoning ordinance, and thus to win zoning approval for the project at issue, led to the plaintiff’s failure to secure financing. *Id.*

The plaintiff argued that it should be excused from its financing obligations pursuant to the agreement’s force majeure clause. *Id.* The court explained that it was clear that the plaintiff’s inability to secure an amendment to the ordinance led to its failure to secure financing. *Id.* “The Court [did] not agree, and declare[d] that, as a matter of law, the force majeure clause of [the contract] does not excuse [the plaintiff] from its financing obligations under [the contract].” *Id.*

In so holding, the court discussed the common law of excuse and force majeure in analyzing the parties’ force majeure provision, and looked to New York courts for additional guidance:

*Contractual force majeure clauses—or clauses excusing nonperformance due to circumstances beyond the control of the parties—under the common law provide a . . . narrow defense. Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused.*

*Id.* at 1286–87 (quoting *Kel Kim Corp. v. Central Markets, Inc.*, 524 N.Y.S.2d 384, 385 (N.Y. 1987)).

The parties’ specific force majeure provision did not list “failure to obtain zoning approval among the parade of horribles triggering the section’s application.” *Id.* at 1287. The plaintiff argued that the catch-all phrase that included other events should cover the failure to obtain zoning approval, but the court agreed with the reasoning of the New York Court of Appeals that “[t]he principle of interpretation applicable to [catch-all] clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matter mentioned.” *Id.* (quoting *Kel Kim Corp.*, 524 N.Y.S.2d at 385–86). The court accordingly declined to find that the force majeure provision covered the plaintiff’s situation.

The court explained further by contrasting the events listed in the contract as events of force majeure from the failure to obtain the necessary zoning permits,
which came down to a question of foreseeability. *Id.* 

“[F]orce majeure clauses have traditionally applied to unforeseen circumstances—typhoons, citizens run amok, Hannibal and his elephants at the gates.” *Id.* The court believed the force majeure provision could only cover similar situations that were “demonstrably unforeseen at the time of contracting.” *Id.*

More specifically, the court held that “only if the actions of the [zoning council] were beyond the realm of imagination [at the time of contracting] would the law of force majeure apply.” *Id.* (emphasis added).

Based on the parties’ negotiations prior to contracting and the events leading up to that date, it was foreseeable that zoning approval could be denied. *Id.* “Hence, failure to win zoning permission was a foreseeable event, unlike the catastrophes listed in [the force majeure clause], and not of the nature and kind commonly excused by force majeure clauses. [The parties] could have provided for this eventuality—instead, they left everything in [the plaintiff’s] hands.” *Id.*

**B. Causation**

The Supreme Court of Rhode Island has emphasized the significance of causation in the analysis of force majeure provisions. In *Shelby Insurance Co. v. Northeast Structures, Inc.*, a commercial general liability insurer sued its insured (a contractor) for a declaratory judgment that the policy did not cover the insured’s alleged liability for the collapse of a building under construction. 767 A.2d 75 (R.I. 2001). The insured asserted as an affirmative defense that it “is not liable for any damages caused . . . by an Act of God.” *Id.* at 76.

The court noted that “[i]f the collapse was caused by an act of God—such as high winds—rather than faulty work done on the structure, then . . . the possibility exists that the damage would not be excluded from coverage under the policy.” *Id.* at 77. The court, therefore, explained that a question of fact existed regarding the cause of the building’s collapse. *Id.*

**C. Foreseeability**

An event of force majeure generally must be unforeseeable at the time of contracting to excuse performance. See *URI Cogeneration Partners*, 915 F. Supp. at 1287 (discussed above in section I.A.).

**II. Common law remedies**

**A. Impossibility**

The common law doctrine of impossibility is well-defined in Rhode Island law. “It is both elementary as well as fundamental law that where parties contract and make performance conditional upon the happening of an occurrence of a particular matter, the contract imposes upon the party required to bring about the happening of that occurrence an implied promise to use good faith, diligence and best efforts to bring about that happening.” *Bradford Dyeing Ass’n, Inc. v. J. Stog Tech GmbH*, 765 A.2d 1226, 1237 (R.I. 2001) (citing *United States v. Croft-Mullins Elec. Co.*, 333 F.2d 772, 775 n.4 (5th Cir. 1964)).

“A contracting party impliedly obligates himself to cooperate in the performance of his contact and the law will not permit him to take advantage of an obstacle to performance which he has created or which lies within his power to remove.” *Id.* (quoting *Gulf, Mobile & Ohio R.R. Co. v. Ill. Cent. R.R. Co.*, 128 F. Supp. 311, 324 (N.D. Ala. 1954)).

“It is further both elementary as well as fundamental contract law that if one party to the contract prevents the happening or performance of a condition precedent that is part of the contract, that action eliminates the condition precedent.” *Id.* at 1237–38 (citations omitted).

In *Bradford*, the Supreme Court of Rhode Island ultimately held that the trial justice’s determination that the defendant should be relieved of its contractual obligation because of “impossibility of performance” was flawed. Specifically, the defendant’s contractual performance, although conditioned on obtaining certain permitting by the state’s Department of Environmental Management for the installation of a wastewater treatment system, could not be excused when the failure to obtain the necessary permitting was the result of the defendant’s own failures regarding removal of sludge. *Id.* at 1238 (“There is no legal precedent that permits [the defendant] to create the impossibility that prevented its performance and to then shield itself from its contractual obligations to [the plaintiff] by hiding behind that self-created ‘impossibility’ defense.”).

The court went on to address the defense based on economic conditions. Specifically, the defendant argued that the “cost of the removal of the sludge and for its transportation to dumping sites out of state had become more costly than anticipated,” but the court rejected this reasoning. *Id.* at 1238 (“Economic conditions such as presented in this case scenario are not a viable impracticability defense to [the plaintiff’s] breach of contract claim.”).

Moreover, Rhode Island courts have applied the “generally recognized” rule that an executory contract, “in the absence of contrary provisions, is terminated if, through no fault of either party, its object becomes wholly illegal and therefore permanently impossible of performance.” *Cinquagran v. T. A. Clarke Motors*, 30 A.2d 859, 862 (R.I. 1943) (citations omitted).
In *Cinquegrano*, the court explained that “[w]hen, as here, a supervening lawful order of domestic government makes performance under an existing contract illegal and the enforcement of such order for an unreasonable time admittedly interferes substantially with the expressed intention of the parties and renders impossible the performance of the terms of the original contract, a party who is not at fault is justified in demanding return of the purchase price he has paid thereunder.” *Id.*

Finally, in *Iannuccillo v. Material Sand & Stone Corp.*, 713 A.2d 1234, 1238 (R.I. 1998), the court held that a party’s impossibility argument did not support the extent of relief sought—complete absolution of responsibility under the contract. Here, the court reasoned that any frustration of performance caused by the work stoppage was only temporary in nature. *Id.*

B. Frustration of purpose

“In order to excuse a party’s duty to perform under a contract, the purpose underlying the contract must be totally and unforeseeably destroyed.” *City of Warwick v. Boeng Corp.*, 472 A.2d 1214, 1219 (R.I. 1984) (holding that neither the purpose of the contract nor the value of the consideration at the time the contract was entered into was destroyed).

In *City of Warwick*, the purpose of the contract was to allow the defendant to sell land to the plaintiff. *Id.* Ultimately, the defendant was allowed to sell its property, and the plaintiff should have received the agreed-upon sum. *Id.* The purpose underlying the contract, therefore, was not destroyed.

“A party’s performance under a contract is rendered impracticable upon the occurrence of an event or a manifestation of a circumstance the nonoccurrence of which was a basic assumption on which the contract was made.” See *Iannuccillo*, 713 A.2d at 1238. The requisite elements to a finding of frustration or impracticability upon the occurrence of a supervening event are:

1. the contract was executory, providing for removal of gravel and sand until the desired grade was achieved, which never occurred because of the discovery of the ledge;
2. the discovery of the ledge was a “condition not anticipated by the parties to this contract”;  
3. the nonexistence of the ledge was a basic assumption of the parties;
4. “the essential purpose of the contract—to remove sand and gravel from the lot and achieve an even grade in anticipation of building—was frustrated by the discovery of the ledge”; and
5. the frustration was substantial, as approximately $60,800 was the additional cost the ledge imposed upon the excavation of the plaintiff’s property. *Id.* at 1238–39.

While noting that a “contract’s performance will not be set aside merely because the performance under the contract becomes more difficult or expensive than originally anticipated,” the court explained that the ultimate inquiry for the purposes of accepting or rejecting a defense of frustration is whether the intervening changes in circumstances were so unforeseeable that the risk of increased difficulty or expense should not be properly borne by the party who declined to complete performance. *Id.* at 1239. The court concluded that “the discovery of the ledge so increased the burden upon [the] defendant [] that further performance pursuant to the terms of the contract was rendered impracticable.” *Id.*

III. UCC provisions regarding excused performance

Rhode Island law allows a party to make a demand in writing for adequate assurance of due performance if reasonable grounds for insecurity arise with respect to the performance. *See Pascale Serv. Corp. v. Int’l Truck & Engine Corp.*, No. CA 07-247 S, 2007 WL 9789641, at *4 (D.R.I. Nov. 15, 2007) (citing R.I. GEN. LAWS § 6A-2-609)). In *Pascale*, the court explained that the plaintiff had not demanded “adequate assurance of due performance” prior to bringing a claim for anticipatory breach of contract. *Id.*

Rhode Island has the standard UCC provision regarding the defense of commercial impracticability, but no court has dealt with its enforcement. *See, e.g., R.I. GEN. LAWS § 6A-2-615.*
South Carolina

South Carolina courts have not had to resolve many disputes focused on enforceability of contractual force majeure provisions. The courts, however, have recognized common law reasons for excusing nonperformance since the 18th century.

The key cases are broken down as follows:

I. Contractual force majeure provisions
II. Common law remedies
   A. Impossibility
   B. Frustration of purpose
III. UCC provisions regarding excused performance

I. Contractual force majeure provisions

In the few South Carolina cases interpreting force majeure clauses, courts strictly enforce the specific language of the parties’ contract.

For example, in *Coker International, Inc. v. Burlington Industries, Inc.*, a buyer of textile looms brought an action against a seller seeking rescission of the contract and return of a nonrefundable down payment after a change in circumstances affected the buyer’s ability to earn a profit. 747 F. Supp. 1168 (D.S.C. 1990), aff’d, 935 F.2d 267 (4th Cir. 1991). The buyer intended to resell the looms to a customer in Peru, but subsequent to the parties’ agreement, actions taken by the Peruvian government made resale to that customer impossible. *Id.* at 1170.

The federal district court rejected arguments that the force majeure clause entitled the buyer to excuse performance. The court focused on the provision’s specific language, which provided that deliveries could be suspended “in case of act of God, . . . or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment . . . .” *Id.*

First, the court explained that the clause did not excuse performance if the buyer could not resell the product: “The force majeure clause applies to objective events which directly affect the parties’ ability to perform the contract in question, not the ability to make a profit on resale of the goods.” *Id.* The Peruvian government’s actions did not prevent the buyer from accepting the product. *Id.*

The court also pointed out that even if the force majeure clause was applicable, the buyer’s sought remedies were inappropriate. The contract’s language provided only for suspension of deliveries in the case of a force majeure event—not rescission or return of the down payment. *Id.*

II. Common law remedies

Although there is scant case precedent interpreting force majeure provisions, South Carolina courts have routinely considered common law remedies of impossibility and frustration of purpose in attempts to excuse performance. These remedies are available where “parties failed to foresee and allocate catastrophic risks.” *Morin v. Innegrity, LLC*, 819 S.E.2d 131, 136 (S.C. Ct. App. 2018).

In certain cases, South Carolina courts conflate the impossibility of performance and frustration of purpose doctrines. See *V.E. Amick & Assoc., LLC v. Palmetto Envtl. Grp., Inc.*, 716 S.E.2d 295, 299 (S.C. Ct. App. 2011) (addressing only impossibility while appellant contended that his performance was excused on both grounds); *Morin*, 819 S.E.2d at 137 (noting that the doctrine of impossibility is “also known as impracticability or frustration”). However, in other cases, courts have treated impossibility of performance and frustration of purpose separately. South Carolina courts invoke the same standard when evaluating whether impossibility of performance or frustration of purpose excuses performance: a party to a contract must perform its obligations under the contract “unless its performance is rendered impossible by an act of God, the law, or by a third party.” See *Hawkins v. Greenwood Development Corp.*, 493 S.E.2d 875, 879 (S.C. Ct. App. 1997) (citing *Moon v. Jordan*, 390 S.E.2d 488, 490 (S.C. Ct. App. 1990)); see also *Jones v. Bates*, 127 S.E.2d 618, 619 (S.C. 1962) (citing *Pearce-Young-Angel Co. v. Charles R. Allen, Inc.*, 50 S.E.2d 698, 700 (S.C. 1948)).
A. Impossibility

Under the impossibility of performance doctrine, a party to a contract may be excused from performance if “it is made to appear that the thing to be done cannot be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible.” See Hawkins, 493 S.E.2d at 879 (quoting 17A Am.Jur.2d Contracts § 674, at 682).

There are two types of “impossibility”: (i) “objective impossibility (the thing cannot be done)” and (ii) “subjective impossibility (I cannot do it).” B’s Co. v. B. P. Barber & Assoc., Inc., 391 F.2d 130, 137 (4th Cir. 1968). Impossibility must be more than inconvenience—it must truly be impossible to perform. See Hawkins, 493 S.E.2d at 879 (quoting 17A Am.Jur.2d Contracts § 673, at 681).

A party’s performance is not excused under the doctrine of impossibility if another person or entity could perform under the contract: “[s]ubjective impossibility, possibility which is personal to the promisor and does not inhere in the nature of the act to be performed, does not excuse nonperformance of a contractual obligation.” Moon, 390 S.E.2d at 490 (citing B’s Co., 391 F.2d at 130).

The concept of impossibility is not a new one. South Carolina first applied this common law defense in the 18th century. In 1793, the state’s courts considered a debt proceeding against the representatives of a deceased’s estate. Ordinary of Charlestown Dist. v. Corbett & Lightwood, 1 S.C.L. 328, 322 (S.C. 1793). During the Revolutionary War, the British army had plundered the estate. Id. at 322–23. The court excused the representatives’ performance, finding that it was not the estate administrator’s fault that the estate had become insolvent; rather, the defendants “were discharged from their obligation by an act of an enemy, which rendered it impossible for the administrator to perform.” Id. at 323.

The court found that it was a “well known rule, both of the civil and common law, that if the party performs, or if it is rendered impossible for him to perform, that in either case, both he and his securities shall be exempt from the penalty annexed to the obligation; and that the act of God, or of an enemy, were the highest excuses known in law for the nonperformance of a contract.” Id.

More recently, South Carolina courts have excused performance in less dramatic circumstances than an act of an invading enemy. Courts have excused performance if the subject matter of the contract is destroyed by an act of God, “since where the existence of a specific thing is necessary for the performance of a contract, the accident[al] destruction or non-existence of that thing excuses the promisor.” Pearce-Young-Angel, 50 S.E.2d at 701 (citing Williston, Contracts § 1946, at 5451).

In Pearce-Young-Angel, the Supreme Court of South Carolina found that nonperformance was excused when an act of God—torrential rainfall of five to six inches—destroyed the crop that was the subject matter of the contract. Id. at 583–84. The court held that destruction of property by an act of God excuses nonperformance if the contract specifically references that particular property. Id. at 587–88. Although the court referred to this excuse as impossibility, it was essentially applying common law force majeure.

Consider, however, a case in which a subcontractor failed to construct two subaqueous water transmission mains under two rivers. B’s Co., 391 F.2d at 132–33. The subcontractor claimed that the court should excuse performance because the plans and specifications prepared by its counterparty, an engineering firm, made it impossible for the subcontractor to complete the project. Yet, after the subcontractor failed to install the mains, another company succeeded in their installation. Id.

The Fourth Circuit affirmed the trial judge’s finding that performance of the contract was not impossible, even though “the evidence proved that there was difficulty, expense, and possible hardship involved in the performance of the contract.” B’s Co., 391 F.2d at 137. A party’s performance is not excused under the doctrine of impossibility if it is only impossible for that person or entity to perform—if another person or entity could meet the contractual obligations, then performance is not impossible as a legal matter. Id.

As would be the case if a party was relying on a force majeure clause, the alleged reason that renders performance impossible must actually be the cause of the contractual nonperformance. South Carolina courts have refused, for example, to excuse performance when the true cause of nonperformance was the invoking party’s own financial or economic difficulties. See, e.g., MPI S.C.-1, LLC v. Levy Ctr. LLC, No. 2011-UP-065, 2011 WL 11733080, at *2–3 (S.C. Ct. App. Feb. 16, 2011) (rejecting party’s argument that unforeseen changes in zoning regulations rendered contract performance impossible where changes merely rendered performance less profitable).

South Carolina courts have embraced guidance from the Second Restatement on Contracts, which provides that “mere market shifts or financial inability do not usually effect discharge under the rule stated in this Section.” Restatement (Second) Contracts § 261.

Courts have repeatedly found that “[t]he 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.” See Moon, 390 S.E.2d at 490 (affirming judgment for vendors because purchaser’s performance was not excused due to her financial condition); see also Morin, 819 S.E.2d at 137 (“Even the most generous interpretation of impossibility will not save a contracting party who bargains for his own folly by guaranteeing performance despite impracticability.”).

For example, in V.E. Amick, the Court of Appeals of South Carolina affirmed the circuit court’s finding that a subcontractor’s performance was not excused by impossibility, given the subcontractor owner’s concession that the subcontractor did not cease work because of impossibility, but rather because the company ran out of money. 716 S.E.2d at 300. The court found that performance would have been “merely an inconvenience, and not an impossibility.” Id.

In Morin v. Innegrite, the court similarly refused to excuse performance due to the non-performing party’s financial issues. The former CEO of an LLC brought a breach of contract claim against his former employer. The LLC claimed impossibility as a defense for failing to pay the CEO severance, back pay, and other monies owed to him as a guarantor for the company’s loans. The court found the LLC liable, holding that financial difficulty did not excuse the LLC’s performance. Morin, 819 S.E.2d at 137–38.

To rely on common law force majeure or impossibility, a party has a duty to attempt to overcome the event that otherwise is preventing performance. For example, in deciding to excuse performance in Pearce-Young-Angel, the Supreme Court of South Carolina pointed to the non-performing party’s “exhaustive but unsuccessful efforts” to secure the subject of the contract from another source in determining that performance should be excused. Pearce-Young-Angel Co., 50 S.E.2d at 700.

Consider another case in which the parties debated whether a county ordinance imposing a temporary building moratorium rendered construction impossible. See MPI S.C.-1, LLC, 2011 WL 11733080, at *2–3. In finding that the party’s performance was not excused, the Court of Appeals of South Carolina pointed to the party’s failure to take any actions to mitigate the imposition of the moratorium.

Specifically, a county official had testified that those who filed an application for approval by a given date were exempted from the ordinance. Id. at *3. The non-performing party also never submitted any development plans to the county after the moratorium was in effect, and so could not be certain that an application would have been denied. Id. The party failed to take these steps, which would have mitigated the “impossibility” resulting from the moratorium. Id. The court thus refused to excuse the party’s performance.

The party claiming impossibility of performance has the burden of proof. Hawkins, 493 S.E.2d at 879 (citing 17A Am.Jur.2d Contracts § 674, at 682). Whether performance is impossible is a fact-based inquiry generally appropriate for the ultimate finder of fact.

In Hawkins, the Court of Appeals of South Carolina affirmed the circuit court’s decision to deny a purchaser’s motion for judgment notwithstanding the verdict. Id. The parties disputed whether a purchase agreement’s required construction of an access road became impossible after the builder was denied a permit. Id.

The court found that there was evidence that it “would be difficult, but not impossible, to obtain the required permits.” Id. at 880. The appellate court agreed that the trial judge properly charged the jury on the defense of impossibility and allowed the jury to determine whether the party met its burden of proving the defense. Id.

B. Frustration of purpose

Frustration of purpose is potentially available where performance remains possible but the fundamental purpose of the agreement has been frustrated.

For example, “[w]here, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the 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.” Coker Int’l, Inc., 747 F. Supp. at 1171 (citing Restatement (Second) Contracts § 265); see also MPI S.C.-1, 2011 WL 11733080, at *4–6 (rejecting frustration of purpose defense where party could have negotiated a provision in its contract to provide protection against an unfavorable zoning change).

The frustration of purpose doctrine excuses performance if the product has been destroyed, but does not, for example, allow parties to escape performance due to an inability to resell a product. See Coker Int’l, Inc., 747 F. Supp. at 1171.

Like impossibility, frustration of purpose is not available merely because the contract becomes less profitable for one party. MPI S.C.-1, 2011 WL 11733080, at *4 (citing Restatement (Second) Contracts § 265, cmt. a) (“It is not enough that the transaction
has become less profitable for the affected party or even that he will sustain a loss.

If frustration of purpose applies, the party is discharged only from its remaining duties; the event does not excuse prior performance or completed payments (such as a nonrefundable down payment). See id. at *5 (citing Coker Int’l, Inc., 747 F. Supp. at 1171).

III. UCC provisions regarding excused performance

South Carolina favors a contracting party’s right to demand adequate assurances if the party has reasonable grounds for insecurity. If a party receives a justifiable demand, it must provide the requested assurances within a reasonable time (i.e., 30 days). See T & S Brass & Bronze Works, Inc. v. Pic-Air, Inc., 790 F.2d 1098, 1105 (4th Cir. 1986) (citing U.C.C. § 2-609(1)). Failure to provide adequate assurances of performance may constitute repudiation of the contract. Id.


In T & S Brass, the Fourth Circuit affirmed the decision to relieve a buyer of his obligations after a seller failed to provide adequate assurances upon request. The contract required the seller to deliver four installments of a certain product to the buyer by a specific date.

There was an issue with timely delivery of the first two installments, and the third installment contained damaged product. The buyer then demanded assurance that the fourth shipment would be of quality, but agreed to accept and pay for the fourth shipment “provided [it] passed inspection.” Id. at 1104.

The seller failed to provide such assurances. The court concluded that the buyer had a reasonable basis to demand assurances, and because the seller failed to provide these assurances, the buyer did not have to accept delivery of or pay for the remaining installment. Id.

Notably, however, the buyer did have to pay the contract price for the product received prior to the demand for assurances. Id. (explaining that the nonperforming party is not excused from any obligations accrued prior to the demand).

Similarly, in Pappas v. Ollie’s Seafood Grille & Bar, L.L.C., the Court of Appeals of South Carolina affirmed a trial judge’s grant of summary judgment in favor of the party that reasonably had demanded, but not received, assurances. 2007 WL 8326636, at *7.

The court agreed that the party had sufficient grounds for insecurity to demand assurances after the party discovered various liens and encumbrances on the restaurant assets that were the subject of the contract. The court found no evidence that the counterparty had responded with any assurances within 30 days of the demand. Id. at *7. On that basis and others, the court affirmed the grant of summary judgment. Id.
South Dakota

We found no reported cases involving force majeure disputes arising under South Dakota law. South Dakota recognizes the defense of impossibility of performance by statute, and courts have recognized the common law defense of commercial frustration, which the courts have distinguished from the UCC-based defense of commercial impracticability.

I. Contractual force majeure provisions

We did not uncover any reported cases interpreting disputes about contractual force majeure provisions under South Dakota law.

II. Common law remedies

A. Impossibility

South Dakota has codified the doctrine of impossibility of performance. See, e.g., Johnson v. Sellers, 798 N.W.2d 690, 694 (S.D. 2011) (rejecting defense where contract for the sale of property was not wholly impossible of performance under South Dakota statutory law). South Dakota law provides, “A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of chapter 53-5 relating to the object of contracts, or which is repugnant to the nature of the interest created by the contract is void.” S.D. CODIFIED LAWS § 20-2-2. The referenced chapter 53-5 provides, “Where a contract has but a single object and such object is unlawful in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.” Id. § 53-5-3.

South Dakota courts have excused contractual performance where the unforeseen circumstance occurs to a specific crop supposed to be delivered under a contract on grounds of impossibility. See, e.g., McCaul-Webster Elevator Co. v. Steele Bros., 180 N.W.782, 783 (S.D. 1921) (excusing performance to deliver specific crop of corn when parties were mistaken about the quality grade of the corn); Unke v. Thorpe, 59 N.W.2d 419, 422 (S.D. 1953) (excusing performance on remainder of contract for delivery of specific crop of alfalfa when party, in good faith, delivered all of the alfalfa crop it had that met certain contemplated contract specifications).

The defense is not available where a party assumes the risk of its ability to perform. See Richland State Bank v. Household Credit Servs., Inc., 340 F. Supp. 2d 1051, 1057 (D.S.D. 2004) (rejecting defense for this reason). This remains true even if the party relies on a third party for performance. See id. (citing Groseth Int’l v. Tenneco, Inc., 410 N.W.2d 159, 167 (S.D. 1987) (“Even if the party relies on a third party for performance, the party has also undertaken the risk that the third party will not adequately perform, and cannot be discharged from the contract because of the third party’s nonperformance.”)).

B. Commercial frustration

South Dakota courts have also recognized the defense of commercial frustration stemming from the Restatement (Second) of Contracts § 265. See Groseth Int’l, 410 N.W.2d at 165.

The state’s highest court has explained that the first inquiry into this defense requires determining the principal purpose of the contract to ascertain whether the allegedly frustrating event destroys that purpose. See id. If the frustrating event was within the promisor’s control or due to the promisor’s fault, then the defense is unavailable. See id. (citing 18 Williston, Contracts § 1954 (1978)).
Similarly, the court must consider whether the frustration is substantial enough based on its degree of hardship. *Id.* "In order that contracts may be relied on with certainty, frustration is limited to cases of extreme hardship and must be substantial." *Id.* Economically burdensome or unattractive performance does not render a contract frustrated. *Id.* (citing, among other cases, *Neal-Coo опер Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974)). "The question is whether the equities, considered in the light of sound public policy, require placing the risk of disruption or complete destruction on the contract’s viability on one party or the other." *Id.* (citing *Lloyd v. Murphy*, 153 P.2d 47, 50 (Cal. 1944)).

Lastly, the court must also determine that the non-occurrence of the frustrating event was a basic assumption of the original contract. *Id.* (citing Uniform Commercial Code § 2-615). "This is based upon the theory of an implied term which, in the eyes of the law, the parties themselves would have regulated by agreement if the necessity had occurred to them." *Id.* at 166 (citing *Patch v. Solar Corp.*, 149 F.2d 558, 560 (7th Cir. 1945)).

In *Groseth International*, the South Dakota Supreme Court examined the defense of commercial frustration in detail when alleged as a defense by a manufacturer of farm equipment following that industry’s economic downturn. The court concluded that the contract’s dominant purpose was to create a franchise mechanism for the manufacturer to market its equipment. *Id.* (rejecting trial court’s conclusion that the primary purpose of agreement was profit given that reduced market share or economic losses by the manufacturer would not destroy the purpose for it to have a franchise network to sell and service its products). The court concluded that economic downturns were foreseeable. *Id.* at 167 (citing Restatement (Second) of Contracts § 261 cmt. b). Because the frustrating event—the manufacturer’s decision to sell off its division assets and withdraw from the market—was within the manufacturer’s control, it could not excuse performance based on commercial frustration. *Id.*

## III. UCC provisions regarding excused performance

### A. Demands for adequate assurances

South Dakota recognizes the UCC-based remedy of demanding adequate assurances from a counterparty when reasonable grounds about the counterparty’s ability to perform exist. S.D. CODIFIED LAWS § 57A-2-609. The purpose of this section is to avoid the necessity of one party guessing whether or not the other intends to perform. See *Cole v. Melvin*, 441 F. Supp. 193, 203 (D.S.D. 1977).

Whether a party has reasonable grounds for insecurity to demand assurances, whether a party has made a demand for assurances, and whether its counterparty’s response is adequate, are all generally questions of fact. See, e.g., *Atwood-Kellogg, Inc. v. Nickeson Farms*, 602 N.W.2d 749, 752–53 (S.D. 1999) (collecting cases reviewing whether a demand for adequate assurance must be in writing and concluding that genuine questions of fact remain as to whether the party demanded assurances correctly or whether the party merely was requesting information). But see *id.* at 754–55 (Gilbertson, J., dissenting) (believing sufficient evidence to conclude as a matter of law that party made adequate assurances demand sufficient to suspend performance until they assurances were received).

### B. Commercial impracticability


In *Groseth International*, the court, after rejecting the common law defense of frustration, also considered the defense of commercial impracticability. 410 N.W.2d at 167–68. As the court explained, "there may be excuse from performance where very greatly increased difficulty is caused by facts not only unanticipated, but inconsistent with the facts that the parties obviously assumed would likely continue to exist." *Id.* at 167.

The court distinguished the defense of commercial impracticability, which focuses on "occurrence which greatly increase the costs, difficulty, or risk of the party’s performance," from the defense of commercial frustration, which "focuses on a party’s severe disappointment caused by a frustration of his principle purpose in entering the contract." *Id.* The court concluded that there were open factual questions that required a jury for resolution, which made summary judgment on commercial impracticability inappropriate. *Id.* at 168.
Tennessee

Most Tennessee caselaw involving force majeure involves the application of common law force majeure rather than parties’ specific contractual provisions. Although parties can contract otherwise, Tennessee common law requires a force majeure event to be beyond the realm of human intervention, beyond the party’s control, and unforeseeable to excuse contractual performance.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability

II. Other common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions
   A. General requirements


1) “Any misadventure or casualty . . . when it happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention.

2) And, the event must be of such character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by the aid of any appliances which the situation of the party might reasonably require him to use.

Id.

Contracting parties, of course, are free to negotiate bespoke contractual force majeure provisions that apply to other situations by defining specific events. See, e.g., Bayader Fooder Trading, LLC v. Wright, 13-2856, 2014 WL 5369418, at *2 (W.D. Tenn. Oct. 21, 2014) (“A force majeure provision in a contract ‘defines the scope of unforeseeable events that might excuse nonperformance by a party.’”); Ingram Barge Co. v. Century Aluminum of W. Va., Inc., 2012 WL 3945529, at *6 (M.D. Tenn. Sept. 10, 2012) (explaining that force majeure provisions lacked specific exemptions for nonperformance based on economic conditions or the business decision to shut down operations).

B. Causation

Tennessee courts generally require a strict and direct causal connection between the party’s nonperformance and the alleged force majeure event. The threshold inquiry is whether the force majeure event renders performance impossible. See Bayader Fooder Trading, 2014 WL 5369418, at *2 (“To be successful in [force majeure], Defendants must satisfy all of the following . . . performance was impossible[].”)

The causal chain is critical, for an intervening human-caused event could preclude application of what otherwise could be a force majeure event under Tennessee law, depending on the language of the force majeure provisions. Welch v. FFE Transp. Servs., Inc., 3:13-CV-336, 2015 WL 3795917, at *3 (E.D. Tenn. June 18, 2015). For example, an intervening action by a party may proximately cause nonperformance even where an event that might ordinarily qualify as a force majeure event, such as flooding, may also be present. See Butts v. City of S. Fulton, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977). In such a case, the alleged force majeure event did not actually prevent the party’s performance.

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When a party claims that economic conditions consist of force majeure excusing performance, a party’s agreement will need to define specifically that such event is an event of force majeure. See, e.g., In re Millers Cove Energy Co., 62 F.3d 155, 158–59 (6th Cir. 1995) (chronicling other jurisdictions’ treatment of issue while applying Virginia law, and explaining, “Thus, if the Moores had wanted to escape the duty to mine because it was not profitable, the Moores should have included such a clause in the leases.”); Ingram Barge Co., 2012 WL 3150666, at *9 (explaining that parties’ force majeure provisions included acts of God and fires, explosions, and floods, but not changing economic conditions or the party’s business decision to shut down its factory).

C. Mitigation/beyond a party’s control

By definition, Tennessee law requires that a force majeure event be entirely outside the control of the party asserting force majeure. The event must be caused by the “exclusive operation” of forces “uncontrolled or influenced by the power of man and without human intervention.” Butts, 565 S.W.2d at 882. In Butts v. City of South Fulton, a seminal Tennessee force majeure case, the court rejected applying the doctrine even where heavy rains had triggered extensive property flooding, because the natural flow of the surface water was not completely outside of the defendant’s control, and because the defendant had performed construction work that had altered the flow of the water. Id. Thus, the flooding was not un influenced by the power of man, and the party could not rely on force majeure to excuse performance.

Further, under Tennessee law, for a defendant to successfully assert the defense of force majeure, the defendant must take aggressive, affirmative steps to overcome the impediment. See Bayader Fooder Trading, 2014 WL 5369418, at *2. Consider the Bayader Fooder Trading case, where a party alleged that drought and heavy rains delayed the delivery of a shipment of alfalfa hay to a hay-trader. Id at *1. The party argued that an act of God (the weather events) delayed or excused performance under the parties’ force majeure provision. The court rejected the argument because the party could have taken steps to mitigate the effects of the weather, including hiring more workers or leasing additional land to ensure a timely shipment under its supply contract. Id at *2.

Importantly, governmental decrees and regulations do not meet the force majeure standard, unless the contractual provisions state otherwise. See Am. Book Co., 2011 WL 11969, at *2 (holding that a government regulation does not excuse contract performance under force majeure because a “government regulation is not a ‘force of nature, uncontrolled or un influenced by the power of man and without human intervention’”).

Thus, in Tennessee, for force majeure to be successfully asserted as a defense, the event must be entirely outside the realm of human intervention—not merely outside the defendant’s control—and the defendant must have taken serious steps to avert its consequences.

D. Foreseeability

Tennessee courts also apply a strict test for foreseeability, requiring that the force majeure event be of such character that “it could not have been prevented or escaped from by any amount of foresight or prudence.” Butts, 565 S.W.2d at 882. Indeed, 160 years ago in Bryan v. Spurgin, 37 Tenn. 681 (1858), the Tennessee Supreme Court held that events that are “not among the probable contingencies which a man of ordinary prudence should have foreseen and provided for, the non-performance will be excused.” Id. at 685–86. Bryan further explained that a party will not be protected by events that it failed to foresee and expressly address in the contract: “if the performance becomes impossible by contingencies which should have been foreseen, and provided against in the contract, the party will not be excused; for it was his own folly that he did not, by his contract, exempt himself from responsibility in such contingencies.” Id.

Likewise, aberrant but not wholly unforeseeable events are not sufficient to give rise to the successful application of force majeure. For example, in Bayader Fooder Trading, the court reasoned that the hay supplier was not excused from delivering hay when the weather conditions, although not ideal, were not completely unforeseeable. Bayader Fooder Trading, 2014 WL 5369418, at *2. The court reached the same result in Teeple v. State Farm Ins. Co., 88-7-II, 1988 WL 39595, at *6 (Tenn. Ct. App. Apr. 27, 1988), where an accumulation of snow and ice in Tennessee, while not a daily event, was not an “act of God” sufficient to excuse contractual performance.

Other common law remedies

A. Impossibility

In addition to recognizing force majeure as a common law defense, Tennessee law recognizes the defense of impossibility to excuse nonperformance. N. Am. Capital Corp. v. McCants, 510 S.W.2d 901, 905 (Tenn. 1974).

Under the doctrine of impossibility, performance is excused if, "at the making of the contract, or thereafter became, impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss
involved, rather than that it is scientifically or actually impossible." *Id.* That is to say, successfully prevailing on the defense of impossibility does not require a showing of actual impossibility, just that an event arose at or after the time of contracting that made performance "impracticable" because of an "extreme" or "unreasonable" difficulty. *Id.*

Like force majeure, Tennessee courts will not apply the doctrine of impossibility when the events of impossibility are created by the non-performing party's own conduct or when the defendant could have taken steps to mitigate the event. *Dell'Aquila v. Head*, 545 Fed. App'x 439, 442 (6th Cir. 2013) ("A party is not relieved of liability for his nonperformance of a contract based upon the defense of impossibility of performance where the impossibility is caused by the party's own conduct or where the impossibility is caused by developments which the party could have prevented or avoided or remedied by appropriate corrective measures.").

The key inquiry is whether the event giving rise to the alleged "impossibility" was reasonably foreseeable when the parties executed the contract. *Hinchman v. City Water Co.*, 167 S.W.2d 986, 991 (Tenn. 1943) ("A man may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform. The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract."); see also *Gardner v. Gilreath*, CA No. 174, 1990 WL 130894, at *6 (Tenn. Ct. App. Sept. 13, 1990); *Silsbe v. Houston Levee Indus. Park, LLC*, 165 S.W.3d 260, 264–65 (Tenn. Ct. App. 2004). Where the impossibility is caused by the failure of the promisor to obtain required consent or affirmative action by a third party, the promisor will need to allocate this risk/condition in the contract; relying on a defense of impossibility in the event that condition does not occur will be unavailing. *See Allen v. Elliott Reynolds Motor Co.*, 230 S.W.2d 418, 423–24 (Tenn. Ct. App. 1950).

**B. Frustration of purpose**

To invoke frustration of purpose, a defendant must show that the commercial purpose of the performance was frustrated. That is, performance may be excused if "the risk of the frustrating event was not reasonably foreseeable and the value of counterperformance is totally or nearly totally destroyed..." *Williams v. Whitehead*, 854 S.W.2d 895, 897 (Tenn. Ct. App. 1993).

Tennessee's frustration of purpose doctrine is more flexible than force majeure. For example, while force majeure does not excuse performance because of the act of a governmental agency, frustration of purpose might.

In *North America Capital Corp. v. McCants*, a hopeful savings and loan entity was excused from a lease when a federal agency refused to grant it a charter. 510 S.W.2d at 905. The lease contemplated that the premises would be used exclusively as a bank, so when the government refused to grant the charter, the commercial purposes of the performance were considered frustrated. *See id.*

Like the other described defenses, frustration of purpose requires that a defendant take all available options to remedy the frustration and that the event be unforeseeable to excuse performance. *See Williams*, 854 S.W.2d at 897.

**III. UCC provisions regarding excused performance**

**A. Demands for adequate assurances**

Tennessee has adopted the UCC provisions regarding adequate assurances of performance. TENN. CODE ANN. § 47-2-609. If reasonable grounds for insecurity arise, a party has a right to demand "adequate assurance of due performance." *Id.* Until such assurance is given, the requesting party may suspend performance. *Id.* Failure by the counterparty to provide a response within 30 days or less is a repudiation of the contract. *Id.*; see also *Mold-Tech USA, LLC v. Holley Performance Prods., Inc.*, No. E2004-1938-COA-R3-CV, 2005 WL 2051289, at *7 (Tenn. Ct. App. Aug. 26, 2005) (explaining that in certain situations where a party's course of action establishes substantial impairment of the entire contract and not mere insecurity as to future performance, the counterparty can declare the contract breached as opposed to demanding adequate assurances).

Few published Tennessee cases interpret these provisions. One key case, *DLA, Inc. v. D.F. Shoffner Mech. Contractors, Inc.*, No. 1395, 1991 WL 73940, at *5 (Tenn. Ct. App. May 9, 1991), concluded that a demand for adequate assurances must be in writing. This reasoning aligns with the plain text of the Tennessee statute. *Id.* at *5. In the absence of a *written* demand for adequate assurance, there is no justification to suspend performance and repudiate the contract.

The Sixth Circuit considered demands for adequate assurances in a month-to-month commodities contract in *UMIC Government Sec., Inc. v. Pioneer Mortg. Co.*, 707 F.2d 251, 253–54 (6th Cir. 1983). The Sixth Circuit concluded that under Tennessee law,
each monthly contract should be treated separately for purposes of seeking adequate assurances. In other words, retaining funds under a May contract did not necessarily manifest an intent not to perform the June contract, meaning that there was no basis to demand adequate assurances for the June contract. \textit{Id.} at 254.

Finally, the right to request adequate assurances arises only in contracts for goods governed by the UCC. \textit{Madden Phillips Const., Inc. v. GGAT Dev. Corp.}, 315 S.W.3d 800, 813 (Tenn. Ct. App. 2009) ("We note that there is no established right to request for assurances in a contract for services in Tennessee.").

\textbf{B. Commercial impracticability}

Tennessee recognizes that in contracts for the sale of goods, a seller may be excused from scheduled delivery when delivery is “commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.” See Tenn. Code § 47-2-615 (cmt. 1).

The only Tennessee cases addressing commercial impracticability arise in the context of the delivery of crops. In that context, commercial impracticability only applies when a farmer is unable to deliver \textit{particular} crops from a specified field as a result of an unforeseeable event (for example, blight or flood). When the farmer merely agrees to the delivery of a quantity of a crop, an unforeseeable event impacting the farmer’s operations will not give rise to a defense of commercial impracticability. \textit{See Ralston Purina Co. v. McNabb}, 381 F. Supp. 181, 182 (W.D. Tenn. 1974); \textit{Bunge Corp. v. Miller}, 381 F. Supp. 176, 180 (W.D. Tenn. 1974).

Further, the seller must “seasonably” notify the buyer of the delay. Tenn. Code § 47-2-615(c). Failure to give notice prohibits the seller from relying on the commercially impracticable defense. \textit{See Bunge Corp.}, 381 F. Supp. at 180.

When a seller is able to fulfill its supply obligations only partially among customers, the seller must allocate the supply in a “fair and reasonable” manner where performance is rendered commercially impracticable. \textit{See, e.g., Cecil Corley Motor Co. v. Gen. Motors Corp.}, 380 F. Supp. 819, 840 (M.D. Tenn. 1974) (applying Michigan law, but explaining that result would be same under Tennessee law regarding commercial impracticability under the UCC, and finding evidence sufficient to support that car manufacturer allocated short supply in a fair and reasonable manner).
Texas

In Texas, the parties’ specific contractual language will be even more critical than in most jurisdictions because courts refrain from reading common law concepts into the parties’ provisions. For example, a force majeure event only needs to be beyond the control of the declaring party if this requirement is contained in the parties’ agreement. Similarly, for specifically listed force majeure events, the force majeure provision can be enforced even if that event was foreseeable at the time of contracting. Texas courts will look to the common law only to fill in gaps where the parties’ provision is not clear. For example, an alleged event of force majeure will need to be unforeseeable at the time of contracting if relying on generalized catch-all language to cover the event.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability
   E. Notice

II. Common law remedies
    A. Impossibility/Impracticability

III. UCC provisions regarding excused performance
    A. Demands for adequate assurances
    B. Commercial impracticability
    C. Substituted performance

I. Contractual force majeure provisions

A. General requirements

“Force majeure” describes a particular type of event that may excuse contractual performance. See Perlman v. Pioneer Ltd. P’ship, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990). Generally, an “act of God” or similar unforeseeable disruption “does not relieve the parties of their obligations unless the parties expressly provide otherwise.” See GT & MC, Inc. v. Texas City Ref., Inc., 822 S.W.2d 252, 259 (Tex. App.—Houston [1st Dist.] 1991, writ denied); Metrocon Constr. Co. v. Gregory Constr. Co., 663 S.W.2d 460, 462 (Tex. App.—Dallas 1983, writ ref’d n.r.e.).

Enforcing a force majeure provision is dependent on how the contract defines force majeure events and whether the alleged force majeure event fits within the applicable language. The clause’s “scope and application, for the most part, is utterly dependent upon the terms of the contract in which it appears.” See Sun Operating Ltd. P’ship v. Holt, 984 S.W.2d 277, 283 (Tex. App—Amarillo 1998, pet. denied). “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. at 283. In Texas, parties are “at liberty to define force majeure in whatever manner they desire.” See Atl. Richfield Co. v. ANR Pipeline Co., 768 S.W.2d 777, 781 (Tex. App.—Houston [14th Dist.] 1989, no writ).


The primary focus in interpreting contractual force majeure provisions is the parties’ intent. See Zurich Am. Ins. Co. v. Hunt Petrol. (AEC), Inc., 157 S.W.3d 462, 465 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Texas courts must examine the contract as a whole to harmonize and give effect to all of its provisions so that none are rendered meaningless. See id. Courts look at how a reasonable person would have used and understood the language, by considering the

When the alleged force majeure event is not specifically listed in the clause and the force majeure event is alleged to fall within the general terms of a contract’s catch-all provision, Texas courts look to the events enumerated in the clause and apply common-law notions of force majeure, including unforeseeability, to “fill the gaps.” See TEC Oimos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 181 (Tex. App.—Houston [1st Dist.] 2018, review denied Aug. 30, 2019); see also R & B Falcon Corp. v. Am. Expl. Co., 154 F. Supp. 2d 969, 974–75 (S.D. Tex. 2001) (finding seabed anomaly or unknown mechanical problem that caused damage to offshore drilling rig to be of a distinctly different character than listed events in force majeure clause and thus party’s nonperformance not excused).

B. Causation
A party claiming force majeure bears the burden of demonstrating that the alleged force majeure event prevents its nonperformance. See Matador Drilling Co. v. Post, 662 F.2d 1190, 1198 (5th Cir. 1981). Consider Hydrocarbon Management v. Tracker Exploration, where the contract contained the following force majeure clause:

Should lessee be prevented from complying with any express or implied covenant of this lease, from conducting drilling or reworking operations or from producing oil or gas...by reason of scarcity of, or inability to obtain or use transportation, equipment or material, or by reason of any Federal or state law or any order, rule or regulation of governmental authority asserting jurisdiction or otherwise by operation of force majeure (which term includes any other similar or dissimilar cause, occurrence, or circumstance not within the reasonable control of lessee), then while so prevented lessee’s...need to conduct drilling or reworking operations or to produce oil or gas shall be suspended and this lease shall remain in force so long as lessee is so prevented.

The court explained that the Railroad Commission previously had given the company the opportunity to avoid a shut-in order by limiting production, but the company failed to comply with the Railroad Commission’s request, which made the company’s attempt to rely on force majeure to excuse performance based on the government order unsuccessful. Id.; see also Atkinson Gas Co. v. Albrecht, 878 S.W.2d 236, 241 (Tex. App.—Corpus Christi 1994, writ denied) (holding Railroad Commission severance order not a force majeure event because issued for lessee’s failure to timely file production reports); Schroeder v. Snoga, No. 04-96-489-CV, 1997 WL 428472, at *4 (Tex. App.—San Antonio 1997, no writ) (reaching similar conclusion because Railroad Commission order was based on lessee’s unidentified regulatory violations); Red Riv. Res. Inc. v. Wickford, Inc., 443 B.R. 74, 80–81 (E.D. Tex. 2010). Cf. Frost Nat’l Bank v. Matthews, 713 S.W.2d 365, 368 (Tex. App.—Texarkana 1986, writ ref’d n.r.e.) (finding Railroad Commission order was a force majeure event based on conduct of prior operator).

Likewise, the Fifth Circuit “require[s] more than the mere possibility or unsupported conclusion of the existence of hindrance by government regulations to relieve [a party] of [its] obligations under the contract—an actual, material hindrance must occur before performance is excused.” See Perlman, 918 F.2d at 1249. Consistent with the force majeure requirement that nonperformance be caused by an event outside a party’s control, “force majeure is not applicable to hypothetical, possible events which may affect a party’s performance in the future.” Sherwin Alumina L.P. v. AluChem, Inc., 512 F. Supp. 2d 957, 969 (S.D. Tex. 2007). Rather, the force majeure event must have caused the party’s nonperformance to be actionable. See, e.g., WC 1899 McKinney Ave., LLC v. STK Dallas, LLC, 380 F. Supp. 3d 595, 604 (W.D. Tex. 2019).

C. Mitigation/beyond a party’s control
In many jurisdictions, courts require a force majeure event to be beyond a party’s reasonable control irrespective of the specific contractual language at issue. See, e.g., Nissho-Iwai Co., Ltd. v. Occidental

861 S.W.2d 427, 435–36 (Tex. App.—Amarillo 1993, no writ). The Texas Railroad Commission required the company to shut in its well. Ordinarily, this “rule or regulation of governmental authority” would constitute a force majeure event under the parties’ agreement, but the company’s attempt to invoke the “governmental authority” portion of the force majeure clause was rejected because the court concluded that the Railroad Commission’s action requiring the well to be shut-in was not an event beyond [the company’s] reasonable control. Id. at 436–37.
Texas courts’ reluctance to rewrite contracts in a manner the parties never intended is highlighted in *Texas Power v. Amerada Hess Corporation*, No. 14–98–cv–00346, 1999 WL 605550, at *1 (Tex. App.—Houston [14th Dist.] Aug. 12, 1999, no pet.) (not designated for publication). Amerada entered into a base contract with Texas Power Corporation (TPC) for the sale of natural gas. The contract did not require TPC to buy gas from Amerada, but if TPC requested or confirmed a specific order for gas, Amerada was obliged to supply the gas at the price, quantity, and delivery point agreed to in the base contract. *Id.* When abnormally cold weather temporarily diminished the gas supply, Amerada was not able to meet its obligations to all of its customers over a four-day period. While the freeze only slightly affected deliveries to its higher-ranking customers, Amerada could deliver only 77% of its promised supply to TPC on the first day of the freeze and no gas as the freeze continued. TPC opted to cover the shortage by withdrawing gas from its own inventory. *Id.* at *1–2.

In response to Amerada’s next month’s invoice for gas delivered in the month impacted by the weather, TPC deducted $186,447.75 from the invoice as an offset, calculated by subtracting the contract price from the market value of the more expensive gas it bought from its inventory to cover the shortage. Amerada objected and claimed any breach was excused under the parties’ contractual force majeure provisions. *Id.*

Although TPC acknowledged that the cold weather’s freezing of the gas wells constituted a force majeure event under the terms of the contract, TPC argued that Amerada could have overcome its effects and met its contract commitments by purchasing additional gas on the spot market, where the price was approximately five times higher than the agreed-upon contractual price. Rejecting TPC’s argument,
the court explained, “Were we to adopt TPC’s interpretation of the contract, Amerada’s obligation would never be suspended; the force majeure clause would be meaningless. So long as gas could be procured anywhere in the world, at any price, Amerada would be obliged to meet its contractual obligations.” Id. at *3. But see Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co., 118 S.W.3d 60, 68 (Tex. App.—Houston [14th Dist. 2003, pet. denied) (“[T]he party’s assumption about the source of supply—and [even] the other party’s knowledge of that assumption—is not enough to excuse performance if alternative sources of supply are still available to fulfill the contract.”); Ergon-West Va., 706 F.3d at 425–26 (finding ambiguous whether contract language calling for “exercise of due diligence such party is unable to prevent or overcome” to require seller to purchase replacement gas on the spot market and citing Tejas Power and Tractebel for support that both party’s arguments were reasonable).

The four corners of the contract and the specific language of the force majeure clauses are critical in any jurisdiction, but even more so in Texas than most. Texas courts are not likely to impose common law rules or principles of equity to stretch the provisions beyond their plain meaning. Only where force majeure provisions leave gaps will Texas courts look to common law principles for guidance. See TEC Olmos, 555 S.W.3d at 181 (citing Sun Operating, 984 S.W.2d at 283).

D. Foreseeability

Generally, a force majeure event must be unforeseeable at the time of contracting to excuse performance. The First Court of Appeals of Texas, in a divided 2-1 decision, confronted this issue in TEC Olmos v. ConocoPhillips, 555 S.W.3d at 181. There, Olmos entered into a farmout agreement with ConocoPhillips to test-drill land leased by ConocoPhillips in search of oil and gas. The parties’ force majeure provision listed several specific events that would suspend the drilling deadline and a “catch-all” provision for events beyond the reasonable control of the party affected. After the parties executed the contract, the price of oil dropped significantly. As a result, Olmos lost its financing for the projects and informed ConocoPhillips it was unable to meet the drilling deadline. In the subsequent litigation, ConocoPhillips argued that the force majeure provision was inapplicable and not available unless the triggering event (1) is unforeseeable and (2) does not involve a mere economic hardship. Id. at 180.

On appeal, the First Court of Appeals concluded that a change in market conditions could not be a force majeure event given that the parties’ contract did not specifically include this event in the definition of force majeure events. The court also refused to find that the catch-all provision covered changes in market conditions because, under the doctrine of ejusdem generis (meaning the latter must be limited to things like the former), a decline in oil and gas prices was not the sort of event covered by the parties’ force majeure clause. Id. at 182–83. Specifically, the court explained that the contract’s specifically defined events involved governmental actions, labor disputes, and natural or man-made disasters like fires, floods, and storms, and reasoned that because “[t]hese events, while perhaps foreseeable, occur with such irregularity that planning for them and allocating the risks associated with such would be difficult absent a force majeure clause.” Id. at 186.

In contrast, the court concluded that economic downturns and changes in market conditions are sufficiently foreseeable:

Changes in commodities markets and the resulting ability of a party to obtain financing occur regularly and could easily be dealt with in a specific contractual allocation of risks. Indeed, here, Olmos was aware that its ability to perform would be contingent on obtaining financing, but it did not condition its performance on such. In fact, the parties agreed to the contrary that Olmos would bear the risks associated with the drilling of the well, including, presumably, its ability to obtain financing.

Id. The TEC Olmos court reasoned that the uncertainty of future market prices is often the motivation for parties to enter into long-term contracts to fix the price and avoid the risk of price fluctuation. Therefore, “when parties specify certain force majeure events, there is no need to show that the occurrence of such an event was foreseeable.” TEC Olmos, 555 S.W.3d at 183 (emphasis in original). But when parties fail to include specificity in their force majeure provisions in defining the specifically contemplated event on which a party seeks to base its force majeure defense, courts will apply common law notions of force majeure, including foreseeability, to fill the gaps. See id. at 181–83.

The court explained the difference of opinion in whether unforeseeability is required for a specifically listed force majeure event in the parties’ agreement. Id. at 182 (comparing Gulf Oil Corp. v. FERC, 706 F.2d 444, 454 (3d Cir. 1983) (requiring unforeseeability even for specifically listed events) with E. Air Lines v. McDonnell Douglas Corp., 532 F.2d 957, 990–92 (5th Cir. 1976) (party not limited to unforeseeable circumstances where event is specifically listed by parties in force majeure provision)).

In TEC Olmos, because a downtown in market conditions—found foreseeable by the court—was
not specifically listed within the parties’ force majeure clause, the court had to determine whether, under Texas law, a catch-all provision includes foreseeable events. See id. The court concluded that it does not.¹

¹ Id. at 182–83 (citing Valero Transmission Co. v. Mitchell Energy Co., 743 S.W.2d 658, 660 (Tex. App.—Houston [1st Dist.] 1987, no writ) (finding that because change in market conditions was foreseeable, it did not trigger force majeure provisions)). The court explained, “To dispense with the unforeseeability requirement in the context of a general ‘catch-all’ provision would, in our opinion, render the clause meaningless because 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 contract.” Id. at 184–85 (“We will not read the ‘catch-all’ provision of the force majeure clause so broadly that it relieves [the party] of liability because of a circumstance that it was aware of, but took no steps to specifically address in the contract.”).

The TEC Olmos reasoning is consistent with Kodiak 1981 Drilling Partnership v. Delhi Gas Pipeline, Corp., 736 S.W.2d 715, 716, 720–21 (Tex. App.—San Antonio 1987, writ ref’d n.r.e.), which held that there was no unforeseeability requirement when a specified force majeure condition occurred that excused performance. Id. at 183 (explaining Kodiak reasoning). In Kodiak, a natural gas producer entered into a 10-year supply agreement to a pipeline company. The parties’ contract provided that the pipeline must take 80% of the producer’s daily available gas, and if at the end of the year, the pipeline had not taken 80% of the gas, the pipeline had to pay the producer the delta to reach 80%, subtracting any deficiencies caused by force majeure events. Kodiak, 736 S.W.2d at 716–17.

In May 1982, the gas market suffered a severe economic downturn and the pipeline stopped buying gas from the producer on the basis of force majeure. Critically, the parties’ agreement specifically listed “the partial or entire failure of the gas supply or market” as a force majeure event. Accordingly, the San Antonio Court of Appeals, affirming the district court’s ruling, held that the pipeline did not breach the agreement and that its failure to perform was excused by the agreement’s force majeure provision expressly covering this event. Id. at 721. Because the event was a specifically listed event, the court—agreeing with Eastern Air Lines—did not require unforeseeability.

For specifically listed force majeure events, Texas courts do not require the event to be unforeseeable. But for events that would arguably be covered by a force majeure clause’s catch-all language, the event must not have been foreseeable at the time the parties contracted.

E. Notice

There are no set Texas law requirements for the timing of declaring force majeure, but the parties’ specific contractual language often will contain such a requirement. See, e.g., Allegiance Hillview, L.P. v. Range Tex. Prod., LLC, 347 S.W.3d 855, 866 (Tex. App.—Fort Worth 2011) (finding evidence sufficient to support trial court’s conclusion that party provided timely and sufficient notice of an alleged event of force majeure where contract provided such requirements).

Where material, failure to abide by applicable notice provisions can preclude a party’s force majeure argument. See, e.g., Matador Drilling Co., 662 F.2d at 1198 (explaining that because no evidence that party notified counterparty that alleged force majeure condition existed, party did not abide by contractual notice requirement and thus relief pursuant to force majeure provisions was unavailable); Advanced Seismic Tech., Inc. v. M/V Fortitude, 326 F. Supp. 3d 330, 336–37 (S.D. Tex. 2018) (preventing party from relying on force majeure clause where failure to provide immediate notice of alleged force majeure event to counterparty). But see Rowan Cos., Inc. v. Transco Expl. Co., 679 S.W.2d 660, 665–66 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.) (affirming ruling excluding nonperformance based on force majeure from rig blowout, and suggesting that lack of prompt notice of force majeure event, where not a condition precedent to invoking relief, would have to specifically harm the counterparty to matter).

II. Common law remedies

A. Impossibility/impracticability

While contractual terms control the application of force majeure provisions, the common law remedies of impossibility, impracticability, and frustration of purpose fill the gap where no force majeure clause exists. See Tractebel Energy Mktg., 118 S.W.3d at 68.

In Texas, no functional distinctions exist among the doctrines of impossibility and impracticability, or frustration of purpose. See Ramirez Co. v. Hous. Auth. of City of Houston, 777 S.W.2d 167, 175 (Tex. App.—Houston [14th Dist.] 1989, no writ); see also Anadarko Petroleum Corp. v. Noble Drilling (US), LLC, No. CV H-10–2185, 2012 WL 13040279, at *19 (S.D. Tex. May 3, 2012) (“It has long been recognized that the defense of impossibility is synonymous with the defense of impracticability.”).
Because courts cannot simply rewrite the parties’ contract, the defense of impossibility/impracticability is limited to circumstances in which both parties held a basic assumption about the contract that proves untrue. Underlying this presumption is the view that the promisor can always protect itself against foreseeable events by means of an express provision in the agreement. TEC Olmos, 555 S.W.3d at 183; see also Senter v. Dixie Motor Coach Corp., 67 S.W.2d 345, 347 (Tex. Civ. App.—Dallas 1933) (excusing performance of lease agreement when building subject to lease was damaged by fire), aff’d, 97 S.W.2d 945 (Comm’n App. 1936). “Thus, impossibility or impracticality of performance due to the unforeseen failure of a presupposed condition may excuse” a breach of contract. See Tejas Power, 1999 WL 605550 at *2.

Texas courts will excuse performance only when the basis for nonperformance is unanticipated and not contemplated or guarded against in the contract. See United Sales Co. v. Curtis Peanut Co., 302 S.W.2d 763, 766 (Tex. Civ. App.—Dallas 1957, writ ref’d n.r.e.). In Texas cases applying these doctrines, the “basic assumption” of the parties is usually relatively obvious. In Centex Corp v. Dalton, for example, the Supreme Court of Texas excused performance of a contract to pay a finder’s fee when an agency ruling made it illegal to pay such fees. 840 S.W.2d 952, 954 (Tex. 1992). Or, for example, in Erickson v. Rocco, the 14th District Court of Appeals held that a duty to keep insurance on a house was extinguished when the house burned to the ground and thus had no insurable value. 433 S.W.2d 746, 751 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref’d n.r.e.).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

The Uniform Commercial Code (UCC), adopted in part by the Texas Business and Commerce Code, provides additional remedies for contractual nonperformance in sales of goods contexts. UCC Section 2.609 provides that when “reasonable grounds for insecurity” arise with respect to a counterparty’s contractual performance, a party may demand adequate assurance of the counterparty’s due performance. TEX. BUS. & COM. CODE ANN. § 2.609; Bitter Creek Water Supply Corp. v. Sims, No. 11-17-00080-CV, 2019 WL 2710039, at *7 (Tex. App.—Eastland June 28, 2019) (explaining that party must show it made a written demand for adequate assurances to justify suspending performance). Until such assurances are received, the demanding party is entitled to suspend any performance. See Cook Composites, Inc. v. Westlake Styrene Corp., 15 S.W.3d 124, 140 (Tex. App.—Houston [14th Dist.] 2000, pet. dism’d). If the party receiving the demand fails to provide adequate assurance within 30 days, the party is deemed to have repudiated the contract, which excuses the demanding party from performing. Id.

Consider Cook Composites v. Westlake Styrene, where Cook Composites (CCP) and Westlake entered into a three-year contract for the purchase and sale of styrene monomer, a basic building block of plastic. Under the parties’ contract, CCP agreed to buy a set quantity of styrene monomer from Westlake at an agreed formula price in equal monthly installments. During the contract period, Westlake lowered its price twice at CCP’s request to match Westlake’s competitors’ pricing. When CCP requested a third reduction, Westlake requested CCP provide written evidence of the terms and conditions of the competing pricing. When CCP refused, Westlake refused to match its competitor’s price. CCP then refused to pay Westlake the contract price and Westlake sued for breach of contract. To mitigate damages, Westlake sold the styrene monomer CCP had agreed to purchase on the spot market at prices well below the price specified in the parties’ contract. At trial, the court found in favor of Westlake and awarded damages for the difference between the contract price and the spot-market sales price, plus pre-judgment and post-judgment interest and attorneys’ fees. Id. at 138–40.

On appeal, CCP argued that the letters sent to Westlake asking if Westlake intended to match its competitors’ pricing constituted requests for adequate assurance under Section 2.609, and that Westlake’s failure to respond to those letters constituted a repudiation of the contract, which released CCP from its contractual obligations to purchase any additional product from Westlake. The appellate court rejected CCP’s argument, noting: (1) CCP waived the UCC argument by failing to raise anticipatory repudiation as a defense in its pleadings; (2) even if it had raised the defense in its pleadings, anticipatory repudiation traditionally occurs “when the promisor [sic] unequivocally disavows any intention to perform in the future,” which Westlake did not do; (3) the party invoking Section 2.609 “must have reasonable grounds for insecurity,” which CCP did not have, especially because CCP failed to provide the terms and conditions of the price-match as required under the contract; and (4) only an “aggrieved party” (a party that is entitled to resort to a remedy) is entitled to invoke Section 2.609. See id. at 138–41. Because CCP “failed to present the necessary documents, it was in no position to assert a breach by Westlake or to resort to a remedy.” Id. at 140. Thus, whether a party has
“reasonable grounds” to question the other party’s willingness or ability to perform is critical when considering the applicability of the UCC’s right to demand adequate assurances.

B. Commercial impracticability

Section 2.615 of the UCC provides that a seller may be excused from performance due to an unforeseen, supervening circumstance not within the contemplation of the parties at the time of contracting. TEX. BUS. & COM. CODE ANN. § 2.615, cmt. 1.

In WesTech Engineering v. Clearwater Constructors, the Austin Court of Appeals considered whether, under this provision of the UCC, WesTech was excused from complying with its agreement with Clearwater to provide wastewater-treatment equipment for the City of Austin. WesTech Eng’g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190 (Tex. App.—Austin 1995, no writ) (citing TEX. BUS. & COM. CODE ANN. § 2.615, cmt. 4). After the parties executed the contract, the City’s engineering firm determined that WesTech’s equipment would not meet the specifications set forth in the City’s contract with Clearwater. Clearwater then informed WesTech of its decision to seek an alternate source for the equipment and informed WesTech that it would be liable for Clearwater’s increased procurement costs, if any. After Clearwater prevailed at trial, WesTech contended on appeal that it should be excused from performance because it could not have anticipated that the City’s engineering firm would interpret the contract specifications so strictly. The appellate court, however, held that UCC Section 2.615 provides several examples of events that may excuse performance (such as a severe shortage of raw materials or supplies due to war, embargo, crop failure or unforeseen shutdown of major sources of supply) and that the standard contractual arrangement of submitting specifications to a project engineer is not similar. Id. at 202. The court further explained that the commercial impracticability defense does not apply when the contingency in question is “sufficiently foreshadowed at the time of contracting.” Id. The UCC commercial impracticability defense requires the excusing event to have been unforeseeable.

When a seller has the ability to partially perform some, but not all, of its supply obligations, it must allocate its product in a “fair and reasonable” manner. TEX. BUS. & COM. CODE ANN. § 2.615(2) & cmt. 11. When a party fails to make a fair and reasonable allocation, it loses the ability to invoke the benefits of the commercial impracticability defense. See Cosden Oil & Chem. Co. v. Helm, 736 F.2d 1064, 1077–78 (5th Cir. 1984). In Cosden Oil, the Fifth Circuit concluded that the district court erred by allowing the jury to determine the amount of polystyrene the seller should have allocated given the record showed the seller sold the same product to other customers during the disputed period, and had inventory and production capability sufficient to meet the buyer’s orders. Id. at 1078 (indicating court should have awarded the buyer damages for the entire amount of its orders). The court explained,

We decline to accept [the seller’s] argument that its liability for undelivered polystyrene should not extend beyond the quantity that it should have fairly and reasonably allocated. Otherwise, sellers whose partial performance has been rendered impracticable would have no incentive to treat all of its customers equitably. Were we to adopt [the seller’s] suggested rule, a seller encountering unexpected problems could favor certain buyers at the expense of other customers, confident that any liability it incurred would be limited by the reasonable amount it should have allocated.

Id. The court agreed that the seller’s apportionment was not fair and reasonable, and thus the defense of commercial impracticability was not available to the seller. Id.

C. Substituted performance

Lastly, in cases where the parties’ contract provides no relief for changed circumstances, Section 2.614(a) of the UCC provides that a commercially reasonable substitute, if available, must be offered and accepted, when, without fault of either party: (1) the agreed berthing, loading or unloading facilities fail; or (2) an agreed type of carrier becomes unavailable; or (3) the agreed manner of delivery otherwise becomes commercially impracticable. TEX. BUS. & COM. CODE ANN. § 2.614(a).

The Fifth Circuit considered the substitute performance requirement in Jon-T Chemicals v. Freeport Chemical, where the parties had entered into a written contract whereby the buyer agreed to buy between 10,000 and 14,000 short tons of phosphoric acid. 704 F.2d 1412, 1417 (5th Cir. 1983). When record-breaking cold weather conditions crippled commerce in the Chicago area in the winter of 1979, a railroad embargoed shipments from the seller and rerouted traffic to help alleviate railcar congestion. Id. at 1414. The buyer contended the jury should have been instructed that the seller was required to tender delivery of the phosphoric acid by any commercially reasonable substitute, including by truck, for the agreed-upon type of carrier with the railroad unavailable.
The Fifth Circuit rejected the buyer’s argument, explaining that “[t]he sales agreement between [the parties] expressly provided that delivery of the phosphoric acid was to be made by rail unless otherwise agreed.” *Id.* at 1415. This language effectively took the transaction outside the UCC given that although the argument may “have merit were there no contract between the parties relating to the manner of delivery and the absence of such an agreement created a vacuum or an apparent ambiguity . . . the parties’ agreement to deliver the acid by rail unless otherwise agreed does not create a gap for the relevant provisions of the [UCC] to fill.” *Id.* at 1416 (“A contract which speaks so plainly about the duties and obligations of the parties upon the happening of identified events can hardly be interpreted to mean something totally different than what is provided by its express terms.”). The UCC provision would apply only where necessary to fill the parties’ contractual gaps. See *Va. Power Energy Mktg.*, 297 S.W.3d at 402–04 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (rejecting need to use Section 2.614 because no gap needed filling where contract specifically contemplated relief from making delivery if a force majeure event, like a hurricane, prevented performance because of “breakage or accident or necessity of repairs to . . . lines of pipe,” which was the case).
Utah

Few cases have resolved force majeure disputes under Utah law. The state recognizes impossibility, construed as impracticability, and frustration of purpose as common law defenses. The Utah Court of Appeals has suggested that the key to the common law defenses is not whether the parties could have foreseen the supervening event, but whether the parties did, in fact, foresee it and assumed the risk of its occurrence in their contract.

The key cases are broken down as follows:

I. Contractual force majeure provisions
II. Common law remedies
III. UCC provisions regarding excused performance

I. Contractual force majeure provisions

Courts applying Utah law have had limited exposure to disputes regarding force majeure provisions, but several cases have referenced a willingness to interpret them as the parties intended. See, e.g., US Magnesium, LLC v. ATI Titanium, LLC, No. 2:16-cv-1158, 2017 WL 913596, at *1 (D. Utah Mar. 7, 2017) (referencing parties' economic force majeure clause that allowed for party to suspend performance based on certain, defined economic factors); Lone Mtn. Prod. Co. v. Nat. Gas Pipeline Co., 710 F. Supp. 305, 308 (D. Utah 1989) (referencing party's earlier argument that the force majeure provision excused performance under a take-or-pay gas contract that the party later abandoned); DeMarco v. LaPay, No. 2:09-cv-190, 2012 WL 3597540, at *10 (D. Utah Aug. 20, 2012) (finding force majeure provision did not make two-year obligation to build illusory given it was limited in scope to only those things beyond control of developer).

In Desert Power, LP v. Public Service Commission, a Utah appellate court considered the Public Service Commission's determination that a company could not be excused from performance of a power purchase contract based on a force majeure provision. 173 P.3d 218, 220–21 (Utah Ct. App. 2007). The company claimed that its counterparty's decision to redesign an interconnection and the ensuing delays constituted an event of force majeure excusing it from meeting certain deadlines. Id. The court determined that the Commission's decision was not erroneous given the factual findings that the company had made certain decisions and taken actions that contributed to its difficulties. Id. at 222 ("The Commission's factual determination that [the company's] own miscalculations, decisions, and actions affected timelines and caused delays precludes [the company] from qualifying for relief.").

The court found that the reason for nonperformance was not beyond the reasonable control of the company. Id. ("Without establishing those factual conditions, the event cannot be considered an event of force majeure."); see also Aquila, Inc. v. C.W. Mining, No. 2:05-cv-555, 2007 WL 9643101, at *4–5 (D. Utah Oct. 30, 2007), aff'd, 545 F.3d 1258, 1265 (10th Cir. 2008) (concluding party could not rely on force majeure provision where failure to perform caused by various geological problems rather than the asserted labor dispute; this case applies Missouri law and is discussed in greater detail within the Missouri section of this guide).

II. Common law remedies

A. Impossibility

Under the contractual defense of impossibility, an obligation is discharged if an unforeseen event occurs after formation of the contract and without fault of the obligated party, which event makes performance

The Utah Supreme Court first discussed the defense in 1900: “Where the contract is do to acts which can performed, nothing but the act of God or the public enemy, or the interdiction of the law as a direct and sole cause of the failure, will excuse the performance. This principle is elementary.” McKay v. Barnett, 60 P. 1100, 1102 (Utah 1900). The court essentially described common law force majeure. Over time, the doctrine evolved into one of impracticability as opposed to strict impossibility. See Bitzes v. Sunset Oaks, Inc., 649 P.2d 66, 68–69 (Utah 1982) (chronicling development of defense).

Utah courts have excused performance based on impossibility in certain occasions. See W. Props., 776 P.2d at 658–59 (excusing performance where failure of city to approve development of land was not sufficiently foreseeable by parties at time of contracting). The Utah Court of Appeals has explained that even though an event may be foreseeable, “the critical fact is not whether the event could have been foreseen, but rather, whether the parties actually did foresee it and provide accordingly in their contract.” Id. at 658 n.3.

The party seeking to excuse performance bears the burden of establishing the defense of impossibility. See Holmgren, 582 P.2d at 861 (rejecting defense where party failed to produce sufficient evidence to meet burden).

Utah courts have rejected attempts to apply the impossibility defense in broader circumstances than excusing performance, including a party’s attempt to use the defense to equitably adjust a contract price due to an unforeseen event without a modification of the contract by the parties. See Kilgore Pavement Maint., LLC v. West Jordan City, 257 P.3d 460, 463 (Utah Ct. App. 2011).

B. Frustration of purpose

Utah also recognizes frustration of purpose as a defense to nonperformance. See Castagno v. Church, 552 P.2d 1282, 1284 (Utah 1976) (recognizing but rejecting defense where party knew at time of contract that there were no existing water rights to well); see also Bitzes, 649 P.2d at 69–70 (rejecting defense where real property was still available for sale and could be fairly identified such that changes voluntarily made in plat map do not frustrate contract’s purpose).

It differs from the defense of impossibility “only in that performance of the promise, rather than being impossible or impracticable, is instead pointless.” W. Props., 776 P.2d at 659 (finding performance also excused by frustration of purpose where there was no point in leasing land once its development became impossible); see also Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301, 305 (Utah 1975) (finding contract for a specifically designed house in view of a valley frustrated where zoning restrictions, regulations, and building restrictions prevented it).

When performance is excused by impossibility or frustration of purpose, the parties must bear their own losses, but neither may profit at the expense of the other. See Quagliana, 538 P.2d at 307.

III. UCC provisions regarding excused performance

A. Demands for adequate assurances

Utah law recognizes the UCC-based right to demand adequate assurances from a counterparty based on reasonable grounds for insecurity about the counterparty’s ability to perform. UTAH CODE ANN. § 70A-2-609; see Power Sys. & Controls v. Keith’s Elec. Constr. Co., 765 P.2d 5, 11 n.4 (explaining that where a buyer has become uncertain about seller’s duty to perform, buyer should not breach the contract, but demand adequate assurances in writing of due performance pursuant to statute).

B. Commercial impracticability


Cost increases alone, even if significant, do not render a contract impracticable. See Bernina Distrib., Inc. v. Bernina Sewing Mach. Co., 646 F.2d 434, 439 (10th Cir. 1981) (construing Utah law and determining that ruling did not make contract impracticable where parties contemplated possibility of currency fluctuations).
I. Contractual force majeure provisions

A. General requirements

Courts applying Vermont law have had few occasions to resolve issues related to enforceability of force majeure provisions. The burden of proving that contractual performance is excused by force majeure rests with the party invoking the defense. See In re Bushnell, 273 B.R. 359, 364 (Bankr. D. Vt. 2001) (citing R & B Falcon Corp. v. Am. Expl. Co., 154 F. Supp. 2d 969, 973 (S.D. Tex. 2001)). The alleged force majeure event must bear a causal relationship with the non-performing party’s failure to perform. See id. at 364–65 (finding no nexus between events of September 11, 2001 and claimant’s counsel’s failure to act timely).

In Capital City Gas Co. v. Phillips Petroleum Co., the Second Circuit, apparently applying Vermont law, considered a contract for the purchase of propane gas between certain specified maximum and minimum quantities per month at prices determined by prevailing market rates. 373 F.2d 128, 129 (2d Cir. 1967). The contract contained a force majeure provision that provided, “No failure or omission by Seller in the performance of any obligation of this contract shall be deemed a breach of this contract . . . if the same shall arise from any cause or causes beyond Seller’s control, including but not restricted to . . . unavailability of liquefied petroleum gas at the source of supply from which deliveries are normally made hereunder.” Id. at 129–30.

The seller invoked the clause to indicate it was terminating additional sales under the contract because its source of supply, from a refinery in Delaware City, Delaware, was no longer available. Id. at 130. The district court had stated that the failure to designate a specific source of supply in the agreement undermined the seller’s argument, but the Second Circuit said this was not necessarily the case. Id. at 132. The court indicated the seller could establish that as long as the source was the usual, customary, or habitual one on a long-term basis, then the provision would be available to the seller. Id.

The court also rejected an argument that the source of supply must be lost in a manner that would be considered a “true force majeure such as an act of God” given the contract clearly contemplated “just such an occurrence as the one before us.” Id. The court explained, “While it might have been improvident for [the buyer] to have agreed to such a condition in the contract, it should not be the function of a court, where there is no ambiguous language and the meaning of the contract term is provable by evidence of an historical course of action by the parties, to reform the agreement.” Id. The court remanded the case to the district court to hear the merits of each issue, including the viability of the force majeure declaration. Id. at 132–33.

Citing a lack of control over events as being essential, courts applying Vermont law have compared the standards for examining excusable neglect in bankruptcy law with those justifying application of force majeure. See In re Johnston, 37 B.R. 361, 363 (Bankr. D. Vt. 1984).
II. Common law remedies

A. Impossibility


“The impossibility must consist in the nature of the thing to be done and not in the inability of the party to do it.” Id. (rejecting impossibility defense where party argued appointment of receiver made it impossible for traction company to operate a street railway); Cushman v. Outwater, 159 A.2d 89, 94 (Vt. 1960) (“Since the defendants elected to terminate the situation by their own act when it became ‘impossible’ as to them, it is difficult to see where they could sustain any claim for damages at law.”); Williams v. Carter, 285 A.2d 735, 738 (Vt. 1971) (rejecting defense); Retail Merchant’s Business Expansion Co. v. Randall, 153 A. 357, 358 (Vt. 1931); Agway, Inc. v. Marotti, 540 A.2d 1044, 1046 (Vt. 1988) (rejecting defense where party, at best, showed that obtaining two-party checks might be inconvenient and require a special request, but did not show that it was impossible such that failure to perform was excused).

III. UCC provisions regarding excused performance

Vermont courts have not had reason to examine in detail the state’s statutes providing for the right to demand adequate assurances, VT. STAT. ANN. 9A § 2-609, or the defense of commercial impracticability, VT. STAT. ANN. 9A § 2-615, in the sale of goods context.
Virginia

Virginia courts strictly interpret force majeure provisions to apply to the parties’ intent. The specific words used in such provisions are critical. Apart from any contractual provisions, Virginia recognizes the common law defense of impossibility, interpreted as impracticability, as well as frustration of purpose.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions
A. General requirements

As a general matter, the question as to whether an intervening or unanticipated incident disrupting contractual performance constitutes a force majeure event sufficient to excuse performance is grounded in contract interpretation. Courts applying Virginia law apply a traditionally strict interpretation, enforce contracts as written, and look to the parties’ agreed-upon force majeure language to determine whether force majeure is an available contractual remedy. See Drummond Coal Sales, Inc. v. Norfolk S. Ry. Co., No. 7:16-cv-00489, 2018 WL 4008993, *at 10 (W.D. Va. Aug. 22, 2018) (applying rules of statutory construction, at party’s urging, to determine whether pending environmental regulations constitute a force majeure event as defined under the parties’ contract); Gordonsville Energy, L.P. v. Va. Elec. & Power Co., 512 S.E.2d 811, 817 (Va. 1999) (interpreting “[f]orce [m]ajeure [d]ay definition under electric power purchase and operating contract and finding that ”[w]hen contract terms are clear and unambiguous, the words used by the parties must be given their plain and ordinary meanings”).

The potential force majeure event needs to fit within the parties’ agreed-upon contractual definition of force majeure. See, e.g., Atl. Coast Pipeline, LLC v. 5.63 Acres, No. 6:17-cv-84, 2018 WL 1097051, at *13 (W.D. Va. Feb. 28, 2018) (interpreting contractual provision potentially excusing performance for “[f]orce [m]ajeure events, including ‘court orders or injunctions’” and finding clause inapplicable to facts before the court); SunTrust Mortg., Inc. v. Am. Pac. Home Funding, LLC, No. 3:12-cv-477-JRS, 2012 WL 6561728, at *4 (E.D. Va. Dec. 14, 2012) (finding that instances of borrower fraud on home mortgage applications “bears no similarity to the class of circumstances otherwise described” in force majeure provision that included acts such as war, insurrection, fire, flood, strike, or labor interruption in contract between mortgage broker and funding bank); In re Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440, 459 (E.D. Va. 1981) (declining to excuse nonperformance on force majeure grounds after finding that “the language of the [force majeure] clause is such that it is simply not applicable to the facts”).

This analysis, by focusing on the contractual force majeure language, involves a determination as to how the parties defined and contemplated potential force majeure events when they entered into the contract. Cf. SunTrust Mortg., Inc., 2012 WL 6561728, at *4 (finding that because borrower fraud did not fall within the scope of parties’ force majeure provision, “[t]he Court must conclude that [it] was not contemplated in [the provision] as a circumstance beyond the parties’ control”).

Consider Drummond Coal Sales, Inc. v. Norfolk Southern Railway Co., in which a coal supplier attempted to rely on a force majeure provision after it did not ship the minimum volume of coal under a rail transportation services contract due to an alleged decline in the coal market and looming environmental regulations. 2018 WL 4008993, at *1. The counterparty to the contract, a freight railroad company, “urged the
court to apply rules of statutory construction—specifically, *ejusdem generis* and *noscitur a sociis*” to find force majeure inapplicable to the coal supplier’s nonperformance. *Id.* at *10. The parties’ force majeure clause included a general reference to “any cause not within the control of said party,” followed by specific, non-exhaustive examples such as acts of God, wars, “labor troubles,” strikes, civil unrest, or “failure or delay of manufacturers, suppliers or other third parties . . . .” *Id.* (internal quotations omitted).

Due to the structure of the force majeure provision, which started with a general catch-all category followed by specific examples, the U.S. District Court for the Western District of Virginia declined to apply the statutory interpretation rule of *ejusdem generis*. *Id.* The court applied the statutory interpretation tenet of *noscitur a sociis* and engaged in a robust analysis of the parties’ force majeure language, finding that the specific force majeure examples laid out in the provision could not be expanded to the purported reasons for the coal supplier’s nonperformance—environmental regulations’ impact on the coal market. *Id.* at *11. The court explained that *noscitur a sociis* means “a word is known by the company it keeps,” such that words are given meaning by reference to surrounding words. *Id.* (quoting Yates v. United States, 574 U.S. 528, 543 (2015)). The court’s exercise, albeit somewhat unique, nevertheless demonstrates the key role of the specific contractual language.

Force majeure clauses may include a range of various political, economic, and natural events such as “act[s] of God,” strikes, wars, or governmental interference. *See, e.g., id.* at *2–3* (providing excerpt from parties’ force majeure clause); *Penn Va. Oil & Gas Corp. v. CNX Gas Co.*, No. 1:06-cv-00090, 2007 WL 593578, at *3 (W.D. Va. Feb. 22, 2007) (providing excerpt from parties’ force majeure clause).

The scope of force majeure has also been applied in the context of a consent decree entered pursuant to a judicial order to resolve violations of federal and state environmental regulations. *See United States v. Hampton Rds. Sanitation Dep’t*, No. 2:09-cv-481, 2012 WL 1109030, at *7 (E.D. Va. Apr. 2, 2012) (acknowledging holdings from the Fifth Circuit and U.S. Court of Claims that “language contained in a consent decree is critical when interpreting a force majeure provision”). Even where a force majeure clause is presented within a consent decree rather than within a traditional contractual arrangement, the language of the force majeure provision to determine the provision’s potential impact on the parties’ obligations remains critical. *See id.* (finding a foreseeability requirement to be part of the “bargained-for-language” of consent decree’s force majeure provision).

Notice requirements within force majeure provisions can also preclude the availability of a force majeure defense when not followed. *See, e.g., Old Dominion Elec. Cooper. v. Ragnar Benson, Inc.*, No. 3:05-cv-34, 2006 WL 2854444, at *47 (E.D. Va. Aug. 4, 2006) (“Even if lightning strikes were a force majeure event [the non-performing party] failed to comply with the EPC Contract notice provisions and has waived this claim for delay.”).

**B. Causation**

Importantly, there must be a causal relationship between the party’s failed performance or nonperformance and the alleged intervening event. *See, e.g., Westlake Props., Inc. v. Westlake Pointe Prop. Owners Ass’n, Inc.*, 639 S.E.2d 257, 267–68 (Va. 2007) (upholding jury instruction that asked jury to determine whether negligence of party was a proximate cause of a property association’s loss following massive soil erosion from storm, which would preclude force majeure defense); *Middle E. Broad. Networks, Inc. v. MBI Global, LLC*, 689 Fed. App’x 155, 158–60 (4th Cir. 2017) (affirming district court’s grant of summary judgment, which included finding that force majeure clause was inapplicable because “the sole reason [the party] failed to timely deliver . . . was because it failed to pay a subcontractor, not because of any effects of [the Iraq] war”).

The degree of causation between a party’s nonperformance and the intervening circumstances may also depend on the force majeure provision’s language. *See Drummond Coal Sales, Inc.*, 2018 WL 4008993, at *11 (applying language in force majeure clause excusing nonperformance where party was “unable to perform its obligations” due to force majeure event). In *Drummond*, the court held that even if poor market conditions constituted a force majeure event, the market downturns did not prevent the coal supplier from meeting its shipping obligations, and the supplier could alternatively perform by paying shortfall fees that the contract contemplated. *Id.* at *12.

Circumstances that cause market or price variation may not rise to the requisite level of severity typical for force majeure as the Fourth Circuit has “expressed some opposition” to granting relief where a party attempts to classify “an act which results in price fluctuations as being outside its control, thereby rendering the contract unenforceable.” *See Langham-Hill Petroleum Inc. v. S. Fuels Co.*, 813 F.2d 1327, 1329–30 (4th Cir. 1987) (upholding lower court’s refusal to apply force majeure clause in oil supply contract that became unprofitable to one party due to a collapse in the price of crude oil in the world market).
Within the context of fixed price contracts, for example, the Fourth Circuit has held that a party who has agreed to pay a fixed price assumes the risk that the price will change, and accordingly, has held that force majeure provisions should not serve to protect parties against inherent contractual risks. Id. at 1330 (referencing Seventh Circuit holding that “[a] force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract”) (quoting N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 275 (7th Cir. 1986) (internal quotations omitted)).

II. Common law remedies
The common law doctrines of impossibility of performance (also referred to as impracticability of performance) and frustration of purpose are related to the contractual remedy of force majeure, but with distinct requirements. In Virginia, the elements of impossibility of performance and frustration of purpose are “essentially the same.” Drummond Coal Sales, Inc., 2018 WL 4008993, at *12.

A. Impossibility
Impossibility of performance does not rest on contractual language alone, but rather is intended to account for the defects in the parties’ contract by providing a defense to nonperformance where “[t]he parties did not anticipate [the intervening event] fully and completely, if at all, or provide for what actually happened.” See Fla. Power & Light Co. v. Westinghouse Elec. Corp., 826 F.2d 239, 262 (4th Cir. 1987) (quoting 6 Corbin, Contracts ¶ 1331, p. 360 (1962 ed.). The Fourth Circuit, recognizing that impossibility of performance is an equitable doctrine, has held that “the doctrine of impossibility-impracticability does not depend on nor is limited in its application by the specific language of the contract.” Id. at 262, 279 (discussing equity considerations).

Similarly, the Eastern District of Virginia has held that “[u]nless necessary, a contract should not be construed to contain provisions of impossible performance.” Vienna Metro LLC v. Pulte Home Corp., 786 F. Supp. 2d 1076, 1084 (E.D. Va. 2011) (rejecting defenses of impossibility, impracticability, and frustration of purpose with respect to construction contract delayed due to 2007 collapse of real estate market).

The party seeking to invoke the defense must establish the following three elements: (1) “the unexpected occurrence of an intervening act”; (2) the act “was of such a character that its non-occurrence was a basic assumption” of the contract; and (3) performance has been rendered impracticable. Opera Co. of Boston v. Wolf Trap Found. for the Performing Arts, 817 F.2d 1094, 1102 (4th Cir. 1987); Drummond Coal Sales, Inc., 2018 WL 4008993, at *13 (finding that the “first fact to be established is the existence of an occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made”).

In determining the applicability of this defense, the Fourth Circuit has evaluated both the promisor’s obligated action under the contract as well as the means by which the promisor was to render performance. Fla. Power & Light Co., 826 F.3d at 264, 269 (finding impossibility defense available where parties intended that nuclear fuel reprocessing was the only means of fuel disposal under nuclear power supply contract and where the federal government later discontinued availability of fuel reprocessing).

The intervening act affecting performance must have been unexpected, but not necessarily unforeseeable. Drummond Coal Sales, Inc., 2018 WL 4008993, at *13; see Opera Co. of Boston, 817 F.2d at 1100–01 (finding that “[a] requirement of absolute non-foreseeability . . . would be so logically inconsistent that in effect it would nullify the doctrine”). This distinction “is one of degree” and involves an analysis as to how unexpected the intervening event was at the time the parties entered into the contract. Drummond Coal Sales, Inc., 2018 WL 4008993, at *13; see Opera Co. of Boston, 817 F.2d at 1101 (discussing whether the parties could have reasonably foreseen the intervening circumstances as a “real possibility” impacting performance) (internal quotations omitted). For example, the Western District of Virginia in Drummond held that government-imposed environmental regulations cannot support an impossibility defense. 2018 WL 4008993, at *13 (referencing holding by the Oklahoma federal court that governmental regulation is a foreseeable event as a matter of law).

It is “well-settled” under Virginia law that a party may be excused from performance where performance has become impossible as a result of domestic law, the death or illness of an individual of whom the contract required personal performance, or “the fortuitous destruction or change in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance . . . .” Hampton Rds. Bankshares, Inc. v. Harvard, 781 S.E.2d 172, 177–78 (Va. 2016) (quoting Hous. Auth. of Bristol v. E. Tenn. Light & Power Co., 31 S.E.2d 273, 276 (Va. 1944)). However, even when an event has rendered performance impossible, a party will not be excused from its contractual obligations where the party has expressly agreed to assume the risk of contractual performance or where the impossibility is the party’s fault. Id. at 178.
“Impossibility” has been interpreted as synonymous with “impracticability” when applying this doctrine. Opera Co. of Boston, 817 F.2d at 1099 (finding that “modern authorities also abandoned any absolute definition of impossibility” and adopted the “impracticability” or “commercial impracticability” standards under the Uniform Commercial Code instead). Importantly, it is not sufficient that performance has been made “merely difficult or burdensome or unprofitable” by the intervening event. Ballou v. Basic Constr., 407 F.2d 1137, 1141 (4th Cir. 1969); Drummond Coal Sales, Inc., 2018 WL 4008993, at *13 (quoting same).

Impracticability is an objective standard. Ballou, 407 F.2d at 1140–41 (recognizing that, as a matter of Virginia law, “breach of contract is excused only by objective impossibility”); see also Drummond Coal Sales, Inc., 2018 WL 4008993, at *14 (declining to find impossibility defense of take-or-pay contract, in part, due to lack of evidence that performance would threaten the party’s “general financial health” or otherwise result in “extreme financial hardship”).

Objectivity turns on whether the performance can or cannot be done as opposed to a personal, subjective inquiry as to whether the promisor can or cannot perform. Opera Co. of Boston, 817 F.2d at 1099 n.8; see also Ballou, 407 F.2d at 1141 (finding that impossibility defense was not satisfied even though construction as agreed to by the parties “might have been extremely difficult or so expensive as to consume any profit” the contractor may have anticipated). This objective inquiry largely depends on whether there is an alternative means of performance that has not been rendered impracticable. Drummond Coal Sales, Inc., 2018 WL 4008993, at *13 (raising question as to whether an alternative means of performance is so excessively costly so as to be in itself impracticable).

The standard by which a party’s difficulty or hardship is measured is one of varying degree. In the Eastern District of Virginia’s view, this standard has lessened as the impossibility doctrine has developed under common law. In re Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. at 451 (discussing development of case law generally without specific reference to Virginia precedent); see also Opera Co. of Boston, 817 F.2d at 1097 (recognizing that “[t]he doctrine of impossibility of performance . . . was for long smothered under a declared commitment to the principle of sanctity of contracts”). The Eastern District of Virginia has held that impossibility was “formerly a very harsh doctrine” requiring “objective or scientific impossibility,” but has since resulted in a less stringent standard of impracticability. In re Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. at 451 (referencing examples provided in the Restatement (Second) of Contracts as including “extreme and unreasonable difficulty, expense, injury or loss”) (internal quotations omitted).

B. Frustration of purpose
To invoke frustration of purpose, the party seeking to rely on this defense must prove that (1) the principal purpose of the contract has been frustrated; (2) such frustration is substantial; and (3) the non-occurrence of the event was a “basic assumption” of the contract. Drummond Coal Sales, Inc., 2018 WL 4008993, at *15. Frustration is “substantial” where it rises to a level of severity such that it cannot fairly be considered part of the risks assumed by the parties in forming the contract. Id. Neither a decrease in the contract’s profitability nor a loss incurred by the party affected by the frustrating event are sufficient bases for this defense. Id.

III. UCC provisions regarding excused performance
A. Demands for adequate assurances
Under the Virginia version of the UCC, where there has been no breach by anticipatory repudiation and where a party’s actions “give rise to insecurity with respect to [that party’s] performance,” the other party “may in writing demand adequate assurance of due performance and until he receives such assurance may[,] if commercially reasonable[,] suspend any performance for which he has not already received the agreed return.” BMK Sols. v. Biostat, LLC, 190 F. Supp. 3d 539, 548 (E.D. Va. 2016) (quoting VA. CODE § 8.2-609(1)). A party’s “ground[s] for insecurity need not arise from or be directly related to the contract in question.” See Cont’l Elec. Contractors, Inc. v. Cardinal Lighting Co., No. 66463, 1985 WL 306835, at *3–4 (Va. Cir. Ct. July 18, 1985) (finding that “Section 8.2–609 provides a remedy for the seller when he suspects the buyer may be having financial difficulties and its credit may be impaired”).

Even if a party has reasonable grounds for insecurity as to his counterparty’s performance, the party cannot “indefinitely suspend performance” without first making a written demand for adequate assurance from his counterparty. BMK Sols., 190 F. Supp. 3d at 548 (finding breach due to party’s failure to demand adequate assurances and subsequent suspension of performance); see also Hess Energy, Inc. v. Lightning Oil Co., 276 F.3d 646, 650 (4th Cir. 2002) (finding that even if a party “had doubts” regarding the other party’s performance, suspension of performance is “not the appropriate remedy” without first seeking a written
demand for adequate assurance). For example, as between a buyer and seller, Section 8.2-609 of the Virginia UCC provides a seller with the opportunity to modify the contract through new written credit terms; and if the buyer (or party to whom adequate assurances were demanded) does not agree to the seller’s newly proposed terms, the seller may then be permitted, where reasonable, to breach the contract. See Cont’l Elec. Contractors, Inc., 1985 WL 306835, at *4.

B. Commercial impracticability

Commercial impracticability “is basically a codification of the common law doctrine of impossibility of performance, which, in turn, is grounded in the doctrines of mutual mistake and frustration of purpose.” In re Westinghouse Elec. Uranium Contracts Litig., 517 F. Supp. at 450. The defense of commercial impracticability, like the defense of impossibility, is an equitable doctrine. Fla. Power & Light Co., 826 F.3d at 263.

Under this defense, a party may be released from his contractual performance obligation “where the contract, explicitly or implicitly, provides for an exclusive means of performance” and the ability to perform under such specified, exclusive means has become impracticable. In re Westinghouse Electric Uranium Contracts Litig., 517 F. Supp. at 453. Impracticability is generally not grounded in increased expense or economic burden alone. See id. (“Promisors seeking to establish impracticability by reason of increased expense have not generally found a sympathetic ear in court.”).

Reflective of this doctrine’s equitable nature, its success is often dependent on whether the party invoking the defense foresaw or should have foreseen the intervening event because if “the promisor had no reason to anticipate a supervening event which radically increases the difficulty of performance, or which renders performance impossible, it is manifestly unfair to hold him to the agreement.” Id. at 454. Conversely, if the problematic circumstances “may reasonably be said to have been foreseeable,” a successful defense based on impracticability will be less likely. Id. (recognizing that such rationale is “based on the notion that where the parties can reasonably anticipate events that may affect performance, the prudent course is to provide for such eventualities in their contract”).

Additionally, this defense is not available where the promisor is deemed to have assumed the risk that the intervening event or contingency would occur. Id. at 455–56 (relying upon comments to Section 2-615 providing that it “do[es] not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances”).

However, the Fourth Circuit has held that foreseeability “is at best but one fact to be considered” in determining the likelihood of the intervening act at issue and whether it “was of such reasonable likelihood” that the party should have both foreseen the risk that the act could occur and guarded against its occurrence. See Opera Co. of Boston, 817 F.2d at 1102–03.
Washington law enforces force majeure provisions and seeks to enforce parties’ agreements according to their express terms, but requires the claiming party to mitigate damages. Washington courts focus on whether the event is beyond the non-performing party’s control. Washington recognizes common law defenses of impossibility, interpreted as impracticability, and frustration of purpose.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Mitigation/beyond a party’s control
   C. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions

A. General requirements

Whether an occurrence qualifies as a force majeure “triggering event” depends largely on the terms of the contract and whether the occurrence is outside the claiming party’s control. See Hearst Commc’ns, Inc. v. Seattle Times Co., 115 P.3d 262, 270 (Wash. 2005) (finding a labor strike qualified as a force majeure event because it was an extraordinary event beyond the control of the parties).


Where the parties contemplate a particular event’s occurrence elsewhere in the contract, the occurrence of such an event will not constitute a force majeure event, especially when a party is trying to fit it within general catch-all language. For example, in Peterson v. Noots, the Ninth Circuit rejected a party’s attempt to fit a vessel’s launching accident within a force majeure clause’s catch-all phrase of “other like causes” because the parties’ contract specifically provided for insurance against any and all damages arising from the launching of the vessel by allocating this risk to the shipbuilder. 255 F. 875, 878 (9th Cir. 1919).

Extrinsic evidence may supplement or clarify contractual terms only where there is ambiguity; but extrinsic evidence may not be used to contradict or alter the terms of the agreement. See Hearst Commc’ns, Inc., 115 P.3d at 267; see also Dant & Russell v. Grays Harbor Exp. Co., 26 F. Supp. 784, 787 (W.D. Wash. 1939), aff’d, 106 F.2d 911 (9th Cir. 1939) (finding that seller’s failure to deliver was excused where contract was not ambiguous and excused the seller’s failure to delivery when caused by labor strikes). Ambiguity is present if a contract term is reasonably capable of being understood in one or more senses. See Syrov v. Alpine Res., Inc., 841 P.2d 1279, 1282 (Wash. Ct. App. 1993).

Washington courts generally have followed the standard Black’s Law Dictionary definition of force majeure: a “contractual provision allocating the risk if performance is rendered impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled.” See TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc., 142 P.3d 209, 210 n.1 (Wash. Ct. App. 2006) (quoting Black’s Law Dictionary 674 (8th ed. 2004)).

Certain government action has been recognized as force majeure under Washington law. The Ninth
Circuit, for example, in applying Washington law, found that an aircraft manufacturer's emergency employee relocation costs caused by the Iranian hostage crisis were recoverable based on an excusable delay provision that applied to "normal forces majeure, including wars, strikes, acts of God, failures or acts of the government." Islamic Rep. of Iran v. Boeing Co., 771 F.2d 1279, 1289 (9th Cir. 1985).

B. Mitigation/beyond a party's control

A critical factor in evaluating the validity of a force majeure defense in Washington is whether the alleged force was beyond the control of the claiming party. Courts will also consider the mitigation efforts employed by the injured party to minimize his/her damages.

Generally, an occurrence will only qualify as a force majeure event if it was entirely outside the control of the claiming party. See Citoli v. City of Seattle, 61 P.3d 1165, 1175 (Wash. Ct. App. 2002) (enforcing force majeure defense where an electrical company was forced to turn off services for circumstances outside of its control); see also Hearst Commc'ns, Inc., 115 P.3d at 266 (holding the force majeure clause provides a defense to liability where one party is unable to perform its obligations under the contract because of forces beyond its control).

Courts will typically follow the requirements expressed in the language of the force majeure clause. See Puget Soundkeeper All. v. Rainier Petroleum Corp., No. C14-0829JLR, 2017 WL 6515970, at *9 (W.D. Wash. Dec. 19, 2017) (finding consent decree defined a force majeure event as "any event outside the reasonable control of [company] that causes a delay in performing tasks required by this decree that cannot be cured by due diligence," and that because company did not exercise due diligence, force majeure was inapplicable); TransAlta Centralia Generation LLC, 142 P.3d at 211 (providing that the contract defined force majeure as "an event that (i) is not within the control of the Party relying thereon and (ii) could not have been prevented or avoided by such Party through the exercise of due diligence").

Moreover, the injured party is required to act reasonably in mitigating its damages. The question of what is reasonable is fact-specific and generally will be resolved by the ultimate factfinder. See, e.g., id. at 212 (holding that the question of whether the non-performing party's business decision to purchase replacement power once its plant was shut down in an attempt to mitigate damages was for the jury).

C. Notice

Many contracts require the non-performing party to provide notice of a force majeure event within a designated time period. See Puget Soundkeeper All., 2017 WL 6515970, at *9 (explaining that one of the reasons that party's attempt to declare force majeure failed was for lack of requisite notice).

Generally, the counterparty must show that it was damaged by the non-performing party's failure to provide notice for the notice to be material. See Citoli, 61 P.3d at 1179 (noting that while the defendant should have notified the plaintiff of the occurrence, the agreement did not provide that a failure to give notice would lead to damages, and further that the plaintiff did not assert damages arising from the defendant's failure to provide such notice).

II. Common law remedies

A. Impossibility


Further, the party asserting the defense must not have assumed the risk of the unexpected occurrence. See Tacoma Northpark, LLC, 96 P.3d at 458.

B. Frustration of purpose

To invoke frustration of purpose, the purpose that is frustrated must have been the principal purpose of the party in entering the agreement. See Wash. State Hop Producers, Inc., Liquidation Tr. v. Goschie Farms, Inc., 773 P.2d 70, 74 (Wash. 1989). If the risk was foreseeable and could have been guarded against by contract, the defense will not be available to excuse nonperformance. Id. at 77.

If the specific goods in question are no longer available, this defense could be applicable. See, e.g., Snipes Mtn. Co. v. Benz Bros. & Co., 298 P. 714, 715 (Wash. 1931) (finding that if the parties contemplate a sale of the crop of a particular tract of land, and by reason of a fortuitous event, without the fault of the promisor, the crop fails or is destroyed,
nonperformance is excused); see also Colley v. Bi-State, Inc., 586 P.2d 908, 910 (Wash. Ct. App. 1978) (performance was not excused because trade usage showed that the parties did not intend for the seller to take bushels of wheat specifically grown on that farm, only a specific amount of bushels of wheat from any available source).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances


The adequacy of the demand is a question of fact. A demand for assurance must be clear and unequivocal. Id. The parties must be able to understand the demanding party will withhold performance if assurances are not made. See Lectro-Tek Servs., Inc. v. Exeter Packers, Inc., No. 28088–8–III, 2010 WL 2403393, at *9 (Wash. Ct. App. June 17, 2010) (finding that the demand for adequate assurances was not valid where it was unclear that the demanding party would stop performance if the assurances were not provided).

B. Commercial impracticability


The party claiming commercial impracticability cannot have assumed any greater liability in the parties’ contract. Colley, 586 P.2d at 910. Further, the non-performing party must use reasonable efforts to attempt to perform, which generally is a fact issue necessary for the jury’s resolution. See Cypress Ins. Co. v. SK Hynix Am., Inc., 365 F. Supp. 3d 1142, 1151 (W.D. Wash. 2019) (finding that where the contract contained a provision calling for a “Disaster Recovery Plan” for use in the case of a force majeure event and allocated additional supply to other customers, the non-performing party was precluded from claiming commercial impracticability as a matter of law).
West Virginia

West Virginia courts expect parties to allocate risks of contingent events appropriately in their contracts, and will enforce force majeure clauses as written. West Virginia recognizes the common law defense of impracticability, a less stringent version of strict impossibility, but the Supreme Court of Appeals has commented that the defense of commercial impracticability will rarely justify excusing performance.

The key cases are broken down as follows:
I. Contractual force majeure provisions
II. Common law remedies
   A. Impossibility
   B. Frustration of purpose
III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability

I. Contractual force majeure provisions
West Virginia courts give effect to contractual force majeure provisions, but in doing so will construe them strictly based on what the force majeure provision expressly defines as a qualifying event.

The Supreme Court of Appeals of West Virginia has explained, "It is the duty of contracting parties to provide against contingencies, as they are presumed to know whether the completion of the duty they undertake be within their power." Bunch v. Potter, 17 S.E.2d 438, 440 (W.Va. 1941) (citing Virginian Export Coal Co. v. Rowland Land Co., 131 S.E. 253, 260 (W.Va. 1926)).

In Bright v. Coastal Lumber Company, for example, a company filed an action seeking a declaration that coal mining leases were either null and void or voidable due to the absence of merchantable, mineable coal on the leased premises. No. 2:89-0258, 1991 WL 337362, at *1 (S.D. W.Va. Jan. 31, 1991). Pursuant to the leases, the company was obligated to make royalty payments. Id. at *2. Notably, the leases did not condition the payment obligation on the company actually locating and mining coal on the premises. Id.

After entering into the leases, the company commissioned a coal reserve study and subsequently claimed that the premises never contained merchantable, mineable coal. Id. at *3. The company then claimed that it was entitled to rescission of the leases and stopped making royalty payments. Id. The court concluded that the company could not rely on the leases’ force majeure provisions to justify its failure to make the royalty payments. The court explained:

Force majeure clauses are strictly and narrowly construed and the lessee has the burden of proving that the occurrences or conditions which allegedly excuse performance are within the scope of the force majeure clause and are the proximate cause of the failure to mine, and that the lessee has no control over the condition and no power to eliminate or abate it.

Id. at *7 n.12. Here, the force majeure provisions stated that "neither party shall be subject to liability for [nonperformance] if such failure results from an event or occurrence beyond the control of such party." Id. at *7.

steel manufacturer’s damages arising from interrupted operations caused by coke supplier’s declaration of force majeure based on a series of mine explosions).

**Common law remedies**

**A. Impossibility**

The defense of impossibility in West Virginia is a rule of impracticability. The Supreme Court of Appeals of West Virginia adopted the doctrine of impracticability, as set forth in § 261 of the Restatement (Second) of Contracts, in *Waddy v. Riggelman*, 606 S.E.2d 222, 230 (W.Va. 2004) (recognizing that this new rule is “less strict than its inflexible ancestor,” the common law doctrine of impossibility).

Under the doctrine of impracticability, “a party to a contract who claims that a supervening event has prevented, and thus excused, a promised performance” must satisfy a four-pronged test. *Id.* (citing Farnsworth, Contracts § 9.6, at 543–44 (1990)).

First, the party claiming impracticability must demonstrate that the intervening event made performance impracticable. Though impracticable is a lesser standard than impossibility, a party must show (1) “more than a mere increase in difficulty and/or cost to be excused from performance” and (2) that it has “made reasonable efforts to overcome the obstacles to performance.” *Id.* at 230–31.

Second, the party claiming impracticability must show that “the nonoccurrence of the event was a basic assumption on which the contract was made.” *Id.* (noting that the fact an event was unforeseeable is significant in determining whether its non-occurrence was a basic assumption).

Third, the impracticability must have “resulted without the fault of the party seeking to be excused.” *Id.* This not only includes situations where the party itself causes the supervening event, but also instances where the party could have avoided the event through the exercise of reasonable diligence. *Id.* at 231 (“[O]ne seeking relief under the doctrine of impracticability must have made reasonable efforts to overcome the obstacles to performance.”) (citing *Kama Rippa Music, Inc. v. Shelyery*, 510 F.2d 837, 842 (2d Cir. 1975)).

And fourth, the party claiming impracticability must not have “agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance.” *Id.*

In *Waddy*, a buyer purchased tracts of land, and the sellers agreed to provide title to the land free of all liens and encumbrances and to correct all defects in title before closing. The sellers, however, did not obtain the necessary releases before closing on two deeds of trust that encumbered the land. The sellers informed the buyer that they were backing out of the sale, prompting the buyer to sue for specific performance.

The sellers raised the impossibility doctrine as a defense, contending that their nonperformance was excused because it was impossible to obtain the necessary releases before closing. After articulating the new standards for the doctrine of impracticability, the court rejected this argument under the first prong, by finding that the sellers could have obtained the releases before closing, and under the third prong, by finding that the sellers’ inability to obtain the releases was caused by their own neglect. *Id.* at 232; cf. *Gaddy Eng’g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 746 S.E.2d 568, 575–76 (W.Va. 2013) (finding law firm’s performance under joint venture agreement impracticable following the non-occurrence of presupposed events in the parties’ fee-sharing agreement).

**B. Frustration of purpose**

With West Virginia courts construing impossibility as impracticability, the concept of frustration of purpose essentially merges into that same defense. See, e.g., *McGinnis v. Cayton*, 312 S.E.2d 765, 774 (W.Va. 1984) (“Commercial impracticability law has evolved from older contract excuses from performance called impossibility and frustration of purpose.”); *Waddy*, 606 S.E.2d at 229 n.9 (comparing impracticability to supervening frustration).

**III. UCC provisions regarding excused performance**

**A. Demands for adequate assurances**

West Virginia has adopted the UCC provision governing the right to demand adequate assurances of performance in the sale of goods context. *W.Va. CODE § 46-2-609; see Mollohan v. Black Rock Contracting, Inc.*, 235 S.E.2d 813, 816 n.1 (W.Va. 1977) (declining to adopt adequate assurance concept as a matter of general contract law beyond sale of goods context “except to the extent that a demand for assurances and failure to give them may be evidence of repudiation to present to a jury with other evidence to prove absolute, unequivocal and positive repudiation and anticipatory breach”).

Under the UCC provision, when a contracting party has reasonable grounds for insecurity about its counterparty’s performance, it may demand that the counterparty provide adequate assurances of performance, and may further suspend its own performance while the receipt of such assurances
is pending. W.VA. CODE § 46-2-609. West Virginia courts have not confronted this issue in the context of a dispute.

B. Commercial impracticability

A seller’s nonperformance in a contract for the sale of goods may be excused if “performance, as agreed, has been made impractical by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable . . . domestic governmental regulation.” W.VA. CODE § 46-2-615.

The UCC’s fourth comment to this provision states that increased cost alone does not excuse performance, “unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance.” Id. (noting further that rises or collapses in the market are not in itself a justification).

The Supreme Court of Appeals of West Virginia has interpreted this statute to require a disadvantaged party to show “that he was not at fault, that the supervening event was not reasonably foreseeable, that neither party had assumed or allocated the risk, and that the loss would be so severe and create such hardship that performance would be commercially impractical.” McGinnis, 312 S.E.2d at 775 (explaining that though the commercial impracticability doctrine is recognized, it is “rarely allowed as an excuse for nonperformance”); Elkins Manor Assocs. v. Eleanor Concrete Works, Inc., 396 S.E.2d 463, 469–70 (W.Va. 1990) (rejecting commercial impracticability defense where seller had assumed greater obligation in its contract).
Wisconsin

Wisconsin has recognized force majeure and act of God defenses at common law for unforeseen events not caused by human factors. Wisconsin courts interpret force majeure provisions narrowly and consider a party’s obligations to mitigate the effects of force majeure events. Wisconsin also recognizes common law impossibility and frustration of purpose defenses.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Causation
   C. Mitigation/beyond a party’s control
   D. Foreseeability
   E. Notice

II. Common law remedies
   A. Impossibility
   B. Frustration of purpose

III. UCC provisions regarding excused performance
   A. Demands for adequate assurances
   B. Commercial impracticability
   C. Substituted performance

I. Contractual force majeure provisions

A. General requirements

Wisconsin courts have also used various synonyms to describe force majeure such as “Acts of God,” which is defined as “an . . . occurrence due to natural causes and inevitable accident . . . which could not have been occasioned by human agency” or “vis major,” which is described as an “irresistible force . . . arising wholly above the control of human agencies.” Id.; see also State v. Olsen, 299 N.W.2d 632, 634 (Wis. Ct. App. 1980).

Because Wisconsin courts narrowly construe force majeure clauses, parties must provide language describing the specific circumstances under which a force majeure event may excuse performance. See, e.g., GQ Sand, LLC v. Conley Bulk Servs., LLC, No. 15-cv-152, 2016 WL 3248603, at *4 n.6 (W.D. Wis. June 10, 2016) (explaining that “such clauses are generally narrowly construed and rendered unenforceable absent language describing the specific circumstances under which it may excuse performance”).

B. Causation
The alleged force majeure event must actually prevent the performance of the contractual obligations in question. See, e.g., Citgo Petroleum Corp. v. Ranger Enters., Inc., 573 F. Supp. 2d 1114, 1118 (W.D. Wis. 2008) (stating that the impacted party falsely used Hurricane Rita to mask pre-existing supply problems and avoid its contractual obligations); Canadian Steel Foundries v. Thomas Furnace Co., 203 N.W. 355, 357 (Wis. 1925) (finding that the “embargo absolutely prevented delivery [on] the part of the seller. It was a cause over which [the seller] had no control and suspended the operation of the contract, or at least excused the default of the defendant during the time it was in existence.”).

Wisconsin courts do not recognize financial hardship as a force majeure event unless the clause expressly covers such circumstances. See A. Raymond Tinnerman Mfg., Inc. v. TecStar Mfg. Co., No. 12-cv-667, 2013 WL 787367, at *5 (E.D. Wis. Mar. 4, 2013). In A. Raymond, the U.S. District Court for the Eastern District of Wisconsin dismissed the “bold legal proposition that financial collapse is covered under a force majeure clause when the source of the failure to pay is an unforeseen event and the party raising
the defense is without fault.” *Id.* (internal quotations omitted).

The court rejected the non-performing party’s argument that its customer’s financial failure prevented it from paying its contractual counterparty. *Id.* (explaining the party could have made payment from the customer a necessary contingency within the parties’ agreement, for not getting paid by the customer was certainly foreseeable at the time of contracting).

**C. Mitigation/beyond a party’s control**

Courts rely on the express language of the force majeure clause to determine whether a contracting party made sufficient efforts to mitigate or abate the effect of a force majeure event. See *Wis. Elec. Power Co. v. Union Pac. R.R. Co.*, 557 F.3d 504, 509 (7th Cir. 2009). In *Wisconsin Electric*, the force majeure clause stated simply that the invoker must “make reasonable efforts to eliminate or abate the force majeure.” *Id.* at 508.

The contract at issue allowed the railroad to charge a higher rate under the contract if there was not a backhaul shipment. *Id.* at 507. The railroad had been backhauling iron ore to a steel mill in Utah, which stopped when the steel mill’s bankruptcy caused it to shut down operations permanently. *Id.* The railroad eventually claimed that it had to charge Wisconsin Electric the higher rates because the steel mill’s stoppage of operations prevented the railroad from backhauling, and thus was a force majeure event. *Id.*

Wisconsin Electric argued that the railroad could not rely on the force majeure provision to charge the higher rates because, among other things, it did not make a “reasonable effort to abate the force majeure” as required by the contract. *Id.* at 508.

Wisconsin Electric alleged that the railroad had a duty to mitigate or abate the effect of the force majeure event and could have done so by searching for other commodities to backhaul. *Id.* The court disagreed, however, indicating that such a requirement would cause “unmanageable litigation issues” related to disputes about the railroad’s efforts. *Id.* at 509 (“But that would have placed on the railroad a burdensome open-ended duty to explore the possibility of reconfiguring its operations, which would have required searching for, finding, and making contracts with other shippers and perhaps purchasing or renting railcars optimized to carry those shippers’ commodities. . . . This cannot have been what the abatement clause envisaged.”).

The Wisconsin Supreme Court found a more onerous burden to mitigate when examining a force majeure provision in a contract for the supply of tomatoes, which stated, “if by the destruction of the cannery by fire, or if on account of strikes, or from any other cause over which the seller has no control, he is prevented from performing this contract, he shall not be liable for any damages for such failure.” *Newell v. New Holstein Canning Co.*, 97 N.W. 487, 488 (Wis. 1903). The seller alleged that the destruction of the tomato crop by frost fell within the force majeure provision’s coverage. The court disagreed. Because the agreement did not indicate from where the tomatoes had to be procured, the court reasoned that the seller could purchase tomatoes in the open market to satisfy its obligation under the agreement and the evidence did not show that the seller made any sort of effort to try. *Id.; see also Sub-Zero Freezer Co. v. Cunard Line Ltd.*, No. 01-C-0664-C, 2002 WL 32357103, at *4 (W.D. Wis. Mar. 12, 2002) (interpreting Florida law).

**D. Foreseeability**

Similarly, Wisconsin courts require events of force majeure to be unforeseeable at the time the parties entered into the contract unless the contract expressly states otherwise. See *Goldstein v. Lindner*, 648 N.W.2d 892, 899 (Wis. Ct. App. 2002). For example, in *Goldstein v. Lindner*, the lessee invoked the force majeure provision of a lease based on the inability to secure permits. *Id.* The court disagreed and held that parties to a lease are assumed to know what laws and regulations will affect the permitting process. *Id.* Because parties are presumed to have knowledge that potential delays can occur in the permitting process, they cannot base a force majeure argument on government inaction because it was foreseeable at the time the parties entered the contract. *Id.*

**E. Notice**

Even if an event could be an event of force majeure to excuse performance, Wisconsin courts will enforce any notice requirements contained in parties’ force majeure provisions. For example, the *Goldstein* court also explained that the force majeure clause could not be triggered because the requisite notice about the onset of an alleged force majeure event had not been provided. *Id.* at 899–900; see also *United States v. Alshabkhoun*, 277 F.3d 930, 936 (7th Cir. 2002) (dismissing a force majeure argument because of a failure to provide the required notice of a force majeure condition under the agreement); *Rexnord Indus., LLC v. Bigge Power Constructors*, 947 F. Supp. 2d 951, 959 (E.D. Wis. 2013) (dismissing a party’s force majeure defense where it did not present sufficient evidence that it provided written notice within the time constraints required under the contract).
II. Common law remedies

A. Impossibility
In addition to common law force majeure, where contracts do not contain force majeure provisions, a party may rely on the common law defense of impossibility. To invoke impossibility as a defense, a party must show that an event outside the party’s control made performance under the contract impossible. See McMillan v. Fox, 62 N.W. 1052, 1053–54 (Wis. 1895) (finding that owner of lumber yard was not negligent in fire that destroyed the vast majority of the owner’s product because the defense of impossibility excused its performance).

The defense is not available to a party who, through its own negligence, fails to discover at the time of entering into the contract the non-existence of the fact or thing that makes performance by that party impossible. See, e.g., In re Zellmer’s Estate, 82 N.W.2d 891, 894 (Wis. 1957) (rejecting impossibility defense for party who should have known that underlying policy payable to his daughter had lapsed at the time he entered into contract assigning it).

B. Frustration of purpose
To invoke frustration of purpose as a common law defense requires that: (1) the parties’ principal purpose in making the contract is frustrated; (2) without that party’s fault; (3) by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. Chicago, M., St. P. & P. R. Co. v. Chicago & N. W. Transp. Co., 263 N.W.2d 189, 194 (Wis. 1978) (internal quotations omitted).

On the one hand, contracting parties that contemplate potentially frustrating events cannot “invoke the doctrine of frustration to escape their obligations.” Id. (finding that the defense of frustration was not available where the defendant foresaw and helped cause the frustrating event); see, e.g., Convenience Store Leasing & Mgmt. v. Annapurna Mkrg., 933 N.W.2d 110, 117–18 (Wis. Ct. App. 2019) (finding that party failed to establish that the principal purpose of fuel supply contract to new gas station was frustrated due to third party’s demand for alterations to the façade and bathroom construction designs).

On the other hand, when there is nothing an obligor can do to fulfill his or her contractual duties, the obligee’s duty to compensate is excused. In re Estate of Sheppard, 789 N.W.2d 616, 620 (Wis. Ct. App. 2010) (finding that the estate’s duty to render payment under the contract was excused because the decedent’s purpose of entering the contract—receiving flight instruction and pilot services—was frustrated when he died).

III. UCC provisions regarding excused performance

A. Demands for adequate assurances
“A contract for sale imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until the demanding party receives such assurance may if commercially reasonable suspend any performance for which the demanding party has not already received the agreed return.” WIS. STAT. § 402.609(1).

When one party’s conduct constitutes repudiation, the other contracting party has “ample grounds for insecurity” and may “suspend performance until adequate assurances of performance” are provided. Carnes Co. v. Stone Creek Mech., Inc., 412 F.3d 845, 855 (7th Cir. 2005); see also Cargill, Inc. v. Lavine, 321 N.W.2d 364 (Table), 1982 WL 171955, at *3 (Wis. Ct. App. Apr. 6, 1982) (finding party was entitled to demand adequate assurances of performance and pending such assurances, refuse to deliver any other orders, but this did not equate to entitlement to cancel all contracts with that counterparty).

Whether a party has reasonable grounds for insecurity is a question of fact. See Whitehall Packing Co. v. Schoeneweis, 282 N.W.2d 638 (Table), 1979 WL 30528, at *4 (Wis. Ct. App. June 29, 1979) (citing AMF, Inc. v. McDonald’s Corp., 536 F.2d 1167 (7th Cir. 1976)).

B. Commercial impracticability
Wisconsin’s commercial code embraces the standard UCC-based defense of commercial impracticability. See WIS. STAT. § 402.615(1); see also Fed. Pants, Inc. v. Stocking, 762 F.2d 561, 567 (7th Cir. 1985) (excusing seller’s failure to deliver merchandise to buyer following the supplier’s termination of seller’s dealership rights because that contingency made the seller’s performance commercially impracticable).
Wyoming

Courts applying Wyoming law will not require a force majeure event to be unforeseeable or beyond a party's control unless the parties' contract dictates those requirements. Wyoming law recognizes impracticability and commercial frustration, which courts apply in essentially the same manner, as common law defenses to breach of contract.

The key cases are broken down as follows:

I. Contractual force majeure provisions
   A. General requirements
   B. Notice

II. Common law remedies
   A. Impossibility
   B. Commercial frustration

III. UCC provisions regarding excused performance

I. Contractual force majeure provisions

A. General requirements


Most force majeure clauses require an event to beyond the control of the party invoking it. See Unicover World Trade Corp. v. Tri-State Mint, Inc., No. 91-cv-255, 1994 WL 383244, at *10 (D. Wyo. Feb. 23, 1993) (concluding that a force majeure clause that contained catch-all language of "or any other causes beyond its control" modified each of the listed, defined events such that all events needed to be beyond a party's control to qualify). "The force majeure clause is not an escape way for those interruptions of production that could be prevented by the exercise of prudence, diligence, care, and the use of those appliances that the situation or party renders it reasonable that he should employ." Id. (quoting Edington v. Creek Oil Co., 690 P.2d 970 (Mont. 1984)). For example, a federal court applying Wyoming law concluded that a party's manufacturing delays in shipping coins were caused by delays from that party's supplier, and thus were not beyond the party's control and thus not excused by force majeure. Id.

Under Wyoming law, however, courts will not read into a contract a requirement of unforeseeability or that an event has to be beyond the control of a party to excuse performance if the parties' force majeure clause does not impose those requirements. See Perlman v. Pioneer Ltd. P'ship, 918 F.2d 1244, 1248 (5th Cir. 1990) (applying Wyoming law and finding district court erred when it supplied those terms as a rule of law).

Unless the parties specifically contract otherwise, changes in market conditions will not serve as force majeure events, particularly in fixed price contracts where the parties assume the risk of price fluctuations. See W. Tex. Util. Co. v. Exxon Coal USA, Inc., 807 P.2d 932, 936 (Wyo. 1991). Where financial problems cause additional consequences, such as bankruptcy, these also are unlikely to qualify unless the parties' contract states otherwise. See, e.g., Champlin Petroleum Co. v. Mingo Oil Producers, 628 F. Supp. 557, 560–61 (D. Wyo. 1986) ("While the bankruptcy proceedings were clearly outside the control of the lessor or its assigns, the very premise of such proceedings are inherently the result of financial problems.").

Similarly, courts applying Wyoming law have been reluctant to find that expanded government regulation constitutes an event of force majeure. See, e.g., Moncrief, 880 F. Supp. at 1508 (explaining party cannot make a credible argument that expanded federal government regulation was so unforeseeable as to create a force majeure).

In Perlman, the Fifth Circuit, applying Wyoming law, concluded that Wyoming government officials did not "hinder" a party's performance because the party made no effort whatsoever to obtain the appropriate permits or to begin drilling the wells in question. See Perlman, 918 F.2d at 1249 ("Perlman's self-serving conclusion that a force majeure condition existed
was at best merely speculation as to what might have happened had he attempted to drill the wells as planned.

The court required evidence that an actual, material hindrance occur before excusing performance.

Id. (also explaining that party had a duty under contract to make reasonable effort to remove force majeure condition, which the party failed to undertake).

B. Notice

Force majeure provisions often contain notice requirements. For example, Wyoming’s highest court has precluded a party from relying on a contractual force majeure provision where the party failed to follow the contract’s notice requirements. See W. Tex. Util., 807 P.2d at 938. Specifically, the court concluded that a contract requiring prompt, written notice of alleged force majeure events was not satisfied by a party declaring force majeure via telephone calls. Id.; see also Perlman, 918 F.2d at 1249 (referencing 15-day notice provision required by party invoking force majeure but indicating it was not necessary to resolve question of whether notice was proper).

II. Common law remedies

A. Impossibility

Wyoming applies the rule of impracticability as opposed to strict impossibility of performance to excuse nonperformance. See Mortenson v. Scheer, 957 P.2d 1302, 1305 (Wyo. 1998) (“While it has been common to allude to these problems as ones of impossibility of performance, we adopt the view of the Restatement that impracticability is a more appropriate term because the rule reaches situations in which true impossibility is not necessarily present.”). “The rule of impracticability to excuse performance is invoked when supervening circumstances render performance of one of the conditions of the contract impracticable.” Id. at 1306 (citing Downing v. Stiles, 635 P.2d 808, 811 (Wyo. 1981)).

Wyoming’s highest court has explained that impracticability is a strict standard to be invoked only when circumstances truly dictate the impracticability, and not when a party assumes the risk that fulfillment of a condition precedent will be prevented. Id. This is particularly true when performance of a contract depends on obtaining a required governmental license or permit. See id. at 1306–07 (finding obtaining permit was condition precedent and party knew of this requirement at time contract was made, assumed the risk that it may not be obtainable, and therefore are charged with the consequences of not securing it). But see Mad River Boat Trips, Inc. v. Jackson Hole Whitewater, Inc., 803 P.2d 366, 367–69 (Wyo. 1990) (explaining that parties could not have anticipated Forest Service refusing to make assignment of permits).

For a governmental regulation to make a contractual duty impracticable, its non-occurrence must have been a basic assumption of the contract. See Moncrief, 880 F. Supp. at 1508 (citing Union Pac. Res. Co. v. Texaco, 882 P.2d 212, 226 (Wyo. 1994) (finding the non-occurrence of governmental regulations could not have been a basic assumption of natural gas contract where ongoing and changing governmental regulation of gas industry was the rule rather than the exception in the mid-1970s)).

Temporary impossibility will not cancel a contract; the obligation to perform will revive when performance subsequently is possible. See Colo. Coal Furnace Dists., Inc. v. Prill Mfg. Co., 605 F.2d 499, 504 (10th Cir. 1979).

B. Commercial frustration

In Downing v. Stiles, the Wyoming Supreme Court introduced the concept of commercial frustration, which is for all practical purposes the same as impracticability. 635 P.2d at 811 (citing Restatement (Second) of Contracts § 261, Discharge by Supervening Impracticability) (rejecting the defense because the continuation of the Rustler Bar’s business was not the principal purpose for which the contract was made and the frustration was not substantial). The alleged frustrating event cannot have been foreseeable. Mortenson, 957 P.2d at 1306 (citing Downing, 635 P.2d at 813) (“The obligor is expected to provide in the contract for contingencies that are foreseeable.”).

III. UCC provisions regarding excused performance

Few Wyoming cases deal with the UCC-based remedies for contractual nonperformance. For example, the only reported case explains that the question of the UCC-based commercial impracticability defense generally requires resolving disputed questions of fact. See Meuse-Rhine-Ijssel Cattle Breeders of Canada Ltd. v. Y-Tex Corp., 590 P.2d 1306, 1312 (Wyo. 1979) (dealing with case involving production and sale of bovine semen used for artificial insemination).
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**Navigating contractual nonperformance**

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