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Practice Update

A Short Primer on *Force Majeure* and Related Defenses

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Including Discussion on Their Applicability to the COVID-19 Pandemic

The current COVID-19 pandemic may result in debtors asserting payment defenses to loans and other contractual obligations based on *force majeure*, frustration of purpose, commercial frustration, impossibility of performance, impracticality of performance, material adverse change, or similar concepts.

This primer discusses each of these concepts in some depth. Although the focus of the primer is on the applicability of the defenses to the payment of a borrower's obligations to a financial institution lender, the principles discussed often apply equally to other contractual scenarios, including real property leases and purchase and sale transactions.

Force Majeure

The basic concept of *force majeure* is to relieve a party from its contractual duties and obligations when its performance of those duties and obligations has been prevented by a force beyond its control, or when the purpose of the contract has been frustrated. *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.,* 729 F.2d 1530, 1540-42 (5th Cir. 1984); *Gulf Oil Corp. v. FERC,* 706 F.2d 444, 452 (3d Cir. 1983). *See generally* 30 Williston on Contracts, § 77.31 (4th ed. July 2019 update). The concept is also recognized by Article 2 of the UCC governing sales, which provides in Section 2-615(a) – Section 672.615(1) in Florida - that a seller is excused from timely delivery or for non-delivery of goods where the seller's performance has become impracticable either by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made, or by compliance in good faith with any applicable foreign or

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domestic governmental regulation or order whether or not it later proves to be invalid.[2]

There is a similar provision in Article 2A for the UCC governing personal property leases, Section 2A-405(a) – Section 680.405(1) in Florida. Although there appear to be no Florida cases analyzing Section 2A-405(a), the Official Comment thereto cites Section 2-615 as its Uniform Statutory Source, suggesting that the reasoning in cases such as the two *Eastern Air Lines, Inc.* cases cited in footnote 2 below would be persuasive.

The burden of demonstrating *force majeure* is on the party seeking to have its nonperformance excused – 30 Williston, *supra,* § 77.31 at n. 5 - and the non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted *force majeure*. *Gulf Oil Corp.,* 706 F.2d at 452.

Force majeure is an affirmative defense, and is waived if not pled. *Yusem v. Butler*, 966 So. 2d 405 (Fla. 4th DCA 2007); 30 Williston, *supra,* § 77.31 at n. 1 – *citing Maralex Resources, Inc. v. Gilbreath*, 76 P.3d 626 (N.M. 2003).

If your loan or contract documents contain a *force majeure* clause, and particularly if the clause specifically lists pandemics or epidemics as a *force majeure*, you will need to review the precise language in the clause carefully to determine if it is implicated. In doing this review, bear in mind that *force majeure* clauses, because they excuse contractual nonperformance, are typically narrowly construed – *i.e.*, construed against excusing nonperformance of a contract. *E.g., In re Cablevision Consumer Litigation*, 864 F.Supp.2d 258, 264 (E.D.N.Y. 2012) – (As to *force majeure* clauses, "They are construed narrowly and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified.") *Accord, ARHC NV WELFL01, LLC v. Chatsworth At Wellington Green, LLC*, 2019 WL 4694146 (S.D. Fla. 2019) – (Noting that, in Florida, such clauses are narrowly construed, generally only excuse nonperformance if the event causing the nonperformance is specifically identified in the clause, may excuse nonperformance even when performance is not impossible - *citing Snavely Siesta Associates, LLC v. Senker*, 34 So. 3d 813 (Fla. 2d DCA 2010) and *Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718 (Fla. 2d DCA 2010) - but also noting that the purpose of a *force majeure* clause is to allocate 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.* at *3.)[3] [Emphasis added.]

For example, in *Kyocera Corp. v. Hemlock Semiconductor, LLC,* 886 N.W. 2d 445, 2015 (Mich. Ct. App. 2015), the contract under which Kyocera was to purchase a large quantity of polysilicon – a product used in the manufacturing of solar panels - contained a *force majeure* clause covering events beyond the party's control, including specifically acts of government. But the contract did not specify which acts, or which governments, were covered by the clause, or how much, or how little, market price risk was being assumed by Kyocera. Ultimately, because of that lack of clarity, the trial and appellate courts found that the clause was not specific enough to excuse Kyocera's nonperformance under the contract when the government of China began providing illegal subsidies to Chinese companies, enabling them to gain a majority stake in the world's solar panel market, and causing more than 20 solar panel manufacturers in the United States and Europe to go out of business. *Accord, Cartan Tours, Inc. v. ESA Services, Inc.*, 833 So. 2d 873 (Fla. 4th DCA 2003) – (Refusing to enforce a *force majeure* clause because the phrase "affecting the ability of the Olympic Games to be held" in the clause was ambiguous in that it could reasonably mean preventing the games altogether or merely affecting them.)

If pandemics are listed in a loan document as an example of a *force majeure,* a court is likely to determine that the parties have allocated the risk of pandemics per the specific provisions of the contract – usually to the obligee / lender – and that the obligor's nonperformance is excused in accord with the provisions of the *force majeure* clause. *Cf.*, *One World Trade Ctr., LLC v. Cantor Fitzgerald Sec.*, 789 N.Y.S.2d 652 (N.Y. Sup. Ct. 2004) – (Tenants' leasehold was destroyed during the 9/11 terrorists attacks. Tenants' counterclaim for recoupment of increased rent paid in contemplation of future benefits – benefits that would never be realized because of the 9/11 attack - denied because *force majeure* clause had to be construed narrowly, and shielded lessor from liability for nonperformance resulting from acts of third parties, including the 9/11 terrorists.)

But, in general, absent specific language in the *force majeure* clause to the contrary, the courts view the parties as having allocated the risk of such unspecified future events to the obligor. *E.g., In re Cablevision Consumer Litigation*, 864 F.Supp.2d at 264 – (As to *force majeure* clauses, "They are construed narrowly and will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified.")

Thus, absent a specific reference in the clause to the contrary, a pandemic may not enough to trigger a *force majeure*

clause. In general, a party is not excused from nonperformance under a *force majeure* clause because performance has become burdensome or economically disadvantageous. *E.g., Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 858 (11th Cir. 2009), *citing Stand Energy Corp. v. Cinergy Servs., Inc.*, 760 N.E.2d 453, 457 (2001) - ("Mistaken assumptions about future events or worsening economic conditions do not qualify as a 'force majeure.'"). To the same effect are *In re Millers Cove Energy Company, Inc.*, 62 F.3d 155 (6th Cir. 1995), *citing U.S. v. Panhandle Eastern Corp.*, 693 F.Supp. 88, 96 (D. Del. 1988) – ("Ordinarily, only where a force majeure clause specifically includes the event alleged to have prevented performance, will a party be excused from performance.") and *Dunaj v. Glassmeyer*, 580 N.E.2d 98, 101 (Ohio Ct. C.P. 1990).

For example, in *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 910 N.Y.S.2d 408, 2010 WL 1945738 (Sup. Ct. 2010), Ruby Tuesday attempted to avoid its ground lease obligations under a *force majeure* clause allegedly triggered by "the unprecedented worldwide economic meltdown...," *i.e.* the Great Recession. After noting that *force majeure* clauses are to be construed narrowly, the court was unsympathetic:

> Defendant's decision to undertake a capital intensive expansion during a time of apparent economic growth and its subsequent responses to the severe economic downturn represent business decisions on the part of Ruby Tuesday, not events outside of its control.
> .....
> **Further, there has been no showing that the prospect of a severe economic downturn was not reasonably foreseeable.** Commercial parties routinely enter into contractual agreements to allocate economic risk, and the risk of changing economic conditions or a decline in a contracting party's finances is part and parcel of virtually every contract, especially those involving commercial development.

Id. at *4. [Emphasis added.][4]

Can a lender make a similar argument when faced with a COVID-19 *force majeure* defense, especially one with a vaguely worded *force majeure* clause? Yes, although to avoid application of the other related defenses discussed later in this Primer, the lender will have to address the issue of whether the COVID-19 pandemic was reasonably foreseeable.

But before we get to that question, let's consider what happens if the *force majeure* clause does not specifically

reference pandemics or epidemics, but does reference "acts of God." Is a pandemic an "act of God," such that nonperformance of a contract is excused even where the *force majeure* clause does not specifically reference pandemics?

The COVID-19 pandemic and acts of God:

a. In analyzing whether the COVID-19 pandemic qualifies as an act of God, the first thing to bear in mind is that, as noted previously, *force majeure* clauses are to be construed narrowly. It is not an automatic that a pandemic will be determined to constitute an act of God. *E.g.,* Practical Law Commercial Transactions, *Commercial and Contract Law Implications of the COVID-19 Pandemic*, https://1.next.westlaw.com/Document/I6704e6536a2511eaadfea82903531a62/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Search), March 24, 2020 - ("Parties should not assume these catch-all clauses ["other similar events" or "Acts of God"] apply to COVID-19, as courts generally interpret force majeure clauses narrowly.")

Admittedly, there is case law from other jurisdictions supporting the concept that an illness can be considered an "act of God." *E.g.,* 1 Am.Jur.2d *Acts of God* § 6. But the cases sometimes talk in terms of sudden, unforeseeable illnesses as acts of God - *e.g., Grote v. Estate of Franklin*, 573 N.E.2d 360 (Ill. App. 1991) – impliedly leaving open the possibility that a foreseeable illness might not qualify. Thus, in *Hoggatt v. Melin*, 172 N.E.2d 389, 392 (Ill. App. 1961), the court approved a jury instruction defining "Act of God" to include "all misfortunes and actions arising from inevitable necessity which human prudence could not foresee or prevent..."

But there is equally compelling case law from other jurisdictions finding that illnesses are not acts of God. For example, in *Winder v. Franck*, 669 N.W.2d 262 (Table), 2003 WL 21542471 (Iowa, Ct. App. 2003), the court refused to find that a heart attack that caused a fatal accident was an act of God. And in *Freifield v. Hennessy*, 353 F.2d 97 (3d Cir. 1965), the court in Pennsylvania held that "It is a matter of common knowledge, of which we may take judicial notice, that humans are subject to a variety of illnesses which should not be described as results of the "acts of God.'" *Id.* at 99.

It is not at all clear that an illness is considered an act of God in Florida. In perhaps the only discussion of the issue in a published decision in Florida, Justice Sawaya, in his dissent in a bail bond case, *State ex rel. Gardner v. Allstar Bail Bonds*, 983 So. 2d 1218 (Fla. 5th DCA 2008), noted, at fn. 1, that courts in other states have defined "act of God" to include illness and

death. But a review of the authorities cited at fn. 1 reveals that there is limited support for the proposition that illness, as opposed to death, is an act of God. For example, *Tyler v. Capitol Indemnity Insurance Co.*, 110 A.2d 528 (Md. 1955) concerned the concept of death as an act of God, but did not mention illness or disease. To the same effect was *State v. Wynne*, 204 S.W.2d 927 (Mo. 1947). The decision in *Ramer v. State ex rel. Ward*, 302 P.2d 139 (Okla. 1956) did find that illness or disease beyond the prevention or control of human agency is an act of God, but that decision was effectively overruled by the Oklahoma Supreme Court's 1987 decision in *Studebaker v. Cohen*, 747 P.2d 274 (Okla. 1987). There, the court held that an act of God "does not include medical problems," and should not encompass "physical afflictions or medical problems." The only case cited in fn. 1 by Justice Sawaya that appears still to support the contention that illness is an act of God is the 1868 decision in *People v. Tubbs*, 37 N.Y. 586, 1868 WL 6144 (Ct. App. 1868). But even that case, while it spoke of sickness, did not really concern an illness. Instead, the "act of God" referenced was the principal on a bail bond being thrown from a horse just prior to the term of the court.

In 11 Fla.Jur.2d *Contracts* § 264, an "Act of God" sufficient to excuse the nonperformance of a contract must be "so extraordinary and unprecedented that human foresight could not anticipate or guard against it, and the effect of which could not be prevented or avoided by the exercise of reasonable prudence, diligence or care." But there is no mention in § 264 of illness or disease being an act of God *per se* under Florida common law.

Further, there are various cases in Florida – *e.g., Mason v. Load King Manufacturing Co.*, 758 So. 2d 649 (Fla. 2000) and *McDill Columbus Corp. v. Delpiano*, 2008 WL 11332096 (S.D. Fla. 2008) - in which references are made in passing that differentiate between acts of God and illness, which suggests that illness is not an act of God.

b. Even if illness were an act of God, that might not excuse nonperformance of a contract. For example, in *Reynolds v. Travelers Ins.*, 28 P.2d 310, 314 (Wash. 1934), the court found that, while sickness might make it impossible for the insured to pay his premiums, others could pay the premiums on his behalf. Per the court, "Sickness or insanity of the insured is not considered to be such an act of God as will excuse failure to make prompt payment of premiums." And in *Reichenbach v. Sage*, 43 P. 354, 356-357 (Wash. 1896), the court noted that a sick workforce would still not excuse nonperformance unless performance were rendered impossible. To the same general effect is *Detroit Fidelity & Sur. Co. v. U.S.*, 59 F.2d 565, 566 (8th

Cir. 1932), holding that "any illness or disability, the result of disease of conditions beyond the prevention or control of human agency, is regarded as an 'Act of God,' but, in order to constitute a sufficient defense to relieve one of the consequences of a default or breach of an obligation, the conditions must be such as to render it, within the realms of reason at least, impossible to perform the duty or discharge the obligation." The court continued that an act of God would excuse performance of a contract if the intervening circumstances rendered "performance impossible and not when they only make it difficult or undesirable." *Id.* at 567.

The law in Florida would appear to be much the same. For example, in *Moon v. Wilson,* 130 So. 25 (Fla. 1930), the Florida Supreme Court held that, **"An act of God will not excuse the promisee from performance of his part of the contract in making payments where the promisor fully performs his contract of construction..."** [Emphasis added.] Admittedly, *Moon* involved a construction contract and not a loan, but the analogy is patent – where the lender has performed, where the landlord has performed, where a contract promisor has performed, an act of God should not excuse the borrower, or the tenant, or a contract promisee, from making payments due under the loan, the lease, the contract.

c. Even if illness were an act of God, the case law supports the proposition that illness does not excuse nonperformance of a contract if the illness was reasonably foreseeable at the time the contract was made. For example, in Georgia, by statute, an illness can be considered an act of God. O.C.G.A. § 1-3-3(3). Despite the statute, in *Woodard v. Dempsey*, 2016 WL 4079713 (N.D. Ga. 2016), the court noted that the act of God defense was not available in an automobile accident case if it were foreseeable that the defendant, while driving, might experience the type of illness / medical emergency that caused the accident. To the same effect is *Lewis v. Smith,* 517 S.E.2d 538, 540 (Ga. App. 1999) – ("Accordingly, loss of consciousness by a driver would not be a complete defense if by the exercise of ordinary care it was foreseeable to the driver that he might lose consciousness while driving.")

To the same effect is *Eleason v. Western Casualty & Surety Co.*, 35 N.W.2d 301, 303 (Wisc. 1949), essentially holding that the act of God defense would not apply to a driver who suffered from epilepsy because the driver should have known that he might have an accident if a seizure struck while he was driving. Per the court, "Hence because the injury might have been avoided by prudence and foresight it cannot be considered an act of God." *See also Central of Georgia Ry. Co. v. Hall*, 52 S.E. 679 (Ga. 1905) - (holding that a common carrier cannot avail himself of the act of God defense if his own

negligence contributed to the accident), and *Larsen v. Allan Line S.S. Co.,* 80 P. 181 (1905) – (holding that a steamship company was liable for a passenger's injuries incurred during a smallpox quarantine, even though the contract limited the carrier's liability for "Acts of God," because of the carrier's negligence).

Florida law appears to be much the same. For example, in *Atlantic Coast Line R. Co. v. Hendry*, 150 So. 598 (Fla. 1933), the Florida Supreme Court held that the act of God defense could not be asserted in a negligence action where the defendant's negligence was a contributing proximate cause to the injury. *Accord, Asgrow-Kilgore Co. v. Mulford Hickerson Corp.,* 2301 So. 2d 441 (Fla. 1974); *Starling v. City of Gainesville,* 106 So. 425 (Fla. 1925); *Marrero v. Salkind*, 433 So. 2d 1224 (Fla. 3d DCA 1983); *Wm. G. Roe & Co. v. Armour & Co.,* 414 F.2d 862 (5th Cir. 1969).

> And in *Davis v. Ivey*, 112 So. 264 (Fla. 1927), the Florida Supreme Court held:
>
> Failure to exercise reasonable diligence to guard against act of God, which can be guarded against, is actionable negligence. While it is true that no human agency can prevent or stay an act of God, the act itself being that of omnipotence and irresistible**, it is frequently the case that the results which are natural consequences of an act of God by the exercise of reasonable foresight and prudence may be foreseen and guarded against**. Where this can be done by the exercise of reasonable diligence and prudence, a failure to do so would be negligence and subject the party upon whom this duty devolved to damages, although the original cause was an act of God.

Id. at 265. [Emphasis added.]

And, while finding that a hurricane constituted an act of God excusing a power company from providing uninterrupted electric power, the Florida Supreme Court in *Florida Power Corp. v. City of Tallahassee*, 18 So. 2d 671 (Fla. 1944), cited approvingly a definition of act of God from 12 Am.Jur. 939[5] that stated in part that "Accordingly, a seasonable event, one which is likely to happen and which common prudence would provide for, is not such an extraordinary event as will constitute an act of God excusing nonperformance..." *Id.* at 675. This is in accord with rulings such as *Cachick v. U.S.*, 161 F.Supp. 15 (S.D. Ill. 1958), holding that a wind not unprecedented at a particular time and geographical location was not an act of God.

So it appears that the act of God defense may not excuse nonperformance of a contract, particularly if the nonperformance sought is avoidance of payment, and particularly if the alleged act of God was reasonably foreseeable. With that thought in mind, let's move on to a discussion of the other common defenses that are used when a well-drafted *force majeure* clause is not available to a borrower.

***Frustration of purpose, commercial frustration, impossibility of performance, impracticability of performance, and material adverse change*:**

Foreseeability of Pandemics

As will be explained below, the doctrines of frustration of purpose, commercial frustration, impossibility of performance, impracticability of performance, material adverse change, and, as noted above, acts of God, all have one important thing in common: if the intervening / triggering event was reasonably foreseeable, and could have been addressed in the contract, then its occurrence does not excuse nonperformance under the contract.

Given this, consider the ramifications of a contract containing a detailed, perhaps heavily negotiated, *force majeure* clause. Does the fact that the clause, while addressing many things, does not address COVID-19, mean that the frustration of purpose doctrine, or one of the other doctrines discussed below, should apply to excuse nonperformance?

The answer is yes. As noted in the discussion of *force majeure* above, if the parties do not address a risk factor in a *force majeure* clause, that should be interpreted as an affirmative decision of the parties to have that risk factor assumed by the obligor, assuming the risk factor was reasonably foreseeable. *E.g., American Aviation, Inc. v. Aero-Flight Service, Inc.*, 712 So. 2d 809 (Fla. 4th DCA 1998) – ("If the risk of the event that has supervened to case the alleged frustration was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.") To the same effect are *Wright v. Logan*, 2010 WL 11507114 at *6 (M.D. Fla. 2010) - ("Thus, impossibility of performance is not intended to excuse the contractual obligations of a party where the relevant business risk was foreseeable and could have been the subject of an express contractual provision.") and *Genuinely Loving Childcare, LLC v. Bre Mariner Conway Crossings, LLC,* 209 So. 3d 622, 625 (Fla. 5th DCA 2017) – ("If a risk was foreseeable at the inception of the lease, then there

exists an inference that the risk was either allocated by the contract or was assumed by the party.")

So, was the COVID-19 pandemic foreseeable? Yes. Until it was disbanded by the current administration in 2018, the National Security Council maintained a pandemic office, and various public health and national security experts have "warned about the next pandemic for years." Deb Reichmann, *Trump disbanded NSC pandemic unit that experts had praised*, https://apnews.com/ce014d94b64e98b7203b873e56f80e9a, March 14, 2020. The presence and maintenance of a pandemic office by the National Security Council suggests strongly that the foreseeability and danger of pandemics was known well before the onset of the COVID-19 pandemic.

Deb Reichmann is not the only one to report on warnings about future pandemics. The World Health Organization's Global Outbreak Alert and Response Network ("GOARN"), first met in Geneva, Switzerland in April 2000, and identified twenty years ago the need for a global network to deal with global threats of epidemic prone and emerging diseases. *See* https://www.who.int/ihr/alert_and_response/outbreak-network/en/.

Many warnings have been given as far back as 2005 and before that a global pandemic was a distinct possibility that should be taken seriously. For example:

a. John Walcott, *The Trump Administration is Stalling an Intel Report that Warns the U.S. Isn't Ready for a Global Pandemic*, https://time.com/5799765/intelligence-report-pandemic-dangers/ March 9, 2020:

> ... two officials who have read it say it contains warnings similar to those in the last installment, which was published on January 29, 2019. The 2019 report warns on page 29 that, 'The United States will remain vulnerable to the next flu pandemic or large-scale outbreak of a contagious disease that could lead to massive rates of death and disability, severely affect the world economy, strain international resources, and increase calls on the United States for support.'

The article goes on to report that the 2019 warning of the United States' vulnerability to pandemics – contained in the annual Worldwide Threat Assessment from the U.S. Director of National Intelligence - was the third in as many years. So, since 2017, the U.S. Director of National Intelligence has reported to the U.S. House of Representatives on the danger of pandemics.

b. Kevin Loria, *Bill Gates thinks a coming disease could kill 30 million people within 6 months*," https://www.businessinsider.com/bill-gates-warns-the-next-pandemic-disease-is-coming-2018-4, April 29, 2018. The title to this 2018 article is self-explanatory.

c. Gregory F. Treverton, Erik Nemeth, Sinduja Srinivasan, *Threats Without Threateners? Exploring Intersections of Threats to the Global Commons and National Security*, Rand Corporation, 2012. This Rand Corporation[6] report from 2012 is a treasure-trove on the foreseeability of pandemics:

i. In analyzing its five priority issues – nuclear proliferation, conflict in the Middle East, water scarcity, pandemics and climate change - Rand notes that, "**In current circumstances, only pandemics seem to be an existential threat, capable of destroying America's way of life**." *Id.* at 1. [Emphasis added.] Bear in mind, this statement was made eight years ago.

ii. Rand notes, at p. xi, that "a future pandemic may be virtually certain," but notes that its timing and severity are not certain. But on p. 2, Rand notes that "**Pandemics are a real possibility in the here and now; there is nothing future about them**." [Emphasis added.]

iii. Rand notes, at p. xii, that "Climate change was immediately recognized as an issue of global commons, while pandemics have only recently come to be thought of in that way..." (Bear in mind that the reference to "only recently" was made in 2012.)

iv. Rand deemed the problem of pandemics of sufficient importance that it poses a challenge to our national security. "Do climate change, water scarcity, and pandemics pose challenges to national security? In general, they do..." *Id.* at p. 3.

v. Rand further notes, at p. 4, that "... pandemics top the list of threats – killing one quarter of Americans would not finish off U.S. society but would change it beyond recognition..."

vi. All of the above quotes from the report are preamble to the report's section on Pandemics, starting at p. 7, "... **only pandemics hold the risk of destroying American society within a foreseeable future**." [Emphasis added.]

vii. At p. 9, the report notes that "Global warming seems a certainty and its impact may already be felt, but for the most part the timing and magnitude of its consequences

are future and uncertain. Pandemics are similar. While some new virus is a virtual certainty … exactly when a new disease with pandemic potential might strike is uncertain…"

viii. The report notes on p. 10 that "… when pandemics hit, they will be acute…"

ix. The report notes on p. 12 that "By contrast, although the 1918 flu epidemic offered an agonizing preview, **not until the arrival of mass travel by jet did pandemics seem usefully perceived at a global commons issue**." [Emphasis added.] Continuing on this theme at p. 13, the Report notes that "… **because of far-reaching airplane travel, pandemics can spread quickly across the world from the origin**." [Emphasis added.] Footnote 6 to this quote elaborates by reminding us that "This is exactly why H1N1 was classified as a pandemic – the entire world was affected simultaneously, according to a recent Security and Defence Agenda (SDA) report (Dowdall, 2011)." [The reference to Dowdall is to J. Dowdall, *Pandemics: Lessons Learnt and Future Threats*, Brussels: Security & Defence Agenda, 2011.]

x. The report notes on p. 13 that "The most threatening of the three to security, pandemics, is also the one most amendable to national action." [The "three" are climate change, water scarcity, and pandemics.]

xii. The report says of pandemics, on p. 15, that "it is hard to imagine another threat to the very existence of nations, including the United States…"

xiii. In footnote 2 on p. 15, the report notes, "In recent discussions on pandemics hosted by the Security and Defence Agenda, there was strong consensus that H1N1 was mild, but the threat was very real, and provided countries with the opportunity to 'test' their preparedness systems. (Dowdall, 2011)."

xiv. The report notes at p. 23 that SARS, a viral disease in humans, appeared in a "near-pandemic" between November 2002 and July 2003, with an overall mortality rate of 9.6%, which was higher than the mortality rate of the 2009 H1N1 pandemic.

xv. The report notes on p. 24 that "…the world has had the good luck of recently getting to practice pandemic monitoring, initially on a disease, SARS, that was not too easily communicated and then on anther, H1N1, that was not very lethal."

xvi. The report, in its conclusion, notes on p. 41 that "**Pandemics are an obvious global security concern**…"

Something that is "obvious" is obviously reasonably foreseeable.

d. Rem Reider, *Contrary to Trump's Claim, A Pandemic Was Widely Expected at Some Point*, https://www.factcheck.org/2020/03/contrary-to-trumps-claim-a-pandemic-was-widely-expected-at-some-point/, March 20, 2020. This article is another treasure trove for the foreseeability of a COVID-19-like pandemic. *E.g.:*

i. "Mark Lipsitch, an epidemiology professor at Harvard University, told us that there was plenty of evidence that a disease of this kind posed a serious threat and that the notion that it could not be foreseen is off base. '**Three years ago, experts were saying that bat coronaviruses could become a new pandemic**,' he said in an email." [Emphasis added.]

ii. "A week before the Trump administration took office in January 2017, Obama administration officials focused on the dangers of a pandemic in a briefing for top Trump aides, according to Politico. **One of the possible scenarios sketched out included a fast-spreading global disease leading some countries to impose travel bans.**" Says Lisa Monaco, President Obama's homeland security advisor, "**We included a pandemic scenario because I believed then, and I have warned since, that emerging infectious disease was likely to pose one of the gravest risks for the new administration.**" [Emphasis added.]

e. T. Horimoto and Y. Kawaoka, *Influenza: lessons from past epidemics, warnings from current incidents*, Nature Reviews Microbiology, August 2005. This 2005 paper postulated that the then-recent outbreaks of H5 and H7 influenza raised a concern that a new influenza pandemic would occur in the near future.

f. David E. Sanger, Eric Lipton, Eileen Sullivan and Michael Crowley, *Before Virus Outbreak, a Cascade of Warnings Went Unheeded*, https://www.nytimes.com/2020/03/19/us/politics/trump-coronavirus-outbreak.html, March 19, 2020 - ("As early as the George W. Bush administration, homeland security and health officials focused on big gaps in the American response to biological attacks and the **growing risk of pandemics**.") [Emphasis added.]

g. Hilary Hoffower, *Bill Gates has been warning of a global health threat for years. Here are 11 people who seemingly predicted the coronavirus pandemic*, https://www.businessinsider.fr/us/people-who-seemingly-predicted-the-coronavirus-pandemic-2020-3, March 20, 2020. From this article:

> i. "Infectious disease expert Michael Osterholm has also been warning of a global pandemic for the past decade. According to CNN, Osterholm wrote in Foreign Affairs magazine in 2005 that, 'This is a critical point in our history. Time is running out to prepare for the next pandemic. We must act now with decisiveness and purpose.'"
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> ii. "In a 2006 Flu Pandemic Preparedness Plan, these [Massachusetts] public health officials projected that as many as 2 million people could become ill..."

h. Michael T. Osterholm, *Preparing for the Next Pandemic*, Foreign Affairs, July/August 2005 – ("A number of recent events and factors have significantly heightened concern that a **specific near-term pandemic may be imminent**. It could be caused by H5N1, an avian influenza strain currently circulating in Asia. At this juncture scientists cannot be certain.") [Emphasis added.] This statement was made fifteen years ago.

i. Center for Infectious Disease Research and Policy, University of Minnesota, *Foreign Affairs focuses on pandemic threat*, http://www.cidrap.umn.edu/news-perspective/2005/06/foreign-affairs-focuses-pandemic-threat, June 10, 2005 – ("*Foreign Affairs* is the second well-known journal in less than three weeks to publish a sizeable collection of articles on the threat of a pandemic. The British journal *Nature* published 10 articles on the subject in its May 26 issue.")

j. Joseph Young, *We Ignored This Chilling 2007 Warning of a Bat-Diet Coronavirus Pandemic*, https://www.ccn.com/we-ignored-this-chilling-2007-warning-of-a-bat-diet-coronavirus-pandemic/, March 24, 2020 – ("A 2007 study published by researchers at Hong Kong University **precisely predicted the reemergence of a coronavirus outbreak from bats**. ... Studies in the early 2000s warned bats can cause the reemergence of coronavirus.") [Emphasis added.]

k. Emily Baumgaertner and James Rainey, *Trump administration ended pandemic early-warning program to detect coronaviruses*, https://www.latimes.com/science/story/2020-04-

02/coronavirus-trump-pandemic-program-viruses-detection, April 2, 2020:

> Two months before the novel coronavirus is thought to have begun its deadly advance in Wuhan, China, the Trump administration ended a $200-million pandemic early-warning program aimed at training scientists in China and other countries to detect and respond to such a threat.
>
> **The project, launched by the U.S. Agency for International Development in 2009**, identified 1,200 different viruses that had the potential to erupt into pandemics, including more than 160 novel coronaviruses. **The initiative, called PREDICT, also trained and supported staff in 60 foreign laboratories — including the Wuhan lab that identified SARS-CoV-2, the new coronavirus that causes COVID-19.**
> .....
> The pandemic 'didn't surprise us, unfortunately,' said Jonna Mazet, executive director of the One Health Institute in the UC Davis School of Veterinary Medicine, who served as the global director of PREDICT for a decade.

[Emphasis added.] The fact that the U.S. Agency for International Development launched the project eleven years ago to detect potential pandemic viruses originating in, among other places, Wuhan, China, had detected more than 160 novel coronaviruses with the potential to erupt into pandemics, and that the pandemic did not surprise the global director of the program, demonstrates the reasonable foreseeability of the COVID-19 pandemic.

l. And in Florida? South Florida Sun Sentinel Editorial Board, *Pearl Harbor, 9/11 an coronavirus*, Orlando Sentinel, April 9, 2020, at A10: "**In 2005, when Jeb Bush was governor, health officials predicted 'a crisis remarkably similar to the one playing out now,' the [Tampa Bay] Times reported, 'a virus that could infect more than a million Florida residents.' Preparation became a priority**." [Emphasis added.] Unfortunately, Florida cut the funding for that preparation during the administration of Governor Rick Scott. This despite the fact that during the Scott administration, "Florida experienced its worst tuberculosis outbreak in decades, the Zika virus infested South Florida, and a hepatitis A epidemic was declared a public health emergency." *Id.*

m. As referenced by the U.S. Supreme Court in *Bruesewitz v. Wyeth, LLC*, 562 U.S. 223 (2011) (Sotomayor J., dissenting), the

U.S. Congress has recognized the importance of dealing with pandemics when it "authorized the Secretary of Health and Human Services to designate a vaccine designed to prevent a pandemic or epidemic as a 'covered countermeasure.' 42 U.S.C. §§ 247d-6d(b), (i)(1), (i)(7)(A)(i)." *Id.* at 253. This decision appears to be referencing the version of the statute that became effective on December 30, 2005.

n. Finally, as evidenced by statements in a variety of cases decided over the past several decades, many *force majeure* clauses list epidemics as a triggering event. *E.g., U.S. v. Utah Const. & Min. Co.*, 384 U.S. 394 (1966); *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982); *U.S. v. Croft-Mullins Electric Co., Inc.*, 333 F.2d 772 (5th Cir. 1964). The inclusion of epidemics as triggering events in *force majeure* clauses is not surprising because a search through virtually any form book, old or new, will reveal epidemics listed as a triggering event in many forms for *force majeure* clauses.

If form makers over the years, and the thousands (millions?) of contract parties who have used their forms, thought it important to include epidemics as triggers for *force majeure* clauses, that equates into a general awareness of the reasonable foreseeability of epidemics. And if epidemics are reasonably foreseeable, it follows that a pandemic ought to be reasonably foreseeable, since it is just an epidemic on a bigger scale. *See, https://www.dictionary.com/e/epidemic-vs-pandemic/* - ("Compared to an epidemic disease, a pandemic disease is an epidemic that has spread over a large area, that is, 'it's prevalent throughout an entire country, continent, or the whole world.'")[7]

Perhaps the only thing that was not foreseeable with regard to the current COVID-19 pandemic is number of government officials who claim that it was not foreseeable. Because make no mistake, as the above sources, and many others, demonstrate quite clearly, scientists and public health officials have been sounding the warning for many years – at least the last 20 years – of the likelihood and dangers of an impending pandemic.

Thus, there is a strong argument to be made by a lender that a pandemic on the scale of the COVID-19 pandemic was reasonably foreseeable.

Frustration of Purpose

Frustration of purpose refers to that condition surrounding the contracting parties where one of parties finds that the purpose 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. *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.,* 174 So. 2d 614, 617 (Fla. 2d DCA 1965). *Accord, Marathon Sunsets, Inc. v. Coldiron*, 189 So. 3d 235 (Fla. 3d DCA 2016); *E.B. Sherman, Inc. v. Mirizio*, 556 So. 2d 1143 (Fla. 3d DCA 1990).

The frustration or purpose doctrine is limited, particularly where the risk in question – *e.g.,* the COVID-19 pandemic – was foreseeable. Pardon this lengthy, but on point, quote from *Hillsborough County v. Star Insurance Company*, 847 F.3d 1296 (11th Cir. 2017):

> Under Florida law, " '[f]rustration of purpose' refers to that condition surrounding the contracting parties where one of the parties finds that the purpose 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." *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. 2d DCA 1965). The doctrine, however, has limits. For example, "if knowledge of the facts making performance impossible were available to the promisor, he cannot invoke them as a defense to performance." *Shore Inv. Co. v. Hotel Trinidad, Inc.*, 158 Fla. 682, 29 So. 2d 696, 697 (1947). *See also Ferguson v. Ferguson*, 54 So. 3d 553, 556 (Fla. 3d DCA 2011) ("Because of the central importance placed upon the enforceability of contracts in our culture, the defense of impossibility (and its cousins, impracticability and frustration of purpose) must be therefore applied with great caution if the contingency was foreseeable at the inception of the agreement."); *1700 Rinehart, LLC v. Advance Am.*, 51 So. 3d 535, 537–38 (Fla. 5th DCA 2010) (explaining that the lack of consideration/frustration of purpose doctrine "has no proper application in a case ... in which the particular potential obstacle was not only foreseen by the parties, but as to which they specifically bargained"); *Home Design Ctr.—Joint Venture v. Cnty. Appliances of Naples*, 563 So. 2d 767, 769–70 (Fla. 2d DCA 1990) (noting that the "doctrines of impossibility of performance and commercial frustration of purpose ... 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 contractual agreement")

Id. at 1305.

Thus, the foreseeability of a pandemic equates into an argument that frustration of purpose cannot be used as a COVID-19-related defense.

In general, changed economic conditions cannot be the basis a defense of frustration of purpose. In *Vision Bank v. Luke*, 2010 WL 2639626 (N.D. Fla. 2010), Vision Bank extended a one million dollar loan to Luke to purchase a residential lot in 2004. *Id.* at *1. Luke executed a note as evidence of the loan, and Luke's business, Image Properties, executed a mortgage to secure the loan. *Id.* In 2010, following default in payment, Vision Bank filed a suit against Luke for breach of contract. *Id.* at *2. Image Properties moved to intervene and filed causes of action against Vision Bank. In one of the counts, Image Properties sought recession or cancelation of the mortgage as a result of frustration of purpose, presumably because of the significant declines in value suffered by many properties as a result of the Great Recession. The court granted Vision Bank's motion to dismiss that cause of action, finding that the decline in the value of the real property did not support a claim of frustration of purpose. *Id.* Per the court, "Furthermore, the fact that the property has declined in value does not support a claim of frustration of purpose. Courts 'have been careful not to find commercial frustration if it would only result in allowing a party to withdraw from a poor bargain.' *Valencia Center, Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1269, 1269 (Fla. 3d DCA 1985)."

Further, if the frustration of purpose is only temporary – if the pandemic ends – the contract obligor's duty to perform is only temporarily suspended "unless his performance after the cessation of the impracticability or frustration would be materially more burdensome that had there been no impracticability or frustration." Restatement (Second) of Contracts § 269 (Oct. 2019 Update).

Commercial Frustration

Closely akin to the frustration of purpose doctrine, the commercial frustration doctrine is predicated on the premise of providing relief where the parties could not protect themselves by the terms of the contract against the happening of subsequent events. *Hilton Oil Transport v. Oil Transport Co., S.A.,* 659 So. 2d 1141, 1147 (Fla. 3d DCA 1995). This doctrine is rarely a successful defense because courts have been careful not to find commercial frustration if it would only result in allowing a party to withdraw from a poor bargain. *See Valencia Center, Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1269 (Fla. 3d DCA 1985). Moreover, it does not apply where the intervening event was reasonably foreseeable and could and should have been controlled by

provisions of the contract. *Hilton Oil*, 659 So. 2d at 1147; *Home Design Center – Joint Venture v. County Appliances of Naples, Inc.*, 563 So. 2d 767 (Fla. 2d DCA 1990) – ("Even under theories which permit a broader application of the doctrine of commercial frustration, the defense is not available concerning difficulties which could reasonably have been foreseen by the promisor at the time of creation of the contract.") *Id.* at 770.

Given the premise that the COVID-19 pandemic was reasonably foreseeable, the commercial frustration doctrine should not pose a defense to nonperformance of a loan agreement.

Further, if the frustration of purpose is only temporary – if the pandemic ends – the contract obligor's duty to perform is only temporarily suspended "unless his performance after the cessation of the impracticability or frustration would be materially more burdensome that had there been no impracticability or frustration." Restatement (Second) of Contracts § 269 (Oct. 2019 Update).

Impossibility of Performance

Impossibility of performance refers to those factual situations where the purposes for which the contract was made, have, on one side, become impossible to perform. *Crown Ice,* 174 So. 2d at 617. Impossibility of performance 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. *E.g., American Aviation, Inc. v. Aero-Flight Service, Inc.*, 712 So. 2d 809 (Fla. 4th DCA 1998):

> The doctrine of impossibility of performance 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 in the agreement. ... If the risk of the event that has supervened to cause the alleged frustration was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to an inference that the risk was assumed.

Id. at 810.

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 prior to the execution of the contract, the defense of impossibility is not

available. *Shore Inv. Co. v. Hotel Trinidad, Inc.*, 29 So. 2d 696, 697 (Fla. 1947).

The fact that a property has declined in value does not excuse nonperformance under the doctrine of impossibility of performance. *See Ferguson v. Ferguson*, 54 So. 3d 553, 556 (Fla. 3d DCA 2011). In *Ferguson*, a former husband attempted to excuse his nonperformance under a marital settlement agreement (to pay his former spouse a portion of the proceeds of the sale of the marital real property) based on impossibility of performance. The court declined the relief requested, and held that former husband could not void his marital settlement agreement as a result of changes in the real estate market. The court reasoned that the decline in the real estate market shortly after the former husband signed the marital settlement agreement, "while marked and unfortunate," was not the sort of unanticipated circumstance that falls within the purview of the doctrine of impossibility. *Id.* at 556. Per the court:

> Economic downturns and other market shifts do not truly constitute unanticipated circumstances in a market-based economy. The assignment of this risk before a final closing of the transaction between the parties was therefore among those for which a reasonably prudent person, represented by counsel, might have provided.

Id. at 557.

This idea that, in a market economy, economic downturns are to be anticipated, was echoed by the Seventh Circuit in *Hoosier Energy Rural Electric Cooperative, Inc. v. John Hancock Life Insurance Company*, 582 F.3d 721 (7th Cir. 2009):

> "The district court may have thought that economy-wide conditions justified this reallocation (of risks), but **it is hard to see how an economic downturn can be alleviated by making contracts less reliable**. Enforceable contracts are vital to economic productivity. ...That Hoosier Energy found itself unable to borrow money to roll over the loan would not excuse repayment; the "impossibility" doctrine never justifies failure to make a payment, because financial distress differs from impossibility (citations omitted.)
> .....
> What was impossible in fall 2008 may well be possible in fall 2009.

Id. at 727 – 728. [Emphasis added.]

Similarly, pandemics are foreseeable. It is hard to see how a pandemic can be alleviated by making contracts less reliable.

Impracticability of Performance

Under Florida law, impossibility of performance can include extreme impracticability of performance. *Valencia Center, Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1267 (Fla. 3d DCA 1985). Thus, the impracticability defense is a subset of the impossibility defense, and the comments in the section above regarding foreseeability apply equally to it.

The impracticability defense is rarely successful. Per the Third District in *Valencia*, "... courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless, and expensive ...") *Id.* at 1269. *See also, Eastern Air Lines v. Gulf Oil Corp.*, 415 F.Supp. 429, 439 (S.D. Fla. 1975) – (Impracticability of performance defense inappropriate where oil company's costs increased dramatically as a result of the energy crisis.)

Under the doctrine of impracticability of performance, a party is excused from nonperformance 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. But again, the defense fails if the contingency was reasonably foreseeable.

In *Bank of America v. Shelbourne Development Group, Inc.*, 2011 WL 829390 (N.D. Ill 2011), the lender filed suit due to borrower's default under loan agreement and moved to strike borrower's legal defense of commercial impracticability. The court found that viability of this defense depends upon whether the economic downturn was foreseeable. *Id.* at *4. While not finding – in the context of a motion to strike an affirmative defense – that the economic downturn was or was not reasonably foreseeable, the court nonetheless struck the defense, finding that the borrower's inability to pay did not discharge its duties or create an impossibility or impracticality defense. *Id.* at *5. *See also, Orlando Utilities Commission v. Century Coal*, 2008 WL 4570270 (M.D. Fla. 2008) – ("Neither a rise nor a collapse in the market in itself a justification [for nonperformance] for that is exactly the type of business risk which business contracts at fixed prices are intended to cover.") *Id.* at *2 - 3.

Further, if the frustration of purpose is only temporary – if the pandemic ends – the contract obligor's duty to perform is only temporarily suspended "unless his performance after the cessation of the impracticability or frustration would be materially more burdensome that had there been no

impracticability or frustration." Restatement (Second) of Contracts § 269 (Oct. 2019 Update).

Material Adverse Change

Many contracts – particularly for the purchase and sale of real estate – contain clauses allowing one or more of the parties to cancel or withdraw from the contract prior to the closing in the event of a "material adverse change" ("MAC") in conditions. This necessarily raises the question of whether the COVID-19 pandemic is a "material adverse change" sufficient to support nonperformance under a MAC clause in a contract.

In determining if a MAC has occurred, courts in cases like *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539 (8th Cir. 1997), usually adopt an objective standard as to what a reasonable purchaser would deem material. Thus, this is likely to be a fact-based inquiry, with each court applying a reasonableness standard based on each case's particular facts and circumstances.

In general, courts have been reluctant to enforce MAC clauses. In *Norris v. Edwin W. Peck, Inc.*, 381 So. 2d 353 (Fla. 5th DCA 1980), the court found that an amendment to a declaration of condominium - designating a storage room and 55 parking spaces as limited common areas appurtenant to one floor of the condo project – was not a material adverse change that would violate the unit owners' subscription agreements. In *Oceania Joint Venture v. Trillium, Inc.* 681 So. 2d 881 (Fla. 3d DCA 1996), the court found that a substitution of the developer of a condominium project, while a material change, was not an adverse change that would support rescission of a purchase contract.

Neither of these Florida cases discusses in any detail the elements of a "material adverse change." But in *D & T Properties, Inc. v. Marina Grande Associates, Ltd.*, 985 So. 2d 43 (Fla. 4th DCA 2008), the court defined a "material" modification of a condominium offering to be one that was "so significant that it would alter the buyer's decision to enter into the contract," and found that a $90 per month increase in a charge for a multimedia system was not material. *Id.* at 49 - 50. Implicit in that test – "so significant that it would alter the buyer's decision to enter into the contract" – is the idea that the change must be unanticipated at the time the contract is made. Certainly, if an event were anticipated at the time the contract were entered into, the buyer cannot later say, upon the occurrence of the anticipated event, that he / she would not have entered into the contract if only he / she had known that the event was going to occur.

In *IBP v. Tyson Foods, Inc.*, 789 A.2d 14 (Del. Ch. 2001), the court discussed the concept of material adverse change in more detail, and limited the applicability of a "material adverse effect" clause to unknown events that substantially threaten the overall earnings potential of the target – there a business entity – in a "durationally significant manner." There, the court found no material adverse change because Tyson already knew about IBP's volatile earnings.

As the above analysis of the other defenses makes clear, there is a strong argument that the COVID-19 pandemic was reasonably foreseeable. There is also support for the argument that the COVID-19 pandemic is not "durationally significant." In *Akorn, Inc. v. Fresenius Kabi AG*, CV 2018-0300-JTL, 2018 WL 4719347, at *53 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018), the court spoke in terms of an enforceable MAC – there referred to as a "material adverse effect" - being one that was consequential over a commercially reasonable period "which one would expect to **be measured in years rather than months**." [Emphasis added.] To the same general effect is *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715, 738, 742 (Del. 2008) – (EBITDA declines of three to eleven percent in 2007 and 2008 – a two year span - did not constitute a material adverse effect. A material adverse effect would require poor earnings results to "measured in years rather than months," and to "persist significantly into the future.") *But see Raskin v. Birmingham Steel Corp.*, 1990 WL 193326 slip op. (Ct. Ch. Del. 1990) – (A 50% decline in earnings over two consecutive quarters might be a "material adverse development.")

Current estimates are that the COVID-19 pandemic could last from 12 to 18 months. Tegan Taylor, *How long will the COVID-19 pandemic last?* https://www.abc.net.au/news/health/2020-03-20/coronavirus-covid19-pandemic-how-long-will-it-last/12043196, March 20, 2020. Since the estimated duration of the pandemic is 12 to 18 months, and not a matter of "years" – certainly less than the two years of reduced EBITDA in *Hexion* - the argument would be that the COVID-19 pandemic was reasonably foreseeable and is not "durationally significant" as that term is used in the case law. In *Akorn*, the court enforced a MAC clause, one of the few reported decisions to do so, but noted that the adverse condition had already lasted a year and showed no sign of abating. Assuming a 12 to 18 month timeline for the COVID-19 pandemic to run its course, the light at the end of the tunnel should be in sight at the end of one year.

End Notes

[1] Akerman LLP is a 100 year old law firm with more than 700 attorneys located in 26 offices from coast to coast. Ed Foster is the Chair of the firm's Financial Institutions Commercial Litigation Practice.

[2] But this statutory provision will not excuse nonperformance if the occurrence of the contingency was foreseeable and the risk of the occurrence was not specifically allocated under the contract. *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429, 438 (S.D. Fla. 1975) – (Holding that the burden of proof is on the party claiming excuse, and that, "In short, for U.C.C. § 2-615 to apply there must be a failure of a pre-supposed condition, which was an underlying assumption of the contract, which failure **was unforeseeable**, and the risk of which was not specifically allocated to the complaining party.") [Emphasis added.] *Accord, Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991-992 (5th Cir. 1976).

This is important because the Restatement (Second) of Contracts 11 Intro. Note (Oct. 2019 Update), states that the Restatement has embraced the analysis employed by Section 2-615, thus effectively inserting the element of foreseeability into any *force majeure* analysis. This is reflected in Restatement (Second) of Contracts § 261, which is worded very similarly to Section 2-615 of the UCC.

[3] If the contract contains a number of performances promised in the alternative, and the triggering event under a *force majeure* clause implicates less than all of the alternative performance options, nonperformance of the other performance options may not be excused unless the contract specifically says so. Restatement (Second) of contracts § 270 (Oct. 2019 Update); Restatement (first) of Contracts § 469 (Oct. 2019 Update).

[4] This concept that the triggering event for a *force majeure* defense not be reasonably foreseeable was echoed in *Gulf Oil Corp.*, 706 F.2d at 452 – ("However, it is well settled that a *force majeure* clause in a non-warranty contract defines the area of **unforeseeable events** that might excuse nonperformance within the contract period." *Citing U.S. v. Brooks-Callaway Co.*, 318 U.S. 120 (1943). [Emphasis added.] To the same effect is *in re Cablevision Consumer Litigation*, 864 F.Supp.2d at 264:

> "Force majeure clauses are to be interpreted in accord with their function, which is to relieve a party of liability

> when the parties' expectations are frustrated due to an event that is 'an extreme and **unforeseeable** occurrence,' that 'was beyond [the party's] control and without its fault or negligence.' " *Team Mktg. USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 839 N.Y.S.2d 242, 246 (3d Dep't 2007) (*quoting* 30 Lord, Williston on Contracts § 77:31 4th ed.).

[Emphasis added.]

[5] *See also* 1 Am.Jur.2d *Acts of God*. §§ 8-11.

[6] Rand Corporation is a non-profit corporation that was established in 1948 "... to further and promote scientific, educational and charitable purposes, all for the public welfare and security of the United States of America." https://www.rand.org/about/history/a-brief-history-of-rand.html. It has been described as "... an American nonprofit global policy think tank created in 1948 by Douglas Aircraft Company to offer research and analysis to the United States Armed Forces. It is financed by the U.S. government and private endowment, corporations, universities and private individuals." https://en.wikipedia.org/wiki/RAND_Corporation.

[7] A borrower may argue that a pandemic is less foreseeable than an epidemic, and so the failure to include epidemics in a *force majeure* clause should not be viewed as shifting the risk of a pandemic to the borrower – and should not bar the borrower from raising the occurrence of a pandemic as a defense to nonperformance, using one of the doctrines discussed below. But to many borrowers – hoteliers, restaurateurs, apartment complex owners, a local homebuilder, etc. – it really does not matter if the event that is making his / her customers sick and / or unable to pay for services or rent is a local epidemic or a global pandemic. So if the *force majeure* clause did not include epidemics, and so shifted the risks posed by epidemics to the borrower, the lender would argue that it also shifted the risks posed by pandemics.
