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Force Majeure and the Coronavirus: Exposing the "Foreseeable" Clash Between Force Majeure's Common Law and Contractual Significance

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COMMENT

FORCE MAJEURE AND THE CORONAVIRUS: EXPOSING THE "FORESEEABLE" CLASH BETWEEN FORCE MAJEURE'S COMMON LAW AND CONTRACTUAL SIGNIFICANCE

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COVID-19 presents unique challenges and opportunities for modern contract jurisprudence.[1] Due to the social, political, and economic upheaval,[2] masses of contracting parties are seeking an "out" to their contractual obligations via exculpatory "force majeure" clauses.[3] The implications of this one little clause cannot be overstated. In some cases, hundreds of millions of dollars rest upon the construction of a few words in the often-overlooked, boilerplate language of the force majeure clause.[4] However, force majeure as a legal doctrine is woefully underdeveloped,[5] and in many states there is little to no state law interpreting these clauses.[6] Courts that

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1. Lydia Wheeler, *Coronavirus Threatens to Flood Courts with Contract Disputes*, BLOOMBERG L. (Mar. 25, 2020), https://news.bloomberglaw.com/health-law-and-business/coronavirus-threatens-to-flood-courts-with-contract-disputes (noting that COVID-19 "has left companies across an array of industries wondering what to do if they can't perform the services they are contractually obligated to provide").

2. The United States' GDP dropped to the lowest recorded level in modern American history. *Coronavirus: US Economy Sees Sharpest Contraction in Decades*, BBC (July 30, 2020), https://www.bbc.com/news/business-53574953.

3. The term "force majeure" describes an overpowering event, caused by forces outside of human control. Ky. Utilities Co. v. S. E. Coal Co., 836 S.W.2d 392, 399 (Ky. 1992) (citing *Force Majeure*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

4. *See, e.g.*, Complaint at 2–3, Regents of the Univ. of Cal. *ex rel* Dep't of Intercollegiate Athletics v. Under Armour, Inc., 2:20-cv-7798 (C.D. Cal. Aug. 26, 2020) (alleging breach of fifteen-year, $280 million contract and arguing COVID-19 may not constitute a force majeure).

5. Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App. 1998) ("Force majeure, is now little more than a descriptive phrase without much inherent substance.").

6. *See* Haverhill Glen, LLC v. Eric Petroleum Corp., 67 N.E.3d 845, 850 (Ohio Ct. App. 2016) (noting force majeure as a new concept to Ohio law); Specialty Foods of Ind., Inc. v. City of South Bend, 997 N.E.2d 23, 26 (Ind. Ct. App. 2013) (observing "Indiana has very few cases interpreting

have never interpreted the force majeure clause, or have previously given it a cursory review, now must make important interpretative decisions. These choices may determine which businesses survive disruptions in performance caused by COVID-19. Even more broadly, these choices will shape force majeure construction and interpretation in a post-COVID-19 world.[7]

This Comment highlights a largely unexplored area[8] of force majeure jurisprudence: the unclear and conflicting relationship between force majeure as a contractual tool and force majeure as a term of common-law significance.[9] At common-law, force majeure was traditionally defined as an unforeseeable event that prevents compliance with contractual obligations.[10] By contrast, modern contract jurisprudence developed an increased reliance on force majeure clauses, in which parties identify specific events that may excuse nonperformance.[11] These force majeure clauses do not need to be unforeseeable to be enforceable.[12]

This Comment demonstrates how these two conceptions of force majeure inevitably clash on the subject of foreseeability and it articulates why that clash matters.[13] If a court presumes parties intend force majeure's common-law significance to bear on the clause, the court will impose an unforeseeability requirement on the delineated force majeure events.[14] By contrast, if a court presumes the parties intend the terms of the force majeure clause to exclusively control, a foreseeable force majeure event may still

force majeure clauses"); URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1286 (D.R.I. 1996) (noting "Rhode Island case law provides little guidance" in analyzing force majeure clauses); Rohm & Haas Co. v. Crompton Corp., No. 020435, 2002 WL 1023435, at *2 (Pa. Ct. Com. Pl. Apr. 29, 2002) ("Pennsylvania state cases addressing force majeure are surprisingly few and far between."); Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150, 154 (Mich. Ct. App. 1991) ("[Force majeure] is virtually unknown in Michigan common law."); B.F. Goodrich Co. v. Vinyltech Corp., 711 F. Supp. 1513, 1518 (D. Ariz. 1989) (noting the lack of Arizona caselaw interpreting force majeure provisions).

7. *See infra* Part II.

8. *See* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 182 (Tex. App. 2018) (noting only two jurisdictions other than Texas that have addressed this area of force majeure).

9. *See infra* Part I.B.

10. *See, e.g.*, Gulf Oil Corp. v. Fed. Energy Regul. Comm'n, 706 F.2d 444, 452 (3d Cir. 1983) ("[I]t is well settled that a *force majeure* clause . . . defines the area of unforeseeable events that might excuse nonperformance within the contract period.").

11. These clauses are so commonplace they are often considered boilerplate. *See, e.g.*, Langham-Hill Petroleum Inc. v. S. Fuels Co., 813 F.2d 1327, 1329 (4th Cir. 1987) (analyzing a "boilerplate" force majeure clause).

12. *See, e.g., id.* at 1329 n.1 (referencing a force majeure clause that does not expressly require unforeseeability).

13. *See infra* text accompanying notes 14–18.

14. *See infra* Section I.C.1.

excuse noncompliance.[15] Thus, the court's presumption on the intended meaning of force majeure may be outcome determinative.

COVID-19 has brought this inevitable clash to a head, with contracting parties across the nation facing pandemic-related contractual interferences.[16] While COVID-19 may intuitively seem like an unforeseeable event, this will likely be far more difficult to prove than it first appears.[17] An additional, court-imposed unforeseeability requirement may prove fatal to prospective force majeure defenses, when force majeure precedent already suggests very few parties are likely to obtain relief.[18] Disentangling force majeure's common-law understanding from its use as a contractual tool may avoid increasing the burden on an invoking party who already has a steep hill to climb.[19] More importantly, disentangling these concepts is crucial to increase certainty around force majeure clauses for future contracting parties and for parties currently contemplating judicial relief, as these parties will be better able to approximate the merits of their claim with clearer guidance on the interpretation of force majeure in their jurisdiction.[20]

This Comment advocates for the Court of Appeals of Maryland to adopt an interpretive strategy that courts in Texas and Indiana have followed.[21] This approach ("the Texas approach") presumes that parties intend the term "force majeure" to be defined exclusively within the contract, while assigning common law the subordinate role of filling in the gaps.[22] This approach avoids illogical consequences, uncertainty, and the unnecessary expenditure of judicial resources that arise under the presumption of common law ("the common-law approach").[23]

Part I describes the state of force majeure jurisprudence today.[24] Section I.A. provides an overview of the elements a party must satisfy to successfully

15. *See infra* Section I.C.2.

16. *See supra* text accompanying notes 2–3.

17. *See infra* Section I.A, D.

18. *See infra* text accompanying note 151.

19. *See infra* Section II.C.2 (highlighting the risk of opening a rabbit-hole of litigation if courts apply a common-law unforeseeability requirement to COVID-19 related disruptions).

20. *See infra* Section II.B–C.

21. *See infra* Part II.

22. *See infra* Sections I.C.2. This approach is referred to as "the Texas approach" because it emerged first in Texas and was later adopted in Indiana. *See infra* Section I.C.2.

23. *See infra* Section II.B–C.

24. This Comment will focus on force majeure and its common-law roots, as the Uniform Commercial Code ("U.C.C.") does not expressly reference force majeure. *See generally* U.C.C. (AM. L. INST. & UNIF. L. COMM'N 1977). The closest reference in the U.C.C. to force majeure is located within § 2-614, which outlines the doctrine of commercial impracticability. U.C.C. § 2-614. Commercial impracticability closely mirrors the common-law doctrine of impossibility. E. Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 438 (S.D. Fla. 1974). Though force majeure is related to other common-law doctrines of excuse like the doctrine of impossibility, this Comment

invoke a force majeure defense.[25] Section I.B. highlights the limited Maryland state precedent concerning force majeure.[26] Next, Section I.C. provides an explanation of the differences between the Texas approach and the common-law approach.[27] Finally, Section I.D. discusses recent cases across the country in which courts have interpreted COVID-19 as a proposed force majeure event.[28]

Part II compares these opposing presumptions and argues that Maryland courts should adopt the Texas approach, which presumes parties intend the term "force majeure" to be exclusively defined within a contract, while permitting common-law to fill in the gaps. Section II.A. critiques the common-law approach.[29] Next, Section II.B. highlights the comparative benefits of the Texas approach.[30] Finally, Section II.C. argues that COVID-19 provides the impetus for Maryland courts to definitively adopt the Texas approach, in part to avoid tangential questions that may arise under the common-law approach of whether the pandemic was a foreseeable event.[31]

I. BACKGROUND

Lawyers and courts often describe force majeure clauses as articulating a "parade of horribles."[32] This is because force majeure clauses include a laundry list of terrible and unlikely events that may excuse a party from liability for nonperformance of their contractual obligations.[33] Force majeure

will focus exclusively on force majeure. For a discussion of the differences between these doctrines, see Kelley, *infra* note 166, at 93–97.

25. *See infra* Section I.A.

26. *See infra* Section I.B.

27. *See infra* Section I.C.

28. *See infra* Section I.D.

29. *See infra* Section II.A.

30. *See infra* Section II.B.

31. *See infra* Section II.C.

32. URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996).

33. *See, e.g.*, Watson Lab'ys, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1113 (C.D. Cal. 2001) (referring to force majeure clauses as "a parade of horribles"). These terrible and unlikely events run the gambit, as courts have analyzed large-scale events like the war with ISIS and 9/11 under force majeure clauses, along with smaller-scale events like a power failure at a wedding and a worker's foot amputation. Middle E. Broad. Networks, Inc. v. MBI Glob., LLC, No. 1:14-cv-01207, 2015 WL 4571178, at *3–4 (E.D. Va. July 28, 2015) (holding the war with ISIS did not excuse delays in delivery and construction of a broadcasting studio in Baghdad because the war was not a force majeure event under the contract); OWBR LLC v. Clear Channel Commc'ns, Inc., 266 F. Supp. 2d 1214, 1221–24 (D. Haw. 2003) (rejecting 9/11 as a force majeure event that would excuse a company's failure to host a music event in Hawaii five months after the attack); Facto v. Pantagis, 915 A.2d 59, 62 (N.J. Super. Ct. App. Div. 2007) (holding a power failure at a wedding reception constituted a force majeure event under the contract); Seitz v. Mark-O-Lite Sign Contractors, Inc., 510 A.2d 319, 321–22 (N.J. Super. Ct. App. Div. 1986) (holding the amputation

clauses developed in modern contract law[34] to ameliorate the harsh rules at common-law, in which the promisor's obligations were absolute.[35] The force majeure clause contracts around the common-law rule of absolute obligation by providing parties with a mechanism to identify specific events that may excuse nonperformance.[36] Consistent with general principles of freedom of contract, parties enjoy great leeway to allocate these improbable and otherwise unpredictable risks.[37] The court's ultimate goal in interpreting a force majeure clause, as in contract law generally, is to ascertain and effectuate the parties' intent.[38]

Section I.A. provides a brief overview of the elements a party must satisfy to invoke their force majeure clauses and excuse contractual nonperformance.[39] Next, Section I.B. highlights the lack of Maryland precedent concerning force majeure.[40] Section I.C. describes the inter-jurisdictional divide between the Texas approach and the common-law approach.[41] Lastly, Section I.D. highlights recent cases concerning COVID-19 as a force majeure event.[42]

A. Force Majeure Interpretation Generally

In a force majeure analysis the burden is on the invoking party[43] to prove that: (1) the event in question qualifies as a force majeure event under the agreement; (2) the force majeure event caused the invoking party's

of a contractor's foot did not excuse the company's failure to replace a sign as the amputation did not constitute a force majeure event under the contract).

34. *See Kel Kim Corp. v. Cent. Mkts.*, Inc., 519 N.E.2d 295, 296 (N.Y. 1987) (noting the judicial disposition before the nineteenth century of not permitting any excuses to nonperformance for a promisor).

35. *See* Milske v. Steiner Mantel Co., 103 Md. 235, 247, 63 A. 471, 473 (Md. 1906) (holding that a windstorm did not excuse nonperformance of contractual obligations, as the promises were unconditional).

36. Stand Energy Corp. v. Cinergy Servs., Inc., 760 N.E.2d 453, 457 (Ohio Ct. App. 2001).

37. However, force majeure clauses may not be so broad that they make the contractual promises illusory. *See, e.g.*, Corestar Int'l PTE. Ltd. v. LPB Commc'ns, Inc., 513 F. Supp. 2d 107, 121 (D.N.J. 2007) (noting parties may not contract for a specific schedule for shipment and "at the same time include a contract term that serves as an absolute defense to any delay").

38. *See* Sun Operating P'ship v. Holt, 984 S.W.2d 277, 287 (Tex. App. 1998) (noting the force majeure clause's interpretation is "dependent upon the intent of the parties as garnered from the wording of the instrument involved").

39. *See infra* Section I.A.

40. *See infra* Section I.B.

41. *See infra* Section I.C.

42. *See infra* Section I.D.

43. Emerald Int'l Corp. v. WWMV, LLC, No. 15-cv-0179, 2016 WL 4433357, at *3 (E.D. Ky. Aug. 15, 2016).

noncompliance to the degree specified in the contract; and (3) any procedural requirements set out in the force majeure clause have been satisfied.[44]

1. Does the Event Trigger the Force Majeure Clause?

A force majeure clause typically includes a list of specific, enumerated events.[45] Courts construe these enumerated events with their ordinary and accepted meanings in such a way that aligns with the contract as a whole and does not render another contractual provision meaningless.[46] Additionally, most force majeure clauses include a "catch-all" provision, which includes general language that may encompass more types of events than those specifically enumerated.[47]

In analyzing a catch-all provision, courts often employ the *ejusdem generis* canon of construction.[48] *Ejusdem generis* means "of the same kind or class," and is a canon of construction that interprets a general word following a list of words to be similar in kind to the words in the preceding list.[49] For example, in *Seitz v. Mark-O-Lite Sign Contractors, Inc.*,[50] the Superior Court of New Jersey relied on the *ejusdem generis* canon to hold that a contractor's foot amputation did not constitute a force majeure within the contract's catch-all provision, as an amputation was not similar in kind to the enumerated events of "strikes . . . fires, floods, earthquakes, or acts of God."[51]

44. Kyocera Corp. v. Hemlock Semiconductor, LLC, No. 15-025786-CK, 2015 Mich. Cir. LEXIS 11, at *9–10 (Mich. 10th Jud. Cir. Ct. June 16, 2015), *aff'd*, 886 N.W.2d 445 (Mich. Ct. App. 2015).

45. *Id.*

46. *See, e.g.*, Facto v. Pantagis, 915 A.2d 59, 62 (N.J. Super. Ct. App. Div. 2007) ("A *force majeure* clause must be construed, like any other contractual provision, in light of 'the contractual terms, the surrounding circumstances, and the purpose of the contract.'") (quoting Marchak v. Claridge Commons, Inc., 633 A.2d 531, 535 (1993)). This requirement is particularly important in considering the relationship between a force majeure clause and an assumption of risk provision. *See, e.g.*, Dunaj v. Glassmeyer, 580 N.E.2d 98, 101 (Ohio Ct. Com. Pl. 1990) ("When a party assumes the risk of certain contingencies . . . such contingencies cannot later constitute a 'force majeure.'").

47. *See, e.g.*, Maralex Res., Inc. v. Gilbreath, 76 P.3d 626, 636 (N.M. 2003) (analyzing a catch-all provision).

48. *See Seitz v. Mark-O-Lite Sign Contractors, Inc.*, 510 A.2d 319, 321–22 (N.J. Super. Ct. App. Div. 1986) (declining to include a worker's incapacitation in the force majeure's catch-all provision, as it was dissimilar from the enumerated events).

49. Harleysville Preferred Ins. Co. v. Rams Head Savage Mill, LLC, 237 Md. App. 705, 726, 187 A.3d 797, 809 (Md. Ct. Spec. App. 2018) (quoting *Ejursdem generis*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

50. 510 A.2d 319 (N.J. Super. Ct. App. Div. 1986).

51. *Id.* at 321–22.

"Acts of God" are a unique enumerated term within a force majeure clause, as some courts equate the term force majeure to the common-law concept of an "act of God."[52] In modern jurisprudence, however, "acts of God" have largely been incorporated as one kind of event that may be included under the umbrella of a force majeure clause.[53] An "act of God" is traditionally understood as an "unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado."[54] By contrast, force majeure clauses are generally drafted to include both "acts of God," and events which are within human control, such as strikes or government interferences.[55]

The requirement that events fall within an enumerated force majeure event or a catch-all provision is particularly important when parties invoke financial difficulties or market fluctuations as an alleged force majeure event.[56] Generally, market fluctuations and increases in financial burdens are insufficient to invoke force majeure.[57] Courts will not presume that parties intended market fluctuations or financial difficulties to be included within either an enumerated event[58] or a catch-all phrase.[59] However, parties may voluntarily bargain for and include market fluctuations or financial difficulties within their agreement.[60] This concept had historic application during the 2008 financial crisis. Most courts rejected that the financial crisis constituted a force majeure event, absent the express inclusion of economic

52. *See, e.g.*, Langham-Hill Petroleum Inc. v. S. Fuels Co., 813 F.2d 1327, 1328 (4th Cir. 1987) (referring to force majeure clauses and "[a]ct of God" clauses synonymously).

53. *See, e.g.*, *id.* at 1329 n.1 (including "acts of God" within a list of force majeure events).

54. Gonzalez v. Tanimura & Antle, Inc., No. CV06-2485-PHX-MHM, 2008 WL 4446536, at *9 (D. Ariz. Sept. 30, 2008) (quoting *Act of God*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

55. *See, e.g.*, *Langham-Hill Petroleum Inc.*, 813 F.2d at 1329 n.1 (including both "acts of God" and "strikes" and government interference within a force majeure clause).

56. *See, e.g.*, Stand Energy Corp. v. Cinergy Servs., Inc., 760 N.E.2d 453, 457 (Ohio Ct. App. 2001) (noting that "worsening economic conditions . . . do not qualify as a *force majeure*").

57. *See, e.g.*, *id.*; Hampton Island, LLC v. HAOP, LLC, 702 S.E.2d 770, 775 (Ga. Ct. App. 2010) ("[T]he fact that one is unable to perform a contract because of . . . his poverty . . . will not ordinarily excuse nonperformance . . . ." (quoting Bright v. Stubbs Props., 210 S.E.2d 379, 380 (Ga. Ct. App. 1974))); Hanover Petroleum Corp. v. Tenneco Inc., 521 So. 2d 1234, 1240 (La. Ct. App. 1988) ("[A]dverse economic conditions . . . do not constitute force majeure."); *see also infra* notes 58, 60.

58. *In re* Millers Cove Energy Co., Inc. v. Moore, 62 F.3d 155, 158 (6th Cir. 1995) ("Courts . . . generally refuse to excuse lack of compliance with contractual provisions due to economic hardship, unless such a ground is specifically outlined in the contract.").

59. *See, e.g.*, Valero Transmission Co. v. Mitchell Energy Co., 743 S.W.2d 658, 663 (Tex. App. 1987) (declining to include economic changes within the catch-all provision).

60. *See, e.g.*, Great Lakes Gas Transmission P'ship v. Essar Steel Minn., LLC, 871 F. Supp. 2d 843, 851–55 (D. Minn. 2012) (comparing caselaw in which parties expressly included economic downturns within a force majeure to caselaw in which parties failed to expressly provide for economic downturns in the clause).

hardships within the enumerated list of force majeure events.[61] As a practical result, the enumeration requirement limits the number of successful force majeure claims because prospective parties must clear an initial hurdle by proving that their alleged force majeure event is either specifically enumerated or that it fits within the force majeure's catch-all phrase.[62]

2. Did the Event Cause Noncompliance with Contractual Obligations?

The second substantive hurdle to invoking a force majeure defense requires the invoking party to demonstrate that the force majeure event proximately caused its noncompliance[63] to the degree outlined in the contract.[64] For example, in *Kyocera Corp. v. Hemlock Semiconductor, LLC*,[65] the Michigan Court of Appeals considered whether Chinese government market manipulations that affected the price of solar panels constituted a force majeure event within a contract.[66] The court held that because the acts of the Chinese government did not *directly* prevent the invoking parties' noncompliance, the Chinese government's actions could not excuse the invoking party's noncompliance.[67] Rather, the acts of the Chinese government merely made compliance less profitable for the invoking party.[68]

Furthermore, courts are unlikely to find an event was the cause of noncompliance when the noncompliance resulted from the invoking party's

61. *See also supra* note 60. *Compare* Elavon, Inc. v. Wachovia Bank, Nat'l Ass'n, 841 F. Supp. 2d 1298, 1307–08 (N.D. Ga. 2011) (holding the 2008 economic crisis was not a force majeure event under a contract that did not contain a specific enumerated term for changes in economic conditions), *with In re* Old Carco LLC, 452 B.R. 100, 120, 125–26 (Bankr. S.D.N.Y. 2011) (holding the 2008 economic crisis constituted a force majeure event as it fell within the enumerated term "change in economic conditions").

62. *See infra* text accompanying notes 56–61.

63. Coker Int'l, Inc. v. Burlington Indus., 747 F. Supp. 1168, 1170 (D.S.C. 1990), *aff'd*, 935 F.2d 267, 1170 (4th Cir. 1991) (noting that only force majeure events that directly cause noncompliance may excuse nonperformance); N. Ill. Gas Co. v. Energy Coop., Inc., 461 N.E.2d 1049, 1058 (Ill. App. Ct. 1984) (noting Illinois law requires force majeure events to proximately cause the invoking party's nonperformance).

64. *See, e.g.*, OWBR LLC v. Clear Channel Commc'ns, Inc., 266 F. Supp. 2d 1214, 1221 (D. Haw. 2003) (analyzing a force majeure clause that permitted cancellation of obligations when force majeure made compliance "inadvisable").

65. 886 N.W.2d 445 (Mich. Ct. App. 2015).

66. *Id.* at 448–57.

67. *Id.* at 450. The Michigan Court of Appeals also noted that the lower court mistakenly assumed the Chinese government's actions fell within one of the enumerated events in the force majeure clause as an "act[] of Government." *Id.* at 447–48.

68. *Id.* The economic penalties for the invoking party were severe, as the invoking party was liable for $1.74 billion and claimed the costs would force the company to leave the industry. *Id.* at 439.

own negligent acts or omissions.[69] If an invoking party voluntarily chooses not to comply with its contractual obligations due to an increased financial or logistical burden, courts generally find the invoking party's own actions were the proximate cause of noncompliance.[70] Similarly, if the invoking party was aware of a problem or danger and did not take actions to prevent the event's occurrence, the court may find the noncompliance was within the control of the invoking party and that the noncompliance was a result of the party's own negligent acts or omissions.[71]

Courts also have articulated temporal limitations for the applicability of a particular event to the force majeure provision in a contract. For instance, in *OWBR LLC v. Clear Channel Communications, Inc.*,[72] a federal district court considered whether 9/11 constituted a force majeure event in a contract for a music and entertainment event.[73] The court rejected the argument that the 9/11 attack constituted a force majeure event because even if the agreement included "terrorism" as an enumerated event, the connection was too tenuous, as the entertainment event was scheduled five months after the attack.[74] Thus, the directness requirement also limits the number of successful force majeure claims, as the invoking party's actions are closely scrutinized and the temporal limitation has been narrowly interpreted.

3. Has the Invoking Party Satisfied All Procedural Requirements Outlined in the Force Majeure Clause?

Finally, the invoking party must prove that any additional procedural requirements expressed in the force majeure clause have been satisfied.[75] In

69. White v. North, 121 Md. App. 196, 236, 708 A.2d 1093, 1113 (Md. Ct. Spec. App. 1998), *vacated on other grounds*, 356 Md. 31, 736 A.2d 1072 (Md. 1999) (noting an "unwarranted hardship" created by a party's own negligent omission will not support a force majeure defense); Middle E. Broad. Networks, Inc. v. MBI Glob., LLC, No. 1:14-cv-01207, 2015 WL 4571178, at *5 (E.D. Va. July 28, 2015) (rejecting argument that the war with ISIS caused noncompliance by blocking delivery routes, because the proximate cause was the invoking party's failure to pay a subcontractor).

70. *See* Valero Transmission Co. v. Mitchell Energy Corp., 743 S.W.2d 658, 663 (Tex. App. 1987) (noting a contractual obligation cannot be excused merely because performance has become more economically burdensome than anticipated).

71. Allegheny Energy Supply Co. v. Wolf Run Mining Co., 53 A.3d 53, 61–62 (Pa. Super. Ct. 2012) (holding that an abandoned gas well and a collapsed mine roof were inapplicable to the force majeure clause, as the invoking party knew of the problem and failed to take substantial action to prevent it).

72. 266 F. Supp. 2d 1214 (D. Haw. 2003).

73. *Id.* at 1215–16.

74. *Id.* at 1224.

75. *See* Kyocera Corp. v. Hemlock Semiconductor, LLC, No. 15-025786-CK, 2015 Mich. Cir. LEXIS 11, at *9–10 (Mich. 10th Jud. Cir. Ct. June 16, 2015), *aff'd*, 886 N.W.2d 445 (Mich. Ct. App. 2015) (noting procedural requirements may exist within a force majeure clause). This may

some jurisdictions, the failure to comply with any affirmative obligation is fatal to a force majeure defense.[76] Relatedly, the remedy the invoking party requests must be the remedy provided for in the contract. Force majeure clauses may permit a variety of remedies, including suspension of obligations and cancellation of the contract.[77] But, only the remedy permitted in the contract may be judicially enforced.[78] This has become a common litigation topic, with parties unsuccessfully seeking reimbursements of deposits, for example, when their force majeure clause did not explicitly outline such a remedy.[79] Therefore, each of the requirements for a successful force majeure claim narrows the number of litigants who will escape liability for contractual nonperformance, and this thereby ensures that force majeure remains a narrow exception to the general rule that contractual obligations are absolute.[80]

B. Maryland and Force Majeure

States will likely face a surge of COVID-19-related contract litigation in the coming months[81] and there is already data suggesting federal district courts have experienced an increase in COVID-19 related contract litigation since the pandemic began.[82] Those jurisdictions that have little-to-no force majeure precedent will benefit from clearly articulating the relationship between force majeure's common-law and contractual significance.[83] Notably, there is very little precedent in Maryland courts regarding force

include specific notice or mediation/arbitration provisions. *See, e.g.*, Int'l Mins. & Chem. Corp. v. Llano, Inc., 770 F.2d 879, 885 (10th Cir. 1985) (holding notice by the invoking party was inadequate and therefore the force majeure defense failed).

76. Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1168 (W.D. Okla. 1989) ("The failure to give proper notice is fatal to a defense based upon a force majeure clause requiring notice.").

77. *See, e.g.*, Langham-Hill Petroleum Inc. v. S. Fuels Co., 813 F.2d 1327, 1328 n.1 (4th Cir. 1987) (analyzing a force majeure clause that permitted suspension of obligations).

78. *See, e.g.*, NetOne, Inc. v. Panache Destination Mgmt., Inc., No. 20-cv-00150-DKW-WRP, 2020 WL 3037072, at *5 (D. Haw. June 5, 2020) (rejecting force majeure claim seeking return of deposits when the clause does not guarantee the return of deposits).

79. *Id.*

80. *See supra* text accompanying note 35.

81. *See* Jacob Gershman, *Coronavirus Contract Disputes Start Hitting the Courts*, WALL ST. J. (Apr. 20, 2020, 5:30 AM), https://www.wsj.com/articles/coronavirus-contract-disputes-start-hitting-the-courts-11587375001 (noting the expected "wave of [contract] litigation" amid the COVID-19 pandemic).

82. *See* Rachel Bailey, *Continuing to Track New Litigation Caused by COVID-19*, LEXMACHINA (July 16, 2020), https://lexmachina.com/blog/continuing-to-track-new-litigation-caused-by-covid-19/ (observing contract law as one of the top practice areas with the largest number of cases, filed in federal district courts, that would not have been filed if not for the pandemic).

83. *See infra* text accompanying notes 2–7.

majeure clauses.[84] This Author could find no case in which Maryland courts interpreted whether an event fell within an enumerated force majeure clause. The first reference to a "force majeure" in the Maryland courts occurred in 1970, in which the Court of Appeals simply noted that voluntary actions cannot constitute force majeure.[85] Prior to that point, Maryland courts referred only to "act[s] of God."[86]

Maryland follows principles of objective contract interpretation, which bear on the interpretation of force majeure as a contractual clause.[87] Maryland courts, like most jurisdictions, read the clear and unambiguous language of the contract in order to determine what a reasonable person would find the parties intended.[88] In that vein, traditional principles of contract interpretation support a narrow reading of a force majeure clause. Additionally, Maryland courts, like many other jurisdictions, "do not interpret contracts in a manner that would render provisions superfluous or as having no effect."[89] Rather, these courts give effect to each clause in order to avoid an interpretation that "casts out or disregards a meaningful part of the language of the writing."[90] Maryland courts only stray from this interpretive method as a matter of last resort.[91]

C. The Inter-Jurisdictional Divide Between the Texas Approach and the Common-Law Approach.

As the court's primary objective is to ascertain and effectuate the intent of the parties, a court must determine what the parties intended the term "force majeure" to mean within a particular contract.[92] As force majeure is a term of common-law significance, courts must determine whether the parties intended the common-law definition to be imported into the contract, or whether the parties intended to define force majeure exclusively within the contract.[93] To be clear, the outcome of a case may be identical regardless of

84. *See infra* text accompanying notes 85–86.

85. *See* Habliston v. City of Salisbury, 258 Md. 350, 362, 265 A.2d 885, 891 (Md. 1970) (noting action to remove buildings was voluntary and not due to a force majeure).

86. Tyler v. Capitol Indem. Ins. Co., 206 Md. 129, 138, 110 A.2d 528, 532 (Md. 1955) (noting a contractual obligation may be discharged by an act of God).

87. Atl. Contracting & Material Co., Inc v. Ulico Cas. Co., 380 Md. 285, 300, 844 A.2d 460, 468 (Md. 2004).

88. *Id.* at 301.

89. Towson Univ. v. Conte, 384 Md. 68, 81, 862 A.2d 941, 948 (Md. 2004).

90. Sagner v. Glenangus Farms, Inc., 234 Md. 156, 167, 198 A.2d 277, 283 (Md. 1964).

91. *Id.*

92. *See supra* text accompanying note 38.

93. TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 181 (Tex. App. 2018) (noting sometimes "contracts include terms that have common law significance").

which strategy is employed.[94] However, as the definition of force majeure at common-law requires events to be unforeseeable, and a particular force majeure clause in a contract may not expressly require unforeseeability, there is a conceptual tension that may impact the outcome of a case.[95]

Thus far, courts that have addressed this question can be placed into two categories.[96] The first category includes courts that presume parties intend force majeure's common-law significance to be imported, and would require a high bar to overcome that presumption.[97] These courts tend to impose an unforeseeability requirement upon the force majeure event.[98] The second category includes courts that regard the words of a self-defined force majeure clause as controlling and permit common-law notions to fill in the gaps.[99] These courts, more often than not, do not impose an unforeseeability requirement on enumerated force majeure events.[100] This Section discusses the most prominent cases on both sides of this debate, beginning with the common-law approach, and ending with the Texas approach.

1. The Common-Law Approach

Only federal courts have expressly advocated for an interpretive presumption that parties intend common-law components of force majeure, such as unforeseeability, to be read into a contract.[101] This Author could find no state court that has expressly adopted this view.[102] Nevertheless, a string

94. *See, e.g.*, *id.* at 185 (observing that even if the court did not apply an unforeseeability requirement, the event would not constitute force majeure under the *ejusdem generis* doctrine).

95. *See, e.g.*, Watson Lab'ys v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1108–14 (C.D. Cal. 2001) (discussing the parties' dispute over whether unforeseeability ought to be imposed on the force majeure event when the clause did not include an unforeseeability requirement).

96. *Id.* at 1111–12 (framing the two sides of this debate).

97. *E.g.*, *id.* at 1109–14 (holding the parties intended the common-law definition, as they used a boilerplate force majeure clause).

98. *E.g.*, *id.* (imposing an unforeseeability requirement).

99. *E.g.*, Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc. 861 S.W.2d 427, 436 (Tex. App. 1993) ("[L]ease terms are controlling regarding *force majeure*, and common law rules merely fill in gaps left by the lease.").

100. Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp., 736 S.W.2d 715, 720–21 (Tex. App. 1987) (declining to impose an unforeseeability requirement).

101. *See* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 182 (Tex. App. 2018) (highlighting only the United States Courts of Appeals for the Third and Fifth Circuits' cases as forming sides of this debate).

102. This is unsurprising, as many courts have not interpreted force majeure clauses at all. *See supra* note 6.

of federal district and circuit court cases, relying upon each other, shape the doctrine.[103]

First, *Gulf Oil Corp. v. Federal Energy Regulatory Commission*,[104] has been cited as one of the earliest cases on this side of the debate.[105] In *Gulf Oil Corp.*, the Third Circuit held that a gas supplier could not rely on force majeure to excuse its failure to supply gas under a warranty contract because the mechanical failures that caused noncompliance were ordinary and foreseeable.[106] Even though the clause did not expressly require force majeure events to be unforeseeable, the court relied on the common-law definition of force majeure, saying that it is "well settled" that force majeure necessarily includes unforeseeable events.[107] This case represents one of the earliest attempts by a court to reconcile the common-law requirement of unforeseeability with a force majeure clause that does not explicitly mention unforeseeability.

Second, an alternative articulation of this rule emerged in a later case, *Watson Laboratories Inc. v. Rhone-Poulenc Rorer, Inc.*[108] This court articulated a presumption that all force majeure events must be unforeseeable, based upon its common-law definition.[109] However, this court would permit parties to supersede the common-law definition if a bargained-for clause was sufficiently specific, such that it demonstrated an intent for the words on the page to exclusively control.[110] The court considered the boilerplate force majeure clause at issue as fundamentally incapable of demonstrating an intent to supersede common-law, as the parties did not bargain for the terms.[111]

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103. *See TEC Olmos, LLC*, 555 S.W.3d at 182 ("There has, indeed, been a debate regarding whether common-law notions of foreseeability have any place in the interpretation of modern-day force majeure clauses.").

104. 706 F.2d 444 (3d Cir. 1983).

105. *See, e.g.*, *TEC Olmos, LLC*, 555 S.W.3d at 182 (referring to *Gulf Oil Corp.* as representative of one side of this debate); *see also Kodiak 1981 Drilling P'ship*, 736 S.W.2d at 720 (rejecting *Gulf Oil Corp.*, as directly contrary to Texas and Fifth Circuit precedent).

106. *Gulf Oil Corp.*, 706 F.2d at 454–55.

107. *Id.* at 452.

108. 178 F. Supp. 2d 1099 (C.D. Cal. 2001).

109. *Id.* at 1113 (holding defendants failed to overcome the presumption that the invoking party "agreed to bear any loss occasioned by an event which was foreseeable at the time of contracting . . . .").

110. *Id.* (contrasting the vague and boilerplate clause in *Watson Laboratories* with the "specific" clause in *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, which excused specific types of government actions); *see also* E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 988 (5th Cir. 1976) (noting the force majeure clause excused "any act of government . . . affecting materials, equipment, facilities or completed aircraft").

111. *Watson Lab'ys*, 178 F. Supp. 2d at 1110; *see also* Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs., 731 F. Supp. 850, 855–56 (N.D. Ill. 1990) (noting a boilerplate force majeure

In this case, the federal district court, applying California law, held that the United States Food and Drug Administration's shutdown of a medical drug supply company's manufacturer could not fall within the enumerated event of a "regulatory . . . action." [112] The court found that the term "regulatory action" was too vague to demonstrate that the parties intended the shutdown of a manufacturer, a non-party to the contract, to be included. [113] As the term was too vague and the clause was boilerplate, the court imposed the common-law requirement of unforeseeability on the shutdown, determined the shutdown was foreseeable, and, thus, that the force majeure clause would not excuse contractual nonperformance.[114]

One stringent alternative is for courts to require parties to expressly include "foreseeable events" within the clause if they intend foreseeable events to be included.[115] At least one bankruptcy court has embraced this alternative.[116] This court would only permit foreseeable force majeure events to be included when parties specifically include language to that effect in the contract.[117]

2. The Texas Approach

A few state courts, including those in Texas and Indiana, have expressly adopted an interpretive stance regarding the relationship between common-law force majeure and its contractual equivalent.[118] These courts allow the terms of an enumerated force majeure clause to control the scope and

clause invokes a body of common-law analysis, while specific clauses are analyzed like any other contractual provision).

112. *Watson Lab'ys,* 178 F. Supp. 2d at 1103–05, 1113.

113. *Id.* at 1109, 1113.

114. *Id.* at 1113.

115. *In re* Flying Cow Ranch HC, LLC, No. 18-12681-BKC-MAM, 2018 WL 7500475, at *2 (Bankr. S.D. Fla. June 22, 2018) (requiring parties to expressly include "foreseeable events" to overcome the presumption at common law that force majeure events are unforeseeable).

116. *Id.*

117. *Id.* ("[U]nder Florida law, *force majeure* clauses that include foreseeable events . . . are permissible, [but] such events must be provided for in the language of the contract . . . .").

118. *See Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 716, 720–21 (Tex. App. 1987) (holding there is no unforeseeability requirement for a *specified* force majeure condition); Specialty Foods of Ind., Inc. v. City of South Bend, 997 N.E.2d 23, 27 (Ind. Ct. App. 2013) ("[T]he scope and effect of a force majeure clause depends on the specific contract language, and not on any traditional definition of the term.").

application of a force majeure analysis,[119] and permit common-law to fill in the gaps left by general exculpatory language, such as in a catch-all phrase.[120]

For example, in *Kodiak 1981 Partnership v. Delhi Gas Pipeline Corp.*,[121] the Texas Court of Appeals declined to apply an automatic unforeseeability requirement when the proposed force majeure event fell within an enumerated force majeure event in the contract.[122] However, when the proposed force majeure event instead falls within the general catch-all phrase, the Texas Court of Appeals, in *TEC Olmos, LLC v. ConocoPhillips Co.*,[123] held that common law would fill in the gaps and the court would impose an unforeseeability requirement.[124]

D. COVID-19 Disruptions as a Force Majeure

As of May, 2021 courts are still in the early stages of interpreting whether COVID-19 and its related disruptions constitute force majeure events, and few parties have been rewarded relief.[125] This is primarily due to the difficulty in isolating a particular COVID-19-related disruption that *directly* caused noncompliance to the degree specified in the contract.[126] In one notable case, *In re Republican Party of Texas*,[127] the Republican State Convention of Texas was canceled due to COVID-19.[128] While the majority opinion did not rely on force majeure, the dissent reasoned that COVID-19 generally could not constitute a force majeure event, as its ongoing nature was contrary to the clause which defined force majeure events as specific "occurence[s]."[129]

119. *Specialty Foods of Ind., Inc.*, 997 N.E.2d at 27 ("[W]hen the parties have defined the nature of force majeure in their agreement, that nature dictates the application, effect, and scope of force majeure . . . ." (citing Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App. 1998))).

120. *See* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 184 (Tex. App. 2018) (holding the common-law unforeseeability requirement applies to general exculpatory language of catch-all phrases).

121. 736 S.W.2d 715 (Tex. App. 1987).

122. *Id. at* 716, 720–21.

123. 555 S.W.3d 176 (Tex. App. 2018).

124. *Id.* at 182–83.

125. *See infra* text accompanying notes 126–147.

126. *See, e.g.*, Rudolph v. United Airlines Holdings, Inc., No. 20 C 2142, 2021 WL 534669,*7 (N.D. Ill. Feb. 12, 2021) (noting even if COVID-19 fell within United Airline's force majeure clause, the airline must also prove COVID-19 directly caused the airline to cancel its flights); Future St. Ltd. v. Big Belly Solar, LLC, No. 20-cv-11020-DJC, 2020 U.S. Dist. LEXIS 136999, at *20 (D. Mass. July 31, 2020) (noting that, even if COVID-19 constituted force majeure, the invoking party failed to prove how it caused noncompliance).

127. 605 S.W.3d 47 (Tex. 2020).

128. *Id.* at 49 (Devine, J., dissenting).

129. *Id.* at 52.

However, multiple courts have held COVID-19 fell within a force majeure clause as a "natural disaster."[130] In *JN Contemporary Art LLC v. Phillips Auctioneers LLC*,[131] a federal district court in New York considered whether the pandemic fell within a force majeure clause that would excuse an art auction house's failure to comply with an agreement to sell a painting.[132] The district court remarked that "[i]t cannot be seriously disputed that the COVID-19 pandemic is a natural disaster."[133] Other courts have reached similar conclusions.[134] Therefore, recent precedent suggests parties with the enumerated term "natural disaster" within their force majeure clauses have a greater likelihood of COVID-19 successfully excusing noncompliance.[135]

Parties have frequently invoked COVID-19-related government-issued shutdown orders as a force majeure event.[136] However, they have had limited success arguing that these orders are force majeure events due to the difficulty in demonstrating that the shutdown order itself caused noncompliance.[137] For instance, in *Richards Clearview, LLC v. Bed Bath & Beyond, Inc.*,[138] a federal district court in Louisiana noted the difficulty of determining whether a government-issued shutdown order affecting malls caused the Bed, Bath & Beyond store to close.[139] Although the store was located in a mall which was forced to shut down due to the government's order, the Bed, Bath & Beyond store was excluded from the government's order and was not required to close.[140]

When the force majeure clause does not require strict impossibility, but permits a more lenient standard, courts may have more flexibility in

130. *See infra* notes 131–134.

131. No. 20CV4370 (DLC), 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020).

132. *Id.* at *1–7.

133. *Id.* at *7.

134. AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 20-CV-0310, 2020 WL 7024929, at *58–59 (Del. Ch. Nov. 30, 2020) (noting COVID-19 and its effects fits within the enumerated term of "calamities" and arguably fits within the enumerated term of a "natural disaster"); Pa. Democratic Party v. Boockvar, 238 A.3d 345, 370 (Pa. 2020) (finding COVID-19 constituted a "natural disaster" under a Pennsylvania statute).

135. *See also* 1600 Walnut Corp. v. Cole Haan Co. Store, No. 20-4223, 2021 WL 1193100, at *3 (E.D. Pa. Mar. 30, 2021) (finding the pandemic fell within a catch-all phrase as it was similar in kind to "other life-altering national events [], such as war, riots, and insurrection").

136. *See e.g.*, *In re* Cinemex USA Real Est. Holdings, Inc., No. 20-14695-BKC-LMI, 2021 WL 564486, at *6 (Bankr. S.D. Fla. Jan. 27, 2021) (finding force majeure clause excused rental payments for movie theatre forced to close by government order).

137. *See id.*; *see also infra* text accompanying notes 138–140; 143–146.

138. No. 20-1709, 2020 U.S. Dist. LEXIS 160078, at *3 (E.D. La. Sept. 2, 2020), *aff'd on other grounds*, No. 20-30614, 2021 WL 865310 (5th Cir. 2021) (applying Louisiana law).

139. *Id.*

140. *Id.* at *5 n.1, n.3.

providing relief.[141] In *In re Hitz Restaurant Group*,[142] a bankruptcy court examined whether the Governor of Illinois's shutdown order of restaurants, which permitted carry-out dining, caused the invoking party's noncompliance.[143] The force majeure clause at issue did not require strict impossibility.[144] Rather, it permitted any force majeure event that "delayed, retarded, or hindered" performance to excuse nonperformance.[145] Because the shutdown order "hindered" in-person dining, which constituted approximately three fourths of the restaurant's square footage, the invoking party was excused from three-fourths of its rental obligations.[146] In general, these cases demonstrate that there are significant obstacles for parties invoking COVID-19 as a force majeure event.[147]

II. ANALYSIS

COVID-19 exposes the inevitable clash between presuming the common-law definition of force majeure as an unforeseeable event, and presuming parties intend the contractual tool of force majeure to exclusively control.[148] For instance, under the common-law approach, COVID-19 is the prototypical example of a force majeure event.[149] Indeed, courts are already referring to COVID-19 as a force majeure in dicta.[150] However, force majeure precedent suggests that few parties are likely to obtain relief from their contractual obligations due to COVID-19.[151] When a once-in-a-century pandemic does not constitute a force majeure under most contracts, but

141. *See infra* text accompanying notes 142–146.

142. 616 B.R. 374 (Bankr. N.D. Ill. 2020).

143. *Id.* at 378–79.

144. *Id.* at 376–77.

145. *Id.*

146. *Id.* at 377, 379–80.

147. *See supra* text accompanying notes 127–140.

148. *See infra* text accompanying notes 149–154.

149. *See, e.g.*, URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996) (providing cataclysmic examples of force majeure events, such as "typhoons, citizens run amok, [and] Hannibal and his elephants at the gates").

150. *E.g.*, Nat'l Urb. League v. Ross, 977 F.3d 770, 779 (9th Cir. 2020) ("[T]he force majeure of the pandemic . . . ."); Pa. Democratic Party v. Boockvar, 238 A.3d 345, 388 (Pa. 2020) (Wecht, J., concurring) (calling the convergence of a "once-in-a-century pandemic" and postal delays a "*force majeure*"); Westbury Flats LLC. v. Backer, No. LT-78308-12/KI, 2020 WL 5362063, at *5 n.2 (N.Y. Civ. Ct. Sept. 4, 2020) (noting legislation aimed to address the economic downturn caused by the "*force majeure of Coronavirus Pandemic of 2020*").

151. At the time of writing, only one court has permitted some form of relief due to COVID-19 disruptions. *See In re* Hitz Rest. Grp., 616 B.R. 374 (Bankr. N.D. Ill. 2020) (permitting limited relief for a restaurant closure due to a government-issued shutdown order). Precedent similarly suggests that very few parties are likely to be excused for nonperformance. *See supra* Section I.A. For an analysis of the applicability of COVID-19 as a force majeure event, see *infra* Section II.C.

something as small as a power failure at a wedding does,[152] this signals that the role of force majeure in modern contract jurisprudence is deeply confused. This Comment posits that this confusion is caused by the indiscriminate comingling of the common-law conception of force majeure with the contractual tool of the force majeure clause.[153] It is, therefore, crucial for courts to isolate an interpretative strategy that disentangles these intertwined concepts.[154]

This Comment advocates for the Court of Appeals of Maryland to adopt the strategy employed in Texas and Indiana, which presumes the terms of a self-defined force majeure clause are controlling, while relying on common-law merely to fill in the gaps.[155] Under this approach, common law would apply when the contract has general exculpatory language, such as within a catch-all phrase, or when the contract merely invokes the word force majeure and does not enumerate any specific events.[156]

First, Section II.A. discusses why the common-law approach is flawed.[157] Next, Section II.B. highlights the comparative benefits of the Texas approach.[158] Finally, Section II.C. argues that the Texas approach is the ideal strategy to use in interpreting COVID-19 as a force majeure event.[159] This is due in part to the unique qualities of COVID-19, as a widespread and temporally extended event.[160] The Texas approach is meritorious, as it provides certainty to parties while avoiding the unnecessary expenditure of resources and time that would likely occur in disputing whether COVID-19 constitutes a foreseeable event.[161]

A. The Common-Law Approach Results in Illogical Consequences, Deviates from the Ordinary Meaning Canon of Construction, and Relies Too Heavily on Legal Formalism.

This Section will argue that the common-law approach results in: (1) the illogical consequence of requiring enumerated force majeure events to be

152. *See* Facto v. Pantagis, 915 A.2d 59, 60–62 (N.J. Super. Ct. App. Div. 2007) (holding a power failure at a wedding constitutes force majeure under an agreement which explicitly lists power failure as a type of force majeure).

153. *See infra* Sections II.A., II.B. (comparing whether common-law conceptions of force majeure or the contractual force majeure clause should control).

154. *See infra* Sections II.B., II.C.

155. *See infra* Sections II.B., II.C.

156. *See supra* note 120.

157. *See infra* Section II.A.

158. *See infra* Section II.B.

159. *See infra* Section II.C.

160. *See infra* text accompanying notes 221–231.

161. *See infra* Section II.C.

unforeseeable; (2) an unjustifiably high bar to overcome the common-law presumption, which deviates from the ordinary meaning canon of construction; and (3) a heavy reliance on legal formalism that may not align with the parties' ultimate intent.[162]

One of the principal cases on this side of the jurisdictional divide,[163] *Gulf Oil Corp. v. Federal Energy Regulatory Commission*,[164] articulated an early reliance on the common-law definition of force majeure.[165] However, such reliance on the common-law definition to interpret an *enumerated* force majeure event results in illogical consequences.[166] The mere fact that parties include a list of enumerated events in a force majeure clause demonstrates that they foresaw the occurrence of the enumerated events at the creation of the contract.[167] To require enumerated events to also be unforeseeable is to require a logical impossibility.[168] If this unforeseeability requirement is taken seriously, it would effectively nullify enumerated events, which were all technically foreseeable, as evidenced by their contemplation and inclusion in the contract.[169] To reconcile this, courts would need to draw a line between foreseeable events that are so unlikely to occur that they are included as enumerated events, and foreseeable events that are likely to occur and

162. *See infra* notes 164–189.

163. *See, e.g.*, TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 182 (Tex. App. 2018) (referring to *Gulf Oil Corp.* as representative of one side of this debate); *see also* Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp., 736 S.W.2d 715, 720 (Tex. App. 1987) (rejecting *Gulf Oil Corp.*, as directly contrary to Texas and Fifth Circuit precedent).

164. 706 F.2d 444 (3d Cir. 1983).

165. *Id.* at 452. To support this reasoning, the Third Circuit relied entirely on the United States Supreme Court's decision in *United States v. Brooks-Calloway Co*. *Id.* However, the Third Circuit's reliance on this Supreme Court precedent was in error because *Brooks-Calloway Co.* involved a force majeure clause that specifically required all enumerated force majeure events be "unforeseeable." United States v. Brooks-Callaway Co., 318 U.S. 120, 121 n.1 (1943). Yet, the clause in *Gulf Oil Corp.* did not include an explicit unforeseeability requirement. *Gulf Oil Corp.*, 706 F.2d at 456 n.8.

166. *See infra* text accompanying notes 167–171; *see also* Jay D. Kelley, *So What's Your Excuse? An Analysis of Force Majeure Claims*, 2 TEX. J. OIL GAS & ENERGY L. 91, 102 (2007) (characterizing the *Gulf Oil Corp.* court's interpretation as "unduly restrictive").

167. Sun Operating P'ship v. Holt, 984 S.W.2d 277, 288 n.4 (Tex. App. 1998) ("[I]n naming specific force majeure events in the clause[,] the parties undoubtedly foresaw the possibility that they could occur, and that is why they enumerated them to begin with.").

168. *Id.* ("Indeed, to imply an unforeseeability requirement into a force majeure clause would be unreasonable.").

169. *See supra* text accompanying note 167.

therefore, cannot constitute force majeure.[170] This approach necessitates contorting the concept of foreseeability just to remain logically cogent.[171]

An alternative articulation of the common-law approach, adopted in *Watson Laboratories Inc. v. Rhone-Poulenc Rorer, Inc*,[172] must also be rejected. This strategy presumes the common-law definition applies[173] and discounts boilerplate clauses as fundamentally incapable of demonstrating that the parties intended their force majeure clause to overcome the common-law presumption.[174] By rejecting boilerplate language as wholly inapplicable, the court in *Watson Laboratories* set a high bar for the words on the page to overcome the common-law presumption.[175]

For instance, if the disputed enumerated term is "government interventions," the *Watson Laboratories* court would assess whether the clause appeared bargained-for by considering whether the clause appeared specific or tailored to the parties.[176] A sufficiently specific clause in the eyes of the *Watson Laboratories* court, under this example, would likely require precise reference to types of government interventions the parties anticipated, such as denial of permits, delays in licensing, etcetera.[177] However, this specificity requirement is unlikely to be a successful long-term strategy, as it creates perverse incentives for parties in these jurisdictions to simply modify and lengthen their boilerplate language in order to demonstrate specificity.[178] In that sense, this strategy simply kicks the can further down the road.

170. *See* Watson Lab'ys, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1113–14 (C.D. Cal. 2001) (distinguishing the "boilerplate" language of "regulatory, governmental . . . action," which bears a foreseeable possibility of occurring, from other enumerated events that are "so unlikely to occur" as to make them "qualitatively different.").

171. *See supra* text accompanying note 170.

172. 178 F. Supp. 2d 1099 (C.D. Cal. 2001).

173. *Id.* at 1113 (holding defendants failed to overcome the presumption that the invoking party "agreed to bear any loss occasioned by an event which was foreseeable at the time of contracting . . . .").

174. *Id.* at 1110; *see also* Commonwealth Edison Co. v Allied-Gen. Nuclear Servs., 731 F. Supp. 850, 855–56 (N.D. Ill. 1990) (noting boilerplate necessitates a common-law analysis, while specific clauses are analyzed as any other contractual provision).

175. *See Watson Lab'ys*, 178 F. Supp. 2d at 1113 (holding a force majeure clause excusing regulatory actions, among many other types of events, was too vague).

176. *Id.* (contrasting the vague and boilerplate clause in *Watson Laboratories* with the "specific" clause in *Eastern Airlines*, which excused specific types of government actions); *see also* E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 988 (5th Cir. 1976) (analyzing force majeure clause excusing "any act of government . . . affecting materials, equipment, facilities or completed aircraft").

177. *Id.*

178. *See id.* (noting that the contrast between *Eastern Airlines* and *Watson Laboratories* instructs contracting parties in California on precisely how to contract for more protective force majeure clauses).

There are also serious flaws in the most stringent articulation of the common-law approach, adopted by a bankruptcy court in Florida.[179] This articulation requires that parties expressly include foreseeable events within the force majeure clause if they intend foreseeable events to be included.[180] Under such a stringent rule, the court does not give credence to evidence that the parties intended their clause to exclusively control.[181] Such a rule would not consider the length, the specificity, or evidence that the parties had bargained for the terms of their particular clause. Even a five-page, bargained-for force majeure clause would not indicate the parties intended the terms on the page to control under such a stringent rule.[182] This interpretation is contrary to the ordinary meaning canon of construction, which calls for the interpretation of words in their ordinary meaning, unless the context indicates they bear a technical sense.[183] Force majeure's "ordinary . . . meaning" at common law undoubtedly requires unforeseeability;[184] however, a list of enumerated events may indicate a term bears a technical sense within the agreement.[185]

One rejoinder to this is that when parties place so much emphasis on the force majeure clause as to write a lengthy provision, they should have been so thorough as to include "foreseeable" events within the clause, if that was their ultimate intent.[186] However, considering the lack of precedent surrounding force majeure interpretation, and widespread confusion due to the indiscriminate comingling of its common-law and the contractual understandings, it is unclear that contracting parties reasonably would have known to include these "magic words" within the clause.[187] Similarly, it is unclear whether parties reasonably would have intended the force majeure

179. *In re* Flying Cow Ranch HC, LLC, No. 18-12681-BKC-MAM, 2018 WL 7500475, at *2 (Bankr. S.D. Fla. June 22, 2018).

180. *See supra* notes 115–117 and accompanying text.

181. *See In re Flying Cow Ranch HC, LLC*, 2018 WL 7500475, at *2 (requiring specific language of "foreseeable events" if the parties intend foreseeable events to be included).

182. *Id.*

183. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (2012).

184. *See* URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1281, 1287 (D.R.I. 1996) ("[*F*]*orce majeure* clauses have traditionally applied to unforeseen circumstances . . . .").

185. *See, e.g.*, TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 181 (Tex. App. 2018) ("A term's common-law meaning will not override the definition given to a contractual term by the contracting parties.")

186. *See supra* note 173.

187. *See supra* note 6.

provision to impose an unforeseeability requirement.[188] Therefore, this heavy reliance on legal formalism poses troubling consequences. While it may have benefits of certainty and ease of administrability, it may prove ill-equipped to effectuate the intent of the parties, which is the ultimate goal of contract interpretation.[189]

B. The Texas Approach Aligns with the Ordinary Meaning Canon of Construction and Provides Certainty to Contracting Parties and Courts.

The Texas approach aligns with the ordinary meaning canon of construction, as it permits terms which bear a technical sense in the contract to control.[190] This approach is not burdened with the oxymoronic conundrum of requiring foreseeable enumerated events to also be unforeseeable.[191] Nor does this approach create perverse incentives, as parties are not incentivized to write extremely long and detailed clauses to satisfy some "specificity" requirement under the *Watson Laboratories* approach.[192]

Additionally, the Texas approach best effectuates the parties' intent.[193] The mere fact that force majeure clauses have developed into such a widespread contractual tool that they are now known as boilerplate[194] supports the notion that common-law force majeure has, to some extent, "fallen by the wayside."[195] It is reasonable to acknowledge that when parties use a boilerplate contractual tool, their intention is to use a contractual tool. Indeed, it is counterintuitive to presume that in using a boilerplate contractual tool, the parties intended to invoke a body of common law, particularly when such an interpretation may muddy their ability to rely on the contractual provisions they specifically included.[196]

188. *See* E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 991 (5th Cir. 1976) (noting that due to the uncertainty surrounding the force majeure clause, parties had "good reason" to resort to general contractual language).

189. *See supra* text accompanying note 38.

190. *See* ANTONIN SCALIA & BRYAN A. GARNER, *supra* note 183 (describing the "ordinary meaning" canon of construction).

191. *See supra* text accompany notes 166–171.

192. *See supra* text accompanying note 178.

193. *See supra* note 38.

194. *See, e.g.*, Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs., 731 F. Supp. 850, 855 (N.D. Ill. 1990) (referring to a force majeure clause as "boilerplate").

195. Sun Operating P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App. 1998).

196. *See id.* (noting that imposing common law on a self-defined force majeure would "rewrite the contract").

Courts that discount boilerplate language[197] fail to recognize that parties' may intentionally choose to rely on boilerplate language.[198] Parties can, and do, intentionally choose to include boilerplate language, often due to reasoned judgments regarding time and costs.[199] A court should not presume that language parties deemed sufficient to rely upon is not indicative of the parties' intent.[200] To do so is tantamount to "rewrit[ing] the contract or interpret[ing] it in a manner which the parties never intended."[201] Courts that utilize principles of objective contract interpretation, such as those in Maryland, should rely on the words of the contract as the closest approximation of a parties' intent when the term "force majeure" is self-defined within the contract by the enumerated events.[202]

Finally, the Texas approach does not open a floodgate of force majeure litigation; rather, it effectively maintains force majeure's status as a narrow exception to the general rule that parties are required to perform their promises unconditionally.[203] The Texas approach therefore aligns with the underlying purpose of force majeure at common law, but it does so by relying on objective principles of contract interpretation.

This approach is just as successful as alternative approaches in ensuring force majeure remains a narrow exception, but it does so without creating the illogical result of requiring foreseeable events to also be unforeseeable. [204] For instance, in the case of an enumerated force majeure clause, any "force majeure" event must fit within an enumerated term or within the catch-all

197. *See supra* text accompanying note 174.

198. *See supra* text accompanying note 174.

199. *See* Jeremiah T. Reynolds, *Defending Boilerplate in Contracts*, L.A. LAW., Dec. 2008, at 10 (noting that although boilerplate contractual tools get a "bad rap," they drastically reduce transaction costs and permit parties to rely on standard language with reasonable assurances of how the language will be interpreted).

200. *See id.* (noting significant reasons parties rely on boilerplate contractual tools, including the fact that the lack of critical boilerplate provisions may mean the difference between winning and losing a contractual dispute).

201. Sun Operating P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App. 1998).

202. *See* Myers v. Kayhoe, 391 Md. 188, 198, 892 A.2d 520, 526 (Md. 2006) ("We have long adhered to the objective theory of contract interpretation, giving effect to the clear terms of agreements, regardless of the intent of the parties at the time of contract formation."). This view is most consistent with respecting the autonomy of contracting parties. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 567–68 (2003) (describing contract interpretation's goal as effectuating the parties' intent, which follows from respecting the autonomy of drafters).

203. *See infra* text accompanying notes 204–210; *see also* Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987) (noting force majeure under common law provides a narrow defense).

204. *See supra* text accompanying notes 166–171.

provision under the limiting *ejusdem generi*s doctrine.[205] Additionally, a proposed force majeure event would be further limited by other contractual clauses as the court would read the contract as a harmonious whole,[206] without casting out any meaningful provision of the contract.[207] Furthermore, even if a clause fits within the definition of a "force majeure" event as defined in the contract, the invoking party still bears the burden of proving the event caused noncompliance.[208] The Court of Appeals can interpret this quite strictly to only permit force majeure events that bear a direct relationship to the noncompliance.[209] Finally, the Court of Appeals may choose to consider notice requirements strictly, such that failure to comply is fatal to the force majeure defense.[210]

The *Watson Laboratories* case provides another example of why the Texas approach is meritorious. This case would likely have resulted in the same outcome under the Texas approach, but without injecting confusing specificity requirements.[211] For instance, a Texas court would likely have considered a regulatory action against a non-party to the contract to "fit" within the term regulatory event under the contract.[212] However, it likely would have found that the United States Food and Drug Administration's shutdown of a non-party was not the proximate cause of the invoking party's non-compliance.[213] Rather, the proximate cause would likely have been the invoking party's failure to take steps to mitigate the occurrence, to find an

205. *See* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 185–86 (Tex. App. 2018) (applying *ejusdem generis* to a catch-all force majeure provision).

206. Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc., 157 S.W.3d 462, 465 (Tex. App. 2004) (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)).

207. Sun Operating P'ship v. Holt, 984 S.W.2d 277, 286–88 (Tex. App. 1998) (reading the force majeure clause in light of the habendum clause).

208. Sherwin Alumina L.P. v AluChem, Inc., 512 F. Supp. 2d 957, 967 (S.D. Tex. 2007) (holding mere increase in price to upgrade equipment did not prevent compliance).

209. *See, e.g.*, Kyocera Corp. v. Hemlock Semiconductor, LLC, 886 N.W.2d 445, 450 (Mich. Ct. App. 2015) (holding Chinese market manipulations of solar panels did not constitute a force majeure as the government's actions did not directly cause the invoking party's noncompliance).

210. *See* Sabine Corp. v. ONG W., Inc., 725 F. Supp. 1157, 1168 (W.D. Okla. 1989) ("The failure to give proper notice is fatal to a defense based upon a force majeure clause requiring notice.").

211. *See infra* text accompanying notes 212–214.

212. *See* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 181, 193 (Tex. App. 2018) (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005)) (noting enumerated events are analyzed under their ordinary meaning, unless the context indicates they bear a technical sense).

213. *See* Sherwin Alumina L.P. v AluChem, Inc., 512 F. Supp. 2d 957, 973 n.30 (S.D. Tex. 2007) (rejecting the argument that the burden of upgrading equipment prevented noncompliance); *see also Valero Transmission Co. v. Mitchell Energy Corp.*, 743 S.W.2d 658, 663 (Tex. App. 1987) ("[A] contractual obligation cannot be avoided simply because performance has become more economically burdensome than a party anticipated.").

alternative manufacturer, or to secure an adequate stockpile of the pharmaceutical products their manufacturer could no longer produce due to the shutdown.[214]

Therefore, the Court of Appeals should adopt the Texas approach, which permits self-defined force majeure clauses to control the scope and applicability of the analysis, while permitting common-law notions of force majeure to fill in the gaps.[215] This approach aligns with the ordinary meaning canon of construction,[216] it avoids illogical consequences of requiring enumerated events to be unforeseeable,[217] while respecting parties' freedom to contract,[218] and it aligns with the underlying goal of force majeure to remain a narrow exception to contractual obligations.[219]

C. COVID-19 Under the Two Approaches

This Section demonstrates that the Texas approach is the superior interpretive strategy to employ in considering whether COVID-19 constitutes a force majeure event within a contract, as it maintains force majeure's status as a narrow exception to the general rule that parties must perform their promises absolutely, even during an ongoing and wide-spread event like the COVID-19 pandemic. Additionally, the Texas approach is meritorious as it avoids expending judicial time and resources on tangential questions of whether the pandemic was a foreseeable occurrence.

1. The Texas Approach Maintains Force Majeure's Status as a Narrow Exception Even During the Widespread and Ongoing COVID-19 Pandemic.

The Texas approach ensures force majeure remains a narrow exception, even when COVID-19 is the invoked force majeure event.[220] This is because COVID-19 will be difficult to conceptualize and apply as a singular "event," and therefore it will be challenging for parties to demonstrate the pandemic

214. *Valero Transmission Co.*, 743 S.W.2d at 663.

215. *See supra* text accompanying notes 190–196.

216. *See supra* text accompany notes 183–185.

217. *See supra* text accompanying notes 166–169.

218. *See supra* text accompanying notes 196–202.

219. *See supr*a text accompanying notes 204–214.

220. A court will analyze whether COVID-19 fits within an enumerated event in the contract, or the catch-all phrase. *See supra* text accompanying note 46. Some parties may have the term "pandemic," "epidemic," or a catch-all phrase with similar enumerated events within their contracts. Scott M. Kessler & Shane O'Connell, *Mitigating the Effect of Event Cancellations During the COVID-19 Pandemic*, N.Y. ST. B.J., June/July 2020, at 31–32. Some parties may try to include COVID-19 within other general categories like disaster, act of God, or causality. *See* Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48, 57 (2020) (discussing COVID-19 as an "Act of God").

was the cause of their noncompliance.[221] First, the problem of conceptualizing a temporally extended pandemic as a singular event is particularly relevant when there are notice obligations that require, for instance, notice of force majeure invocation within a certain number of days after the event's occurrence.[222] Under a notice requirement, parties would need to explain when precisely COVID-19 started preventing noncompliance. This is so because the start and end dates are crucial for determining the duration of the event, for which contractual duties may be suspended.[223]

The Texas Supreme Court has already flagged this as an issue in *In re Republican Party of Texas*,[224] in which parties cited COVID-19 as a force majeure to justify the closure of an arena that contracted to host the Texas Republican Convention.[225] While the state supreme court's majority did not address the contractual issue,[226] the dissent engaged in a thorough force majeure analysis that may signal how Texas courts may interpret COVID-19.[227] In that case, the force majeure clause required the invoking party to notify the other party of the force majeure "occurrence" within seven days of the "occurrence."[228] The dissent noted that the parties' pleadings did not identify any "occurrence," other than the ongoing issue of COVID-19.[229] The dissent also noted that COVID-19 is a problematic "event" because it is temporally extended.[230] Because the parties could not point to a singular, distinct "occurrence," the dissent reasoned they could not comply with the notice requirement.[231] Second, the dissent signaled that COVID-19 as a force

221. *See infra* text accompanying notes 228–242.

222. *See, e.g.*, *In re* Republican Party of Tex., 605 S.W.3d 47, 52 (Tex. 2020) (Devine, J., dissenting) (analyzing whether COVID-19 can be the triggering event when the contract required notice within seven days).

223. Parties may argue the World Health Organization's declaration of COVID-19 as a pandemic on March 11, 2020, indicated the "start." *Transcript of Virtual Press Conference on COVID-19*, WORLD HEALTH ORGANIZATION [WHO] (Mar. 11, 2020), https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-and-final-11mar2020.pdf?sfvrsn=cb432bb3_2.

224. *In re Republican Party of Tex.*, 605 S.W.3d at 47.

225. *Id.*

226. *Id.* at 48.

227. *Id.* at 48, 49–54 (Devine, J., dissenting).

228. *Id.* at 52.

229. *Id.*

230. *Id.* ("The coronavirus pandemic has been an *ongoing* public-health concern. . . . [I]t has not been—and cannot be—boxed in as a single, distinct occurrence."). Similarly, the court noted that the parties could not identify when COVID-19 began as a pandemic under the contract. *Id.*

231. *Id.* ("A reasonable reader . . . would thus be puzzled on how to follow the seven-days' notice requirement if one cannot pin down the occurrence to a specific calendar day.").

majeure event is problematic because of the causation analysis.[232] The dissent emphasized that compliance was possible because there were ways to perform the contract, such as by catering to public safety measures.[233]

Additionally, there are serious directness concerns due to the nature of a viral epidemic that gradually spreads, in conjunction with human and governmental decisions about how to respond to the epidemic.[234] In essence, there are many events and actors between the inception of COVID-19 in Wuhan, China to the virus somehow preventing compliance for one or both parties to the contract.[235] In *Kyocera Corp. v. Hemlock Semiconductor, LLC*,[236] the Michigan Court of Appeals held that even *one* degree of separation between the force majeure event and noncompliance was too indirect.[237] Here there are innumerous degrees of separation between the event's inception to the invoking party's noncompliance.[238] Additionally, as economic downturns are insufficient bases for a force majeure claim,[239] the economic downturn due to COVID-19 is unlikely to be a sufficient nexus.[240] Under the Texas approach, therefore, COVID-19 is unlikely to be successful in most cases to excuse noncompliance under a force majeure clause.[241]

If parties can pinpoint particular events that prevent compliance, however, it is more likely that the Texas approach will excuse the parties' nonperformance.[242] Although contracts that include government interference as a force majeure event have the greatest likelihood for successful

232. *Id.* at 47, 53.

233. *Id.* at 52–53.

234. Paul K. Stafford, *Coping with COVID-19: Business & Insurance Considerations for the Virus that Made America Virtual*, 18 J. TEX. INS. L. 3, 3–4 (2020). While there may be a temptation to adopt a more lenient directness test out of concern for parties negatively affected by COVID-19, courts should refrain from altering force majeure's narrow directness test, and instead rely on already existing doctrines in equity when appropriate and necessary. *See infra* text accompanying note 256.

235. *A Timeline of COVID-19 Developments in 2020*, AJMC (Jan. 1, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020.

236. 86 N.W.2d 445 (Mich. Ct. App. 2015).

237. *See supra* text accompanying notes 65–68.

238. *See supra* text accompany note 235.

239. *See supra* text accompanying notes 57–59.

240. Robert L. Gegios & Lance Duroni, *The Legal Domino Effect: COVID-19 & Contracts*, 93 WIS. LAW. 12, 13 (2020) (noting the difficulties of proving COVID-19 caused an economic downturn due to human intervention). However, there may be openings for parties who suffered a greatly depleted work force due to COVID-19 infections, or for parties who were directly incapacitated due to COVID-19. *See id.* (observing that direct impact from COVID-19 supports causation analysis).

241. *See supra* text accompanying notes 221–240.

242. *See supra* notes 230–231.

invocation,[243] the United States government's response to the pandemic has hindered contracting parties from claiming government intervention as the cause of their noncompliance.[244] For instance, proclamations of public health emergencies are insufficient to cause noncompliance, as they do not prevent a business from engaging in commercial activity to meet their contractual obligations.[245] Similarly, mere recommendations to institute social distancing measures, to avoid nonessential travel, to wear a mask, etcetera are also likely insufficient to cause noncompliance.[246]

The strongest case for a successful force majeure defense likely involves a government-issued shutdown order.[247] However, even those orders are strictly construed, and many of the shutdown orders have carved out exceptions limiting the number of parties that are actually compelled to shut down.[248] For instance, in *Richards Clearview, LLC v. Bed, Bath & Beyond, Inc.*,[249] a federal district court in Louisiana considered whether a government shutdown order caused Bed, Bath & Beyond to shut down, or whether Bed, Bath & Beyond fell into an exception to the order and closed down voluntarily.[250] The district court held the store's closure was voluntary, as the store was excluded from the closure mandate.[251] Voluntary closures

243. *See, e.g.*, Richard J. Nogal & Brian M. Dougherty, *Illinois Contract Law on Force Majeure, Impossibility, Impracticability and Commercial Frustration in the Age of Covid-19*, 32 DCBA BRIEF 10, 12 (2020) (noting government orders as a cogent argument for force majeure).

244. This leads to a somewhat ironic consequence, as states which wanted to encourage economic growth by delaying government shutdown orders have made it more difficult for parties within these jurisdictions to invoke force majeure. *See supra* text accompanying note 243.

245. *See In re* Republican Party of Tex., 605 S.W.3d 47, 53 (Tex. 2020) (Devine, J., dissenting) (noting social distancing recommendations did not make compliance impossible).

246. There may be slight flexibility here if the contract requires less than impossibility and permits inadvisability. *But see* OWBR LLC v. Clear Channel Commc'ns, Inc., 266 F. Supp. 2d 1214, 1224 (D. Haw. 2003) (rejecting argument that the 9/11 terrorist attack and the resulting travel disturbances made compliance inadvisable because the cancelled event occurred five months after the attack).

247. Paul K. Stafford, *Coping with COVID-19: Business and Insurance Considerations for the Virus that Made America Virtual*, 18 J. TEX. INS. L. 3, 4 (2020) (noting damages that result from actions of civil authorities may trigger contractual or insurance protection as a *force majeure*).

248. *See* Brodie H. Smith, *Beyond Force Majeure and Frustration of Purpose: How Else to Defend a Contract Claim Based on the COVID-19 Pandemic*, 62 ORANGE CNTY. LAW. 32, 33 (June 2020), http://www.virtualonlineeditions.com/publication/?i=661043&p=34 (noting the number of exceptions to the California stay-at-home order "threaten[s] to swallow the [o]rder").

249. No. CV 20-1709, 2020 WL 5229494 (E.D. La. Sept. 2, 2020), *aff'd on other grounds*, No. 20-30614, 2021 WL 865310 (5th Cir. 2021).

250. *Id.* at *1–6; *see also In re* Hitz Rest. Grp., 616 B.R. 374, 378–79 (Bankr. N.D. Ill. 2020) (holding a restaurant still had to pay partial rent because it was not forced to close entirely, as it was able to continue carry-out dining).

251. *Richards Clearview, LLC*, 2020 WL 5229494, at *6.

frustrate a force majeure defense because, generally, a party's voluntary acts and omissions may not constitute force majeure.[252]

The Texas approach provides certainty to parties, as they will be able to assess whether force majeure defenses are prudent.[253] As this analysis indicates, the Texas approach does not open a floodgate of parties being excused from their obligations.[254] Instead, this approach provides clarity, guidance, and reasonably narrow limits on when a party should be permitted to avoid compliance with their obligations.[255] There are other common-law defenses parties may rely on for leniency, which are conceptually preferable as they do not result in contorting the interpretation of force majeure as a contractual tool in the name of equity.[256]

2. Imposing the Common-Law Unforeseeability Requirement During COVID-19 Goes Down the Rabbit Hole of Litigating Whether the Pandemic was "Foreseeable."

COVID-19 exposes why an interpretive strategy that presumptively imposes an unforeseeability requirement on force majeure events is undesirable.[257] Under this interpretation, parties who are able to invoke COVID-19 due to a "pandemic," "quarantine," "disaster," or other similar language may need to argue COVID-19 was an unforeseeable event.[258] The purpose of force majeure at common law was to create a narrow exception for parties to escape contractual obligations.[259] A court that classifies the pandemic as unforeseeable, may inadvertently open the floodgates for large hordes of parties to be excused for their nonperformance, as nearly every contracting party in the United States faced the same global pandemic.[260] The same is true for government-issued shutdown orders, which have been

252. *See supra* text accompanying note 69.

253. *See, e.g.*, Langham-Hill Petroleum Inc. v. S. Fuels Co., 813 F.2d 1327, 1331 (4th Cir. 1987) (upholding a trial court's decision to award attorney's fees to the opposing party, as the invoking party brought a claim with no basis in caselaw).

254. *See supra* text accompanying notes 204–210.

255. *See supra* text accompanying notes 241–253.

256. *See* Gegios & Duroni, *supra* note 240, at 14 (noting force majeure litigation "will make for difficult decisions, as courts grapple with key issues of respect for agreed contract language versus recognition of the horrific and unforeseen effects of COVID-19 on blameless parties").

257. *See infra* text accompanying notes 260.

258. *See supra* text accompany note 97.

259. *See supra* text accompanying note 38.

260. Gegios & Duroni, *supra* note 240 at 13 (noting "all businesses are facing a new reality of supply disruptions, decreased demand for products and services, governmental prohibitions, and strains on their ability to use or maintain workers").

instituted in almost every state.[261] Courts will likely attempt to limit the floodgate effect by honing-in on the causation analysis or focusing on whether compliance was actually impossible. In this case, the unforeseeability analysis does not appear to be doing any of the work of limiting an event's applicability to the clause.[262]

There are additional administrability concerns that are likely to arise in debating whether COVID-19 is a foreseeable occurrence, as there will likely be extremely creative legal arguments that take up a court's time.[263] Will it matter, for instance, if SARS, Swine Flu, and other similar epidemics have affected the United States?[264] Will it matter that government agencies exist for the specific purpose of responding to pandemics?[265] Will it matter that scientists have been warning for years that a global pandemic was imminent?[266] Alternatively, will it be more persuasive that this is a once-in-a-century pandemic and is the prototypical example of a force majeure?[267] For contracts created during the COVID-19 crisis, would COVID-19 still be unforeseeable for a contract made directly after the first case was publicized in Wuhan, China?[268] If so, at what point exactly would the virus cross over from an unforeseeable event to a foreseeable event?[269]

The most important question is this: Are these abstract questions the ideal way for courts to analyze which of the contracting parties should bear the loss? These questions do none of the work in limiting the applicability of COVID-19 to a clause, as courts would need to rely on proximate-cause

261. *See* Amanda Moreland, et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1198 (Sept. 4, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm (noting from March to May alone, forty-two U.S. states issued stay-at-home orders).

262. *See, e.g.*, Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296 (N.Y. 1987) (noting force majeure under common law provides a narrow defense).

263. *See infra* text accompanying notes 264–267.

264. Paul K. Stafford, *Coping with COVID-19: Business & Insurance Considerations for the Virus that Made America Virtual*, 18 J. TEX. INS. L. 3, 3 (2020) (noting the last "pandemic" declaration from the World Health Organization was the Swine Flu in 2009).

265. *See, e.g.*, U.S. DEP'T OF HEALTH & HUM. SERVS., HHS PANDEMIC INFLUENZA PLAN (2005), https://www.cdc.gov/flu/pdf/professionals/hhspandemicinfluenzaplan.pdf (detailing the United States Department of Health and Human Services' pandemic influenza plan).

266. Betsy McKay & Phred Dvorak, *A Deadly Coronavirus Was Inevitable. Why Was No One Ready?*, WALL ST. J. (Aug. 13, 2020, 9:29 AM), https://www.wsj.com/articles/a-deadly-coronavirus-was-inevitable-why-was-no-one-ready-for-covid-11597325213 (noting that scientists warned for decades of a dangerous pathogen that would likely originate in animals).

267. *See supra* text and accompanying note 149.

268. *See* Emadaldin Abdelrahman, *The Egyptian Construction Industry During Covid-19*, 15 CONSTR. L. INT'L 42, 45 (Sept. 2020) (predicting for contracts executed in January 2020, when the city of Wuhan was fully quarantined, COVID-19 may have been foreseeable).

269. *Id.*

analyses or degree-of-interference analyses in order to avoid a floodgate effect.[270] These questions therefore operate as tempting rabbit holes, with none of the net benefits of narrowing which parties may obtain relief, creating clarity for parties, or alleviating the administrative load that is anticipated in the wake of COVID-19.[271]

III. CONCLUSION

The Court of Appeals of Maryland should adopt the Texas approach in construing force majeure clauses.[272] This approach presumes parties intend a force majeure clause with enumerated events to exclusively control, while permitting common law to act as a gap filler for general exculpatory language and catch-all phrases.[273] The Texas approach is conceptually superior to the common-law approach generally and for interpreting COVID-19-related disruptions in contractual performance.

The Texas approach is preferable to the common-law approach, as it avoids oxymoronic consequences of requiring foreseeable events to also be unforeseeable[274] by aligning with the ordinary meaning canon of construction.[275] It also avoids confusing specificity requirements,[276] respects boilerplate language out of a respect for freedom of contract,[277] and avoids a strict, formalist requirement that parties use "magic words" to overcome the common-law presumption.[278]

Finally, the Texas approach is also is the best method for interpreting COVID-19 and its related disruptions as force majeure events.[279] This approach avoids opening up the rabbit hole of whether the pandemic was foreseeable, which is likely to take up valuable judicial resources with very little net benefit.[280] The Texas approach can most effectively respond to widespread and ongoing events, such as COVID-19, while avoiding concerns of a floodgate effect, present under the common-law approach.[281] Finally this approach provides much needed certainty to parties and courts, not only in

270. *See supra* text accompanying note 258.
271. *See supra* text accompanying notes 263–270.
272. *See supra* text accompanying notes 155–156.
273. *See supra* Section II.B.
274. *See supra* text accompanying notes 166–171.
275. *See supra* Section II.B.
276. *See supra* text accompanying notes 177–179.
277. *See supra* note 203.
278. *See supra* text accompanying notes 187–190.
279. *See supra* Section II.C.
280. *See supra* text accompanying notes 264–270.
281. *See supra* Section II.C.1.

interpreting COVID-19-related disruptions, but also in interpreting force majeure clauses in a post COVID-19 world.[282]

282. *See supra* Section II.