The coronavirus (COVID-19) pandemic continues to have a devastating impact on human health, life and economic activity around the world. The virus has caused severe disruptions to the global economy, including the banning of travel, the cancellation of major events, and schools throughout the United States shifting to online learning. Businesses everywhere — including those of many of you reading this — are “going remote.”

What happens to preexisting legal obligations in a pandemic world that nobody could have imagined? The law provides an answer, or at least a standard. Contract law will, under certain circumstances, excuse performance for unprecedented and unanticipated events through negotiated “force majeure” provisions or under the legal doctrine of impossibility of performance or frustration of purpose. This article examines these doctrines and highlights key areas that may help address your questions about whether...
performance — both the performance you may owe and the performance that you expect through your commercial relationships — is excused or required in the wake of the coronavirus and the havoc it has wreaked on the economy.

**Force Majeure**

A force majeure — or “superior force” in French — is a common contractual provision that excuses performance when circumstances beyond the parties’ control render performance untenable or impossible. Generally speaking, in order for a force majeure provision to excuse performance, three requirements must be present: (1) the performance-excusing event must be specifically identified in the language of the force majeure provision; (2) the party relying on the force majeure provision to excuse performance must demonstrate that the event rendered performance objectively impossible and not merely more burdensome or expensive; and (3) the performance-excusing event must be beyond the parties’ reasonable control, meaning the party relying on force majeure did not cause the event and was diligent in taking reasonable steps to ensure performance. Courts interpret force majeure provisions strictly. General words are not given expansive meaning, but instead are confined to things of the same kind or nature as the particular matters mentioned in the provision.

**Impossibility of Performance**

Impossibility of performance is an affirmative defense to a breach of contract, and, like force majeure, it is narrowly construed. Unlike force majeure, however, impossibility of performance is not a negotiated contractual provision. Instead, it is available to excuse performance when there is (1) an unexpected occurrence of an intervening act, (2) that was of such a character that its nonoccurrence was a basic assumption of the agreement of the parties, and (3) the occurrence of that intervening act made performance impossible, or at least commercially impracticable. An example of impossibility of performance is a banquet hall’s excuse from its obligations to rent out the hall when a power failure in the surrounding area prevented the hall from being used. Even in the absence of a force majeure provision listing power failure as a performance-excusing event, the defense of impossibility of performance would be available to excuse performance. The hall could not function as a hall. *See Facto v. Pantagis*, 390 N.J. Super. 227 (N.J. App. Div. 2007).

**Frustration of Purpose**

Frustration of purpose is similar to impossibility of performance and is a common-law defense to performance. It arises when (1) the party’s principal purpose in making the contract is frustrated; (2) without that party’s fault; (3) by the occurrence of an event, the
The nonoccurrence of which was a basic assumption on which the contract was based. Under the doctrine of frustration of purpose, performance is excused not due to impossibility, but because a supervening event causes a failure of consideration or a total destruction of the expected value of the performance. See NPS LLC v. Ambac Assurance Corp., 706 F. Supp. 2d 162, 176 (D. Mass. 2010).

**Construing a Contract in Response to the Coronavirus**

Regardless of whether a party is relying on a force majeure provision, frustration of purpose, or impossibility of performance, the starting point for the analysis is the parties’ intent. One of the most fundamental principles of contract interpretation is that, when the language of a contract is clear and unambiguous, courts must enforce the contract as written and refrain from creating a more or less favorable agreement than the one the parties entered into. Similarly, contracts must be read in their entirety, and a court cannot analyze a force majeure clause or the defense of impossibility of performance in isolation. Instead, a court will focus on the purpose of the underlying contract and the risks a party agreed to assume before analyzing whether performance can properly be excused.

In a coronavirus world, both force majeure provisions and the impossibility doctrine will be applied on the basis of these principles. For example, there is uncertainty on whether or not the coronavirus would excuse performance if the language of the force majeure provision was limited to an “act of God.” Courts have traditionally held acts of God to include natural disasters, such as earthquakes, hurricanes and tornadoes. See, e.g., Am. Nat. Red Cross v. Vinton Roofing Co., 629 F. Supp. 2d 5, 9 (D.D.C. 2009) (“'[a]n Act of God' is the result of the direct, immediate and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention, and is of such character that it could not have been prevented or avoided by foresight or prudence”). However, the U.S. Supreme Court in Gleeson v. Virginia Midland Railroad Co., 140 U.S. 435, 439 (1891), previously recognized that courts have also found “sudden deaths and illnesses” are acts of God. And, the Eleventh Circuit Court of Appeals has found an act of God “applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.” See Warrior & Gulf Navigation Co. v. United States, 864 F.2d 1550, 1553 (11th Cir. 1989). An argument could be made either way on whether the unprecedented coronavirus pandemic is an act of God.
The stronger performance-excusing argument is if the force majeure provision includes express language excusing performance in the event of an “epidemic” or “public health crisis.” In addition, the government’s response to the coronavirus also may be a valid ground to excuse performance, where a force majeure provision lists “government regulation” as a performance-excusing event. Prime contemporary examples would be the closing of Broadway shows by New York State and the banning of certain travel by President Trump. An example of government regulation excusing performance is found in *Northern Natural Gas Co. v. Approximately 9117 Acres in Pratt*, 114 F. Supp. 3d 1144, 1155 (D. Kan. 2015). There, the U.S. District Court for the District Court of Kansas found that the performance of oil drilling leases was excused by a state court order prohibiting lease royalty payments in the wake of a condemnation. Because the force majeure provision in *Northern Natural Gas* recognized changes to “Federal and State Laws, Executive Orders, Rules or Regulations” as performance-excusing events, the state court order was held to be an intervening governmental act that prevented the defendants from performing. Consistent with the analysis in *Northern Natural Gas*, if a party’s contractual performance requires it to perform on Broadway or travel from the United States to Europe, a compelling argument could be made that the actions of New York State and President Trump, respectively, excuse the performance.

Parties pressed to perform their contracts in the wake of the coronavirus emergency are also likely to invoke the defenses of impossibility of performance and/or frustration of purpose. It is impossible for a Broadway show to put on a performance at this time. Likewise, it is impossible for Madison Square Garden to honor tickets to hockey games, NBA games and the Big East basketball tournament. All of those events were called off following New York State’s decision to prohibit events with 500 or more people. But what about a delay in performance for the sale of goods where the coronavirus held up delivery of a component part from China? Is that performance now “impossible”? Or, like any other event, does the seller simply assume the risk of delay, and the contract price recognizes that assumption of risk? Two cases are instructive.

In *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 933 N.E.2d 860, 865 (Ill. App. 2010), the court found that the 2008 global credit crisis, which made the procurement of commercial financing virtually impossible, did not excuse a buyer’s obligation to purchase a commercial property after the buyer was unable to obtain financing. The court stated that the doctrine of impossibility is not available when the performance-excusing event might have been anticipated at the time of contracting. The court noted that, although the 2008 credit crisis might not have been anticipated, the fact that the buyer might not obtain commercial financing was anticipated and should have been guarded against in the parties’ agreement.
A different result was reached in *Pearce-Young-Angel Co. v. Charles R. Allen, Inc.*, 213 S.C. 578, 592 (S.C. 1948), where the court found that the doctrine of impossibility excuses a farmer’s obligation to sell peas after the farmer’s entire crop was destroyed by torrential rains. Floods rendered performance impossible. Similarly, the court in *New York Trust Co. v. SEC*, 131 F.2d 274, 276 (2d Cir. 1942), applying the doctrine of frustration of purpose, held that an SEC order requiring the liquidation and dissolution of a corporation precluded the corporation’s bondholders from collecting certain premiums and interest payments that, but for the corporation’s dissolution, they would have otherwise been entitled to receive. The court found that the parties’ “venture ha[d] been frustrated” because their rights under the debenture agreements in question “contemplated as indispensable the continued existence of the corporation.” *Id.* YPI 180 N. LaSalle Owner, Pearce-Young-Angel Co., and New York Trust Co. demonstrate that the application of impossibility of performance and frustration of purpose will depend on the specific jurisdiction, the foreseeability of the event relied on to excuse performance, and the facts giving rise to the claimed impossibility or frustration.

A party opposing reliance on a force majeure provision or objecting to the application of the doctrines of impossibility of performance or frustration of purpose will argue that performance is not impossible, that the event was foreseeable or not otherwise part of the force majeure provision, or that the party seeking to excuse performance expressly assumed the risk it seeks to avoid. *See, e.g., Beardslee v. Inflection Energy, LLC*, 904 F. Supp. 2d 213, 219-221 (N.D.N.Y. 2012) (granting plaintiff’s motion for summary judgment and rejecting defendants’ claims that force majeure, impossibility of performance, and frustration of purpose operated to extend the duration of defendants’ oil and gas leases). With regard to the above example of a manufacturer that is waiting on a component part from China, if the component part could be obtained from other countries (albeit at an increased price), the manufacturer would have a difficult time excusing performance.

Further, a force majeure provision would likely be inapplicable if the risk that the party seeks to avoid was expressly assumed under the contract. In *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986), a utility company sought to escape a long-term, fixed-price coal contract on the basis of a government regulatory body’s failure to adopt proposed rate increases on electricity. The majority rejected this argument:
[the defendant] committed itself to paying a price at or above a fixed minimum and to taking a fixed quantity at that price. It was willing to make this commitment to secure an assured supply of low sulphur coal, but the risk it took was that the market price of coal or substitute fuels would fall. A force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller (except insofar as escalator provisions give the seller some protection); if it falls, as here, the seller gains at the expense of the buyer. The whole purpose of a fixed price contract is to allocate risks in this way. A force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract. 799 F.2d at 275.

Thus, in situations where a party expressly agreed to assume a risk, the performance may not be excused absent specific express language to the contrary. What seems clear is that price impacts will not be held to create impossibility. The performance must be literally impossible to render, not more expensive to render.

**Guiding Principles**

Determining whether the coronavirus constitutes a force majeure event or an event giving rise to the doctrines of impossibility of performance or frustration of purpose will depend on highly specific facts and the fundamental principles of contract interpretation:

- First, the language of the contract will control the analysis. If you are relying on (or presently negotiating) a force majeure provision, make sure that the performance-excusing event (e.g., epidemic, public health crisis) is specifically referenced in the contract.

- Second, if a party seeks to rely on a more generalized event like a government regulation, the nonperforming party will need to show that the risk that is sought to be avoided is not one that it specifically contracted to assume.

- Third, under a force majeure provision or the defense of impossibility of performance, a party must identify the performance it contracted to undertake and then demonstrate that it was objectively impossible, or at least commercially impracticable, and beyond its reasonable control to have any chance of avoiding the performance obligation.
Finally, while force majeure, impossibility of performance, and frustration of purpose provide escape hatches to contractual obligations, the burden of establishing entitlement to these escape hatches is high in light of the judicial recognition that the purpose of contract law is to allocate the risks that might affect performance.

We hope this alert provides answers to some of your basic questions regarding contractual performance in the face of the coronavirus crisis. If you have further questions or would like to discuss specific facts, Pepper Hamilton’s attorneys are available to assist you. In the meantime, and most importantly, as you read this alert we wish you and your families good health and safety during these unprecedented times.