



American Road  
& Transportation  
Builders Association

# COVID-19: EVALUATING YOUR CONTRACTUAL RIGHTS AND MINIMIZING PROJECT RISK

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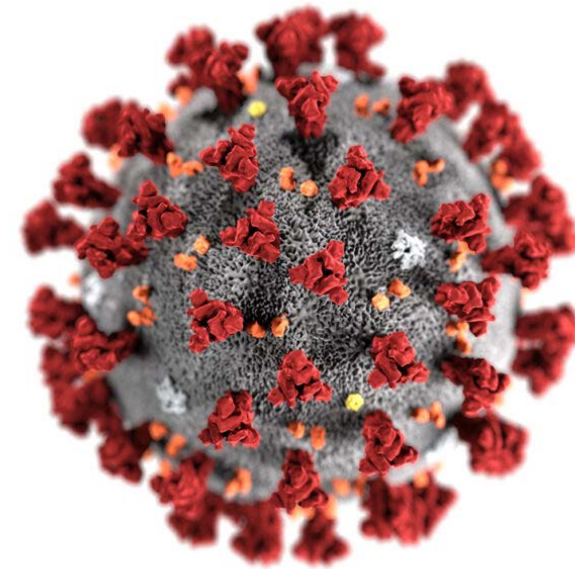


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# IMPACTS OF COVID-19 / HEALTH ORDERS

- Work Restrictions / Project Site Closures
- Project Delays
- Labor Shortages
- Supply Chain Disruptions
- Travel Restrictions



# AGENDA

- *Force Majeure* Clauses
- Relevant FAR Provisions
- Other Relevant Clauses
- Contract Administration Considerations
- Extra-Contractual Doctrines Excusing Performance

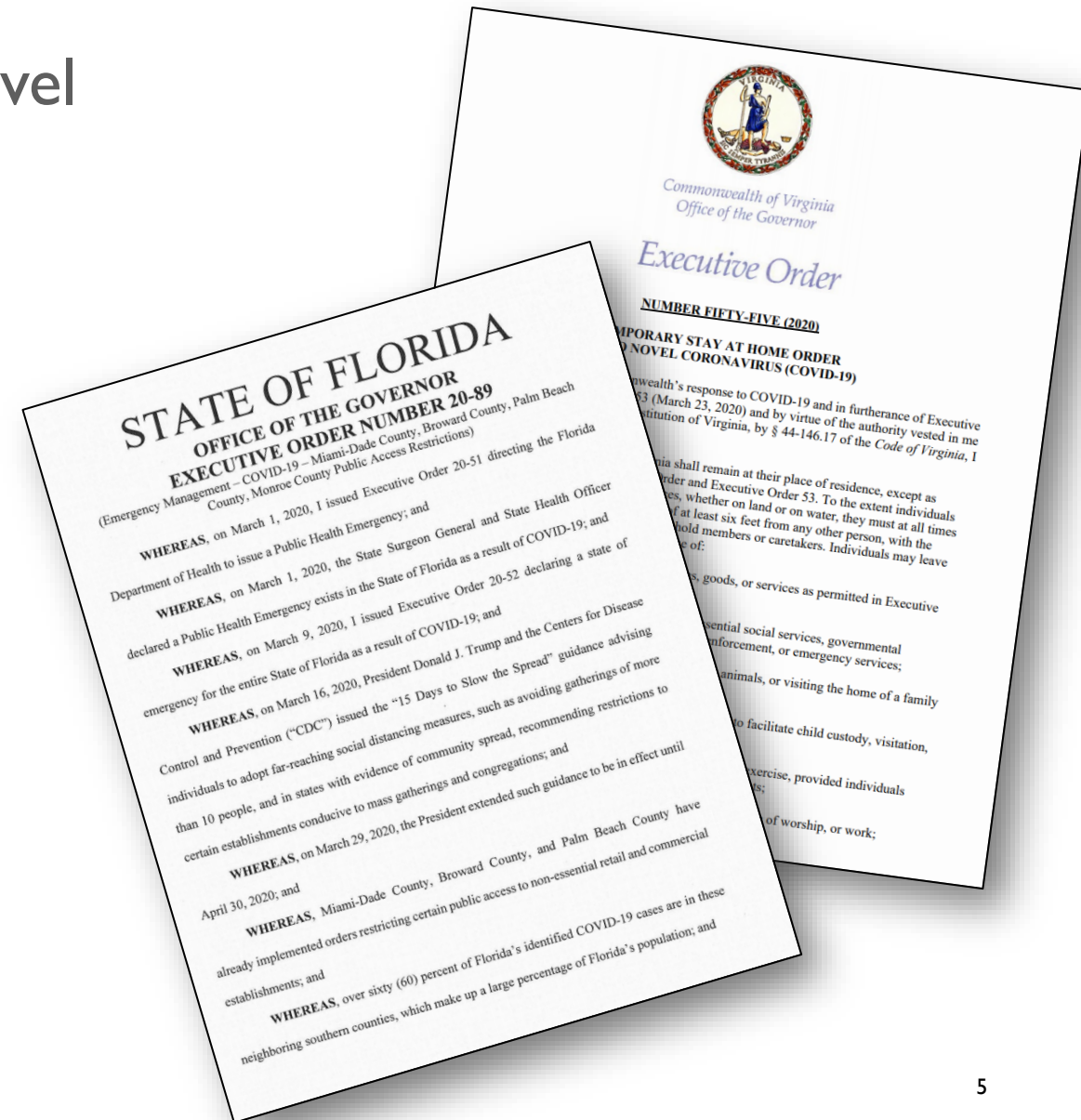
## KEY TAKEAWAYS

- Review Relevant Health Orders
- Review Contracts
- Give Notice
- Follow Contract Requirements



# INTERPRETING GOVERNMENT HEALTH ORDERS

- Currently Handled at State / Local Level
  - Multi-Step Analysis
  - Varies by Jurisdiction
- Is Construction Classified As An “Essential Business”?
- Nature of Restrictions Impacts Available Contractual Rights



# EVALUATING RIGHTS IN CONNECTION WITH COVID-19

- **Step One:** Review the Contract
- **Step Two:** Construe the Contract's Provisions
  - Language of the Provision
  - Structure of the Provision
  - Governing Law
  - Course of Dealings
  - Totality of the Circumstances
- **Alternative Step Three:** Explore Common Law Remedies



# RELEVANT CONTRACT CLAUSES

- *Force Majeure*
- FAR
- Change In Law Impacting Work
- Cost Escalation



## FORCE MAJEURE CLAUSE OVERVIEW

- *Force Majeure* = French for “superior force”
- Defined by Contract
- Normally “[1] unforeseen events [2] beyond the control of both parties that [3] either make contract performance impracticable or frustrate the purpose of such performance.”
  - 2A Bruner & O'Connor Construction Law § 7:229 (“Project risks—Force majeure risks”) (quotation omitted)
- Burden of Proof: Party Asserting Performance Excused
- Effect: Excuses Contractual Performance



## COMMON *FORCE MAJEURE* CLAUSE STRUCTURES

- Broad Clause: No List of Triggering Events
- Specific Clause: List of Triggering Events

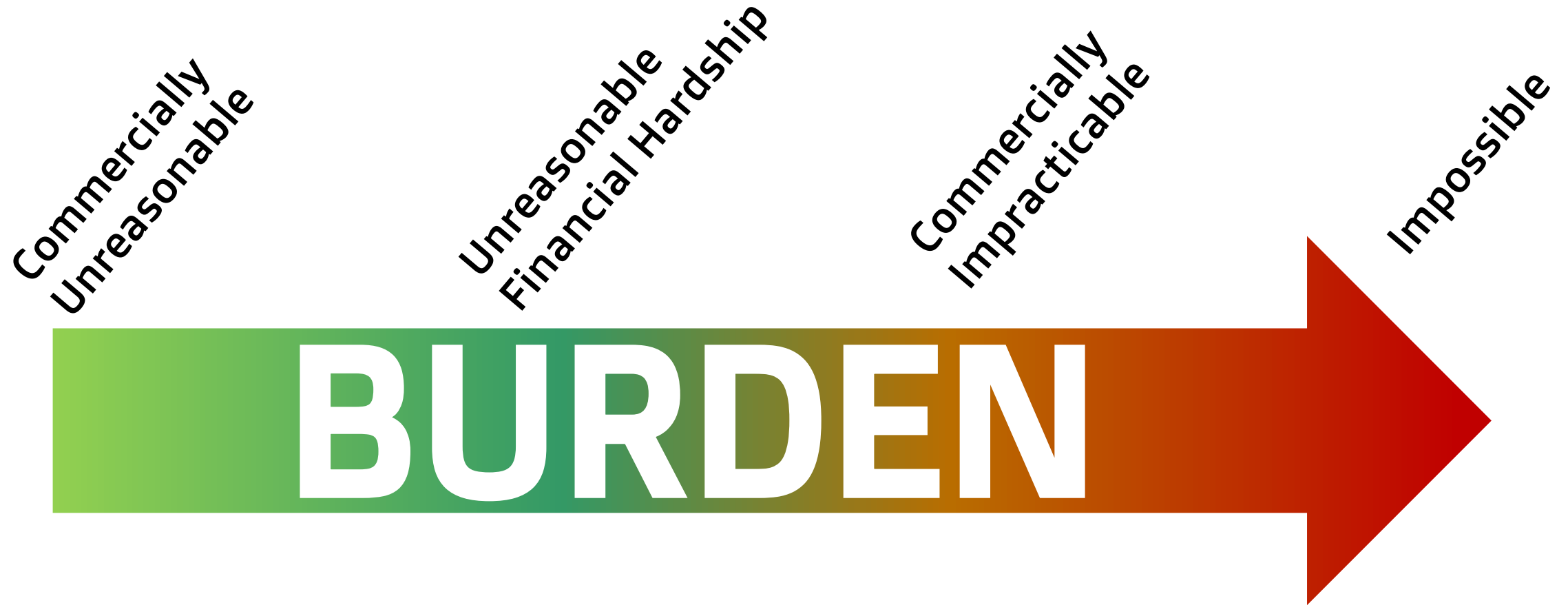


## BROAD CLAUSE: EXAMPLE

“If the performance of any part of this contract by [either party] is prevented, hindered or delayed by reason of any cause or **causes beyond the control of [either party]**, as the case may be, and which cannot be overcome by due diligence, the party affected shall be excused from such performance ...”

Source: West's McKinney's Forms Uniform Commercial Code § 2-301, Form 13

# BROAD CLAUSE: INTERPRETATION IMPACT LIMITATIONS?



## SPECIFIC CLAUSE: EXAMPLE NO. I - SPECIFIC LIST

“9. *Force Majeure*. [The Performing Party] shall not be deemed to have failed to meet any obligation under this agreement if [it’s] performance or failure to perform or delay in performance has been caused by any Act of God, war, strike ... electrical outage, fire, explosion, flood, blockade, governmental action, or other catastrophe (hereafter, “force majeure”).”

Source: *Kleberg Cty. v. URI, Inc.*, 540 S.W.3d 597, 604 (Tex.App. 2016), rev'd, 543 S.W.3d 755 (Tex. 2018)

## SPECIFIC CLAUSE: EXAMPLE NO. 2- NARROW CATCH-ALL

“If either party to this [contract] shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay.”

Source: *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902, 519 N.E.2d 295 (1987)

## SPECIFIC CLAUSE: EXAMPLE NO. 3- BROAD CATCH-ALL

“The Company shall not be liable for any failure in the performance of its obligations under this agreement which may result from strikes or acts of labor union [sic], fires, floods, earthquakes, or acts of God, War or other conditions or contingencies beyond its control.”

Source: *Seitz v. Mark-O-Lite Sign Contractors, Inc.*, 210 N.J. Super. 646, 649, 510 A.2d 319, 321 (Law. Div. 1986)

## SPECIFIC CLAUSE: STRICT INTERPRETATION

“Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.”

-Kel Kim Corp. v. Cent. Markets, Inc., 70 N.Y.2d 900, 902–03, 519 N.E.2d 295, 296 (1987)

## SPECIFIC CLAUSE: COVID-19 COVERED?

- Are Relevant Triggering Events Listed?
  - Epidemic / Disease: ✓
  - Quarantines: ✓
  - State Emergency: ??
  - Government Acts: ??
  - Labor Shortages: ??
- Scope of the Triggering Event “Catch-All”
  - Qualified / Without Limitation / Similarity
  - Cannon of Eiusdem Generis (“of the same kind”)
  - Construction under Applicable Law



## UMBRELLA TERM: “ACT OF GOD”

““Acts of God”— by definition "excusable" as beyond the "control" of mere human agency— historically have been recognized as fortuitous unforeseeable catastrophic natural events, such as earthquakes, volcano eruptions, avalanches, lightening, and the extraordinary weather related events of tornadoes, typhoons, droughts and floods.”

-5 Bruner & O'Connor Construction Law § 15:46 (footnotes omitted)

## FEDERAL CONTRACTS: FAR § 52.249-14 - EXCUSABLE DELAYS

“(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance....”

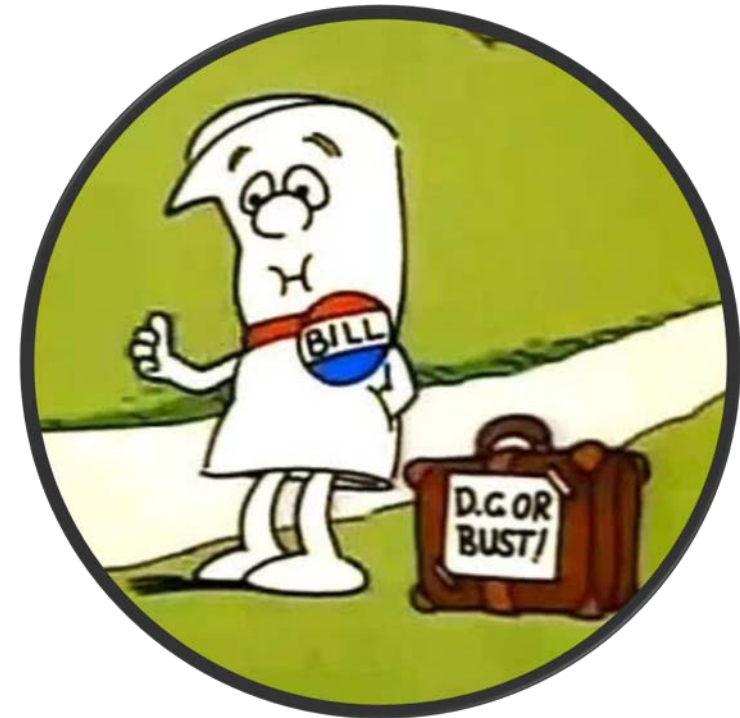
## FEDERAL CONTRACTS: FAR § 52.249-10- DEFAULT - FIXED-PRICE CONSTRUCTION

“...(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if -

- (I) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and...”

# CHANGE IN LAW CLAUSE

- Permits adjustments for statutory, regulatory, and/or judicial changes in the law
- Issues
  - Definition of “Applicable Law”
  - Reasonable Anticipation
  - Timing of Change
  - Available Remedies



## CHANGE IN LAW CLAUSE: EXAMPLE

“Changes in Laws or Regulations not known at the time of opening of Bids (or, on the Effective Date of the Agreement if there were no Bids) having an effect on the cost or time of performance of the Work shall be the subject of an adjustment in contract Price or Contract Times. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment, a Claim may be made therefore as provided in Paragraph 10.05.”

Source: *Mosser Constr., Inc. v. Toledo*, 2007-Ohio-4910, ¶ 10

# ESCALATION CLAUSES

- Permits Contractual Adjustment for Price Increases
- Issues
  - Triggers
  - Caps
  - Substantiation Requirements
- Complication: COVID-19 = Deflationary Impact?



## ESCALATION CLAUSE: EXAMPLE

“If during the performance of this contract, the price of \_\_\_\_\_ significantly increases, through no fault of contractor, the price of \_\_\_\_\_ under this agreement shall be equitably adjusted by an amount reasonably necessary to cover any such significant price increases. As used herein, a significant price increase shall mean any increase in price exceeding \_\_\_\_\_ percent (\_\_\_\_%) experienced by contractor from the date of contract signing. Such price increase shall be documented through quotes, invoices, or receipts. Where the delivery of \_\_\_\_\_ under this agreement is delayed, through no fault of contractor, as a result of the shortage or unavailability of \_\_\_\_\_, contractor shall not be liable for any additional costs or damages associated with such delay(s).”

Source: Edward J. Parrot and Matthew D. Baker, “Trading on Uncertainty: Legal Strategies for Addressing Tariff-Driven Material Cost Escalation,” Watt Tieder Newsletter (Summer 2018)

# SOVEREIGN ACTS DOCTRINE

- “The sovereign acts doctrine shields the Government from liability for breach of contract if the breach resulted from its public and general acts as a sovereign.”

-*Carabetta Enterprises, Inc. v. United States*, 58 Fed. Cl. 563, 568 (2003), *aff'd*, 482 F.3d 1360 (Fed. Cir. 2007)

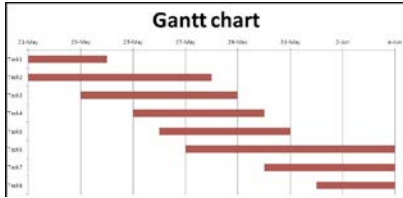
- Key Considerations
  - Public Good v. Altering Specific Bargain
  - Government’s Affirmative Defense
  - Implied / Express Agreement To Assume Risks



# CONTRACT ADMINISTRATION:ACTUALIZING YOUR RIGHTS

- Review Contract
  - Notice Requirements
  - Procedural Requirement for Asserting Claim/Time Extension
  - Dispute Resolution Steps
- Follow All Requirements for Asserting Claim / Time Extension
- Properly Document Claim / Time Extension Request

# EVOLUTION OF THE ENFORCEMENT OF LDS



1931  
**Gantt Chart**  
used for the  
Hoover Dam  
Project

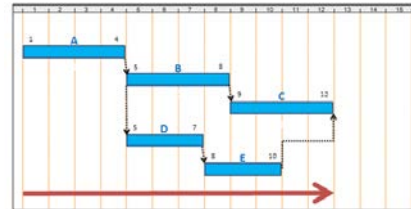
1957  
DuPont successfully  
implements **CPM** with  
Remington Rand  
Univac on a chemical  
plant project

1983  
Primavera's  
**(P3)** first release  
on MS-DOS  
platform

Evolution of Law on LDS

1907  
**LDs Generally  
Recognized  
in the U.S.**  
(*United States v. Bethlehem  
Steel Co.*, 205 U.S. 105, 119  
(1907))

1914  
**Rule Against  
Apportionment**  
(*United States v. United  
Eng'g & Constr. Co.*,  
234 U.S. 236, 242  
(1914))



2000  
Federal Circuit  
adopts **Rule of  
Clear  
Apportionment**  
(*Sauer Inc. v. Danzig*,  
224 F.3d 1340  
(Fed. Cir. 2000))



2011  
**"Rule" Abandoning  
Apportionment**  
applied (*Greg Opinski Constr.,  
Inc. v. City of Oakdale*, 199 Cal.  
App. 4th 1107, 1112 & 1121  
(Ct. App. 2011))

## COMMON LAW: DOCTRINE OF FRUSTRATION

“Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”

-Restatement (Second) of Contracts § 265 (1981)

## COMMON LAW: DOCTRINE OF IMPOSSIBILITY/ IMPRACTICABILITY

“A contracting party has no duty to perform an obligation in the agreement if performance is rendered impossible or impracticable, through no fault of its own, because of a fact that existed at the time when a contract was made and about which this party neither knew nor had reason to know, and the nonexistence of which was a basic assumption of the parties' agreement.”

-30 Williston on Contracts § 77:31 (4th ed.)

## COMMON LAW: HIGH BAR FOR REMEDIES

“A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover.”

-Restatement of Contracts (Second) § 261

# DOCTRINE OF IMPOSSIBILITY AND THE SPANISH FLU

- Napier v. Trace Fork Mining Co., 193 Ky. 291, 235 S.W. 766, 766–67 (1921)
  - “Plaintiff did not complete the grade until December 10th, and it is contended ...that he is excused for not completing it ...because of an epidemic of influenza which made it impossible for him to procure the necessary labor. That his work was hindered and delayed by this condition which developed after the execution of the contract is thoroughly established, but it is by no means satisfactorily proven that the completion of the contract within the specified time was rendered impossible or other than more difficult and expensive.”



# CONCLUDING REMARKS AND QUESTIONS

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