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An “Act of God”? Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change

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An “Act of God”?

Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change

MYANNA DELLINGER*

“Extreme” weather has become the new normal. Previously considered to be inexplicable and unpredictable “acts of God,” such weather can no longer reasonably be said to be so. They are acts of man. The current doctrine of contractual impracticability rests on the notion that a party may be exculpated from contractual liability if supervening events render a performance impracticable, unless they have implicitly or explicitly assumed the risk. To a large extent, courts still consider the foreseeability of the event and an a party’s ability to control it. However, it makes little logical or legal sense to continue to allow parties to escape liability for weather events that are in fact highly foreseeable given today’s knowledge about the causes and effects of severe weather. Some parties may even be found to have had some “control” of the development of the weather event and thus not be able to avoid liability.

This Article proposes taking a new, hard look at the doctrine of impracticability and the closely related doctrine of frustration of purpose. By modernizing these doctrines to reflect current on-the-ground reality, the judiciary may further help instigate a broader awareness of the underlying problem and need for corrective action against climate change at both the private and governance scales. Meanwhile, a more equitable risk-sharing framework should be implemented where contracting parties have failed to reach a sufficiently detailed antecedent agreement on the issue.

The law is never static. It must reflect real world phenomena. Climate change is a highly complex problem requiring attention and legal solutions for many problems including contractual performance liability. The general public is often said to have lost faith in the judiciary. Given this perception, courts could regain some of that faith in the context of events for which no “God,” other supernatural power, or even nature can be blamed.

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INTRODUCTION

Climate change is real and is already affecting humankind as well as our natural surroundings. The list of evidence is persuasive and almost never-ending. For example, over the last century, the global average temperature has increased by more than 1.3°F.¹ Fifteen of the top sixteen warmest years on record have occurred since 2000.² Unsurprisingly, 2015 was the warmest year on record at 1.62°F (0.90°C) above the twentieth century average, more than twenty percent higher than the previous highest departure from average.³ Temperatures reached their highest levels in the history of modern records during the 2001–2010 time period and continue to rise at a rate that is unprecedented in the past 1,300

1. *Climate Change Science Overview*, U.S. EPA, <http://www.epa.gov/climatechange/science/overview.html> (last visited Aug. 5, 2016) (stating that the average temperature in the Arctic rose by almost twice as much during the same period and will continue to warm more rapidly than the global mean); IPCC, 2013: *Summary for Policymakers*, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 20 (2013), http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf.

2. Brandon Miller, *2015 Is Warmest Year on Record, NOAA and NASA Say*, CNN (Jan. 20, 2016, 5:55 PM), <http://www.cnn.com/2016/01/20/us/noaa-2015-warmest-year/>.

3. *Id.*

years.⁴ This situation will worsen unless drastic policy change is made at the global scale *and* implemented on the ground. The Intergovernmental Panel on Climate Change (“IPCC”) has found it “likely” that the global mean temperature by the end of the twenty-first century, compared to 2005 levels, will increase by as much as 8.6°F (4.8°C) unless effective steps are taken to counter the temperature trend.⁵

Climate change has been recognized to cause a wide range of problems such as heat-related human deaths and illnesses (physical and mental),⁶ rising seas, increased storm intensity and frequency, extreme and prolonged droughts and wildfires in some regions, as well as extreme cold spells and snowfall in others. Some currently colder regions on Earth may stand to benefit in a limited manner from warmer temperatures,⁷ but even that may be offset by problems with, for example, crop and other plant diseases the extent of which is not yet fully known. Add to this the risks of civil unrest, riots, mass migrations and perhaps wars caused by water and food shortages. It is no longer reasonably debatable that climate change will take a huge toll on human health and prosperity as well as pose significant risks to national security if it is not curbed.

What causes climate change? Human activity:

Anthropogenic greenhouse gas emissions have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever. This has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years. Their effects, together with those of other anthropogenic drivers, have been detected throughout the climate system and are extremely likely to have been the dominant cause of the observed warming since the mid-20th century.⁸

4. WORLD METEOROLOGICAL ORG., THE GLOBAL CLIMATE 2001–2010: A DECADE OF CLIMATE EXTREMES I (2013); *Climate Change: How Do We Know?*, NASA’S JET PROPULSION LAB, CAL. INST. TECH., <http://climate.nasa.gov/evidence/> (last visited Aug. 5, 2016).

5. IPCC, *supra* note 1.

6. In August 2013, for example, the journal *Science* reported that shifts in climate are strongly linked to human violence around the world, such as spikes in domestic violence in India and Australia, increased assaults and murders in the United States, ethnic violence in Europe, land invasions in Brazil, police violence in Holland, and civil conflicts throughout the tropics. Kathleen Maclay, *Warmer Climate Strongly Affects Human Conflict and Violence Worldwide, Says Study*, BERKELEY NEWS (Aug. 1, 2013), <http://news.berkeley.edu/2013/08/01/climate-strongly-affects-human-conflict-and-violence-worldwide-says-study/>.

7. This once famously caused Russian President Putin to point out that “an increase of two or three degrees wouldn’t be so bad for a northern country like Russia. We could spend less on fur coats, and the grain harvest would go up.” Fred Pearce, *Global Warming ‘Will Hurt Russia,’* NEW SCIENTIST (Oct. 3, 2003), <http://www.newscientist.com/article/dn4232-global-warming-will-hurt-russia.html#.VN6HPikhPOE>.

8. IPCC, *supra* note 1, at 1.

“Extremely likely” means to a 95–100% degree of certainty;⁹ these words of estimative probability are rarely used by the scientific community, further buttressing the strength of their findings.

Continued emissions of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive, and irreversible impacts for people and ecosystems. Limiting climate change will require substantial and sustained reductions in greenhouse gas emissions that, together with adaptation, can limit the risks posed by climate change. No less than twenty-five years after the adoption of the United Nations Framework Conference on Climate Change (“UNFCCC”) at reducing greenhouse gas emissions worldwide, the global governance system only recently, with the Paris Agreement (“Agreement”), decided to limit the increase in the global average temperature to “well below” 2°C above pre-industrial levels, and to “pursu[e] efforts to limit the temperature increase to 1.5°C above pre-industrial levels” by 2100.¹⁰ Although widely lauded, for good reason, as a historical agreement following its adoption in December 2015, the Agreement is not the panacea that many had hoped for and that truly would have been in order given the significance of the problem.

However, reason to remain skeptical towards the ultimate effectiveness of the Agreement exists. For example, the Agreement contains few legally binding provisions. The implementation horizon is long: the first “nationally determined contributions,” promises submitted by each nation about its planned individual action to reach the overall target will be reviewed for the first time in 2023 and every five years thereafter.¹¹ The ultimate goal must be reached by 2100. Many things—good and bad both—could happen in that long time horizon. Nations have committed to the “highest possible ambition,” but the agreement does not set numeric targets for action to be taken.¹² Global peaking of greenhouse gas emissions should be reached “as soon as possible,” with “rapid reductions thereafter.”¹³ This wording sends a clear message to global society that the world’s remaining reserves of coal, oil, and gas must stay in the ground. In contrast to a previous version of the agreement, the adopted text does not, however, call for “reaching greenhouse gas emissions neutrality in the second half of the century,” a

9. *Id.* at 4, n.2.

10. U.N. Framework Convention on Climate Change, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

11. *Id.*

12. This, of course, would have made the agreement unacceptable to some nations such as the United States. *Id.*

13. U.N. Framework Convention on Climate Change, *supra* note 10.

provision that oil producers fiercely resisted.¹⁴ Further, developed nations are expected to assist developing nations in reaching the goals, but no specific goal was agreed upon in this context. An aspirational \$100 billion-a-year-goal is included in the “decision” part of the document and not the “action” part to avoid triggering review in the United States.¹⁵ To be sure, the Agreement is better supranational climate treaty news than what nations have been able to produce over the past many years. However, time will tell whether this time around nations will live up to their promises.

In one way, the Paris Agreement is not all that different from what nations originally promised to do via the 1992 Convention under which nations committed to “[stabilizing] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system,”¹⁶ which has since been recognized to be the 1.5°/2°C temperature increase listed in the Agreement. Thus, although a numerical value has now been attached to what constitutes dangerous anthropogenic greenhouse gas emissions, the substance of the promise is still much the same as in 1992. This is troublesome, as the fact remains that since 1992, greenhouse gas emissions have not been sufficiently curbed at the global scale. In short, there is much reason to be optimistic about the new Agreement, but it is not a fail-proof instrument by any stretch of the imagination.¹⁷ Solutions may have to come from the purely national levels or from narrower national

14. Sewell Chan, *The Road to a Paris Climate Deal*, N.Y. TIMES, Dec. 12, 2015, <http://www.nytimes.com/interactive/projects/cp/climate/2015-paris-climate-talks/key-points-of-the-final-paris-climate-draft>.

15. *Id.*

16. U.N. Framework Convention on Climate Change, *supra* note 10.

17. For example, on January 9, 2016, the U.S. Supreme Court placed a temporary stay on the implementation of the federal Clean Power Plan, which was said to be the “biggest game in town” in terms of achieving the then only two-month-old Paris Agreement. Michael B. Gerrard, *The Supreme Court Stay of the Clean Power Plan and the Paris Pledges*, COLUMBIA LAW SCHOOL: CLIMATE LAW BLOG (Feb. 10, 2016) (last visited Aug. 5, 2016), <http://blogs.law.columbia.edu/climatechange/2016/02/10/the-supreme-court-stay-of-the-clean-power-plan-and-the-paris-pledges/>. The stay may be lifted only when all legal challenges to the Plan have been heard. Lyle Denniston, *Carbon Pollution Controls Put on Hold*, SCOTUSBLOG (Feb. 9, 2016), <http://www.scotusblog.com/2016/02/carbon-pollution-controls-put-on-hold/>. The division of the Court along ideological lines, with conservative justices all supporting the stay while the liberal justices opposed, is troublesome. And, “[i]f these divisions hold, the Clean Power Plan may suffer further setbacks in the Supreme Court which may ultimately render it useless.” Matt McGrath, *Obama Climate Initiative: Supreme Court Calls Halt*, BBC (Feb. 10, 2016), <http://www.bbc.com/news/science-environment-35538350> (last visited Aug. 5, 2016). A host of other measures are needed to meet the United States goals under the new Paris Agreement. Gerrard, *supra*. Many have been set forth in the Second Biennial Report of the United States under the UNFCCC. U.S. DEPT. OF STATE, SECOND BIENNIAL REPORT OF THE UNITED STATES: UNDER THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (2016), https://unfccc.int/files/national_reports/biennial_reports_and_jar/submitted_biennial_reports/application/pdf/2016_second_biennial_report_of_the_united_states.pdf (last visited Aug. 5, 2016). But even all of those goals are not enough to meet the 2025 goals. Gerrard, *supra*.

constellations.¹⁸ The dangerous temperature increase trajectory on which we currently find ourselves will hopefully be altered for the better, but it is unfortunately far from a given that this will be the case.

It already seems as if more parties are affected by natural disasters than ever before.¹⁹ One explanation may be as follows:

More people are affected by natural disasters today because there are more people in the world to be affected. But beyond basic statistics, natural disasters may be getting more expensive because more people are building more expensive infrastructure in areas that are prone to natural disasters, like coastal areas, fire-prone forests, steep mountain slopes, and riverbanks. If disasters are having a greater impact today, . . . the culprit is not Mother Nature, it's human nature.²⁰

With respect to hurricanes alone, some experts believe that increases in losses are “changes in society, not in climate fluctuations.”²¹ Among such changes are increased population densities. For example, “more people lived in south Florida’s Miami-Dade and Broward counties in 1990 than in the entire 103 counties along the hurricane-prone Atlantic and Gulf coasts from Texas through Virginia in 1930.”²² Around the world, hundreds of millions of people live in disaster-prone areas.²³ The number of people affected by “disasters” has been growing by six percent each year since 1960.²⁴ Seen from one point of view, natural “disasters” are disastrous simply because so many people *choose* to live and conduct business in harm’s way.

However, that view does not bar closer scrutiny. The problem is simply not solely attributable to our choice of geographical location. Research clearly shows that “[t]he number of weather-related natural catastrophes in North America has risen from around 50 a year in the early 1980s to around 200 a year, at an annual cost of approximately \$110 billion in 2012.”²⁵ The frequency and intensity of severe weather has worsened over recent decades. Weather is thus not just an environmental

18. See generally Myanna Dellinger, *Localizing Climate Change Action*, 14 MINN. J.L. SCI. & TECH. 603, 616, 651–67 (2013); Myanna Dellinger, *Narrowed Constellations in a Supranational Climate Change Regime Complex: The “Magic Number” is Three*, 37 FORDHAM INT’L L.J. 373, 433–40 (2014), [hereinafter Dellinger, *Narrowed Constellations*].

19. *The “Nature” of the Problem: Population and Natural Disasters*, NASA, http://earthobservatory.nasa.gov/Features/RisingCost/rising_cost2.php (last visited Aug. 5, 2016).

20. *Id.*

21. *Id.*

22. *Id.*

23. David Ropeik, *Putting the Disaster in Natural Disasters. Why Do We Live in Harm's Way?*, BigThink, <http://bigthink.com/risk-reason-and-reality/putting-the-disaster-in-natural-sisasters-why-do-we-live-in-harms-way> (last visited Aug. 5, 2016).

24. Secretariat for the International Strategy for Disaster Reduction, *Percentage of Population Living in Hazard Prone Areas*, U.N., http://www.un.org/esa/sustdev/natlinfo/indicators/methodology_sheets/natural_hazards/population_hazard_proneareas.pdf.

25. Michael B. Gerrard & Shelley Welton, Symposium Commentary, *US Federal Climate Change Law in Obama's Second Term*, 3 TRANSNAT’L ENVTL. L. 111, 122 (2014).

issue—it's a major economic factor as well. "At least \$1 trillion of our economy is weather-sensitive."²⁶ The fourteen most extreme weather-related events in 2011 cost the United States economy more than \$55 billion.²⁷ A related problem is that today's many high-tech goods and machinery are more susceptible to damage than functionally similar items of the past.²⁸ This too adds to the financial risks of contracting.

What does this mean for contract law? Climate change is already affecting and will continue to affect, at least for some time to come, myriad aspects of modern industrialized life, and thus contractual relations. Think, for example, of private and government transactions ranging from farming, power and water contracts to urban and rural planning projects, construction agreements, private and public transportation deals, the sale and delivery of goods, and health, home, and business insurance.²⁹ Contracting parties may undertake obligations that it will become increasingly difficult or even impossible to perform on time or at all if failing to take the increased likelihood of extreme weather events into account at the contract negotiation stages. Realistic planning already mars the contract drafting and execution landscape when it comes to "extreme" weather. If history serves as an indicator of problems to arise in the future, parties may still have a difficult time incorporating new climate realities into their contracts for some time to come.

Some sectors—in particular the insurance sector—are paying heed to the effects of climate change and extreme weather on their business performances. In other sectors, parties continue to conduct "business as usual." The problem with this approach is that there *is* no "usual" anymore when it comes to assessing the risks associated with "extreme" weather events. If it were possible to accurately pinpoint which events would happen where and when, contract drafting would be much simpler. Contracts could then specifically address the risks rather than allocating the risks of unforeseen occurrences, as is currently often the case. However, doing so is at the same time both easier and more difficult. Easier because extreme weather events must now be expected to take place to a greater extent and degree of severity than before, and more difficult because the human imagination often still does not—or cannot—accurately predict what could happen and where. For example,

26. Jeffery W. Meyers & Adam H. Sheinkin, *The Ins and Outs of Fair "Weather Clauses" in Power Project Contracts*, 27 NAT. RESOURCES & ENV'T 18 (2012).

27. *Id.*

28. *The "Nature" of the Problem: Population and Natural Disasters*, *supra* note 19.

29. Although the insurance industry is significantly affected by, and concerned with, the on-the-ground and potential future effects of extreme weather events, it is beyond the scope of this Article to go in depth with insurance contracts per se or the insurance industry in general.

earthquakes are now traced to our insatiable need for fossil fuels.³⁰ Oklahoma—home of numerous fracking activities—saw a fivefold surge in earthquakes in 2014 with twice as many earthquakes as California, although Oklahoma is only half the size of California.³¹ Additionally, the shifting of the weight of ice previously placed on the various parts of Earth's crusts could change the stresses acting on earthquake faults and volcanoes and thus exacerbate already existing risks from this angle.³² In 2014, a tornado pounded Los Angeles with high winds and heavy rain in December, although the Los Angeles area normally does not experience tornadoes.³³ The intense 2003 and 2010 heat waves in Europe were blamed for more than 100,000 deaths,³⁴ although deadly heat waves and extreme cyclones have been far from common in relatively temperate Europe.

Business parties will benefit from carefully considering their contract drafting and performance obligations as they may be presented with a Sophie's choice of sorts if weather poses a problem to their performances: if parties *fail* to draft the contract with sufficient accuracy in relation to the weather risks intended to be covered by the contract, courts may interpret the contract differently than if the parties *had* been more accurate. Conversely, if parties very narrowly describe their desired risk allocation, fewer arguments can be made that unspecified events that may well happen are covered by the agreement.

At bottom, the problem is very much one of awareness and conscious risk consideration. A central cause of this problem is the human misunderstanding of, or inability to understand, risk and probability. For example:

30. See, e.g., *How Oil and Gas Disposal Wells Can Cause Earthquakes*, STATEIMPACT, <https://stateimpact.npr.org/texas/tag/earthquake/> (last visited Aug. 5, 2016); Anastasia Pantisios, *Confirmed: Oklahoma Earthquakes Caused By Fracking*, EcoWATCH (Apr. 23, 2015, 10:26 AM), <http://www.ecowatch.com/confirmed-oklahoma-earthquakes-caused-by-fracking-1882034344.html> (last visited Aug. 5, 2016).

31. Mike Soraghan, *Earthquakes: Shaken More than 580 Times, Okla. Is Top State for Quakes in 2014*, EnergyWire (Jan. 5, 2015), <http://www.eenews.net/stories/1060011066> (last visited Aug. 5, 2016).

32. Andrea Thompson, *Global Warming Might Spur Earthquakes and Volcanoes*, LIVE SCIENCE (Aug. 30, 2007), <http://www.livescience.com/7366-global-warming-spur-earthquakes-volcanoes.html>.

33. Melissa Pamer et al., *Rare Tornado Pounds South Los Angeles Neighborhood with Damaging Winds*, KTLA5, (Dec. 12, 2014, 11:23 PM), <http://ktla.com/2014/12/12/tornado-strikes-south-la-neighborhood-rips-roof-off-building-residents/> (last visited Aug. 5, 2016).

34. Wynne Parry, *Recent Heat Waves Likely Warmest Since 1500 in Europe*, Science (Mar. 17, 2011, 2:02 PM), <http://www.livescience.com/13296-european-russia-heat-waves-climate-change.html> (last visited Aug. 5, 2016).

The chance of the next “Big One” earthquake in southern California—magnitude 7 or greater—is close to 100% sometime in the next 50 years, but it’s only two or three percent for any one of those years. Those low odds of risk in the shorter term, the time frame we care about the most, play right into some serious cognitive limitations that challenge our ability to make intelligent choices about risk.³⁵

Many scientific studies demonstrate the human inability or perhaps conscious reluctance to fully address future risks. This is especially so in relation to climate change and its myriad legal implications.³⁶ As in other contexts, hope springs eternal in the contracting arena.

At the same time, the judiciary continues to give weight to the established, but still highly viable, doctrine of impracticability and the closely related frustration of purpose doctrine. These may allow parties to escape contractual liability when extreme weather has made a contractual performance impracticable or frustrated the purpose of the contract. Relying on these doctrines to the same extent as before does not make much factual, legal, or socio-political sense any longer in light of the availability and increasing reliability of knowledge about the causes and effects of the increasing amount and severity of extreme weather events.

In this Article, I argue that although established contract law principles typically dictate that parties are free to allocate contractual risks as they see fit, time has come for courts to take a harder look at the continued relevance and applicability of inaccurately drafted or inequitable contractual “force majeure” clauses intended to cover extreme weather events. Contractual risk prediction, assumption, and allocation considerations along with significant public policy reasons warrant rethinking the impracticability doctrine as it applies to weather events. While it would require much judicial courage to entirely set aside force majeure clauses in relation to weather events or, where no such clauses have been drafted, to disregard the applicable common law notions of impracticability and frustration of purpose, the judiciary is more likely to and indeed should limit the applications of these doctrines to events that can truly be classified as “extraordinary,” “unforeseen” and contractually unassumed given today’s readily available knowledge of weather patterns and climate change. Such a limitation is warranted for reasons of public policy. Further, the time may have come to evaluate

35. Ropeik, *supra* note 23.

36. See JANET SWIM ET AL., PSYCHOLOGY & GLOBAL CLIMATE CHANGE: ADDRESSING A MULTI-FACETED PHENOMENON AND SET OF CHALLENGES, AM. PSYCHOL. ASS’N TASK FORCE ON THE INTERFACE BETWEEN PSYCHOL. & GLOBAL CLIMATE CHANGE, <https://www.apa.org/science/about/publications/climate-change.pdf>; Tara Parker-Pope, *Wrong About Risk? Blame Your Brain*, N.Y. TIMES (Jan. 16, 2008), http://well.blogs.nytimes.com/2008/01/16/wrong-about-risk-blame-your-brain/?_r=1; Kharunya Paramaguru, *The Battle over Global Warming Is All in Your Head*, SCIENCE (Aug. 19, 2013), <http://science.time.com/2013/08/19/in-denial-about-the-climate-the-psychological-battle-over-global-warming/>.

and allocate contractual risks from a comparative framework much like comparative negligence in torts instead of the currently applicable binary framework applied in contract law.

A judicial reconsideration of impracticability may further encourage contractual partners and even broader segments of society to realize that climate change can and will affect virtually everyone in the future. Everyone—including business partners in contractual transactions that arguably do not directly affect climate change to any yet measurable extent—should be better prepared to face the practical, financial, and legal risks associated with extreme weather events to which we all contribute. The judiciary has a key role to play in this context. A modernized judicial view on impracticability and force majeure clauses in the extreme weather context has the potential to lead to a system of more accurate risk prediction and cost internalization by contracting parties. Rethinking impracticability in relation to weather events would also force a broader societal awareness of the consequences of climate change. These goals can be accomplished via established common law principles of contracts without violating the separation of powers and political question doctrines.

This Article first gives a broad overview of the purpose and effects of the concept of “force majeure” and the impracticability doctrine in general. The Article proceeds to describe the classic legal “human/nature” separation in order to demonstrate how this has become a distinction without much practical difference when it comes to severe weather events and why the related law should develop accordingly. An in-depth deconstruction of the modern doctrine of contractual impracticability and force majeure in the United States follows. In this Part, I critique the doctrine and provide suggestions for change. Considerations include some of the many public policy considerations that play a role in the pressing problems caused by climate change. These must be addressed from numerous angles, including contract law, in order for society to become better prepared both legally and financially for our new weather reality. Several considerations warrant taking a much harder look at the impracticability doctrine than ever before in order to make the common law reflect current reality.

This Article only analyzes the impracticability and frustration of purpose doctrines in light of weather-related events, and thus not events such as riots, wars, and economic and political problems, on the basis of which parties may otherwise also seek contractual exculpation.

I. PURPOSES OF CONTRACTUAL IMPRACTICABILITY

Contract liability is, in general, no-fault liability.³⁷ Thus, “[e]ven if performance is impossible or senseless, the assessment of damages for non-performance remains a possibility.”³⁸ Risk allocation is key. Under the freedom of contract principle, parties are free to allocate the practical and financial risks of unforeseen circumstances as they wish. In the early common law, contracting parties had to perform their promises no matter what. However, notions of consent, mutual mistake, and fairness led courts to find that when a situation had arisen under which the performance at issue was simply not contemplated, it would be unfair to hold a party to an otherwise clearly promised contractual performance.³⁹ Equity was thus the underlying rationale for creating a limited excuse for delayed performances or non-performances despite the contracting parties’ promises to be mutually bound. The excuse sprang from situations in which it was literally impossible to perform under the particular contract. However, as it is rarely truly “impossible” to complete a promised performance—a party can, for example, often cover with goods from another supplier or employ more assistance to perform a service although doing so may be more expensive than originally contemplated—the modern doctrine is known as “impracticability.” This denotes a situation where a performance is so cumbersome and expensive to carry out that it would be unreasonable to enforce the promised performance.⁴⁰

If a party’s total performance or delayed performance is excused, the party will not be liable for breach of contract.⁴¹ Yet, the constructive condition to the *other* party’s performance is, in that case, also not fulfilled. Thus, the other party’s duty to perform its return duty is typically also excused under the common law.⁴² As is most often the case, however, the matter depends on any explicit contractual risk allocation in the form of “act of God” or force majeure clauses. For example, where a boat slip renter entered into a contract that only excused the slip owner’s performance in situations of “inclement weather or any other circumstances beyond its control,” the renter still had to pay rent for the time period during which the boat slip was unavailable due to a flood.⁴³ Parties frequently use similar clauses to allocate the risk of certain events hindering their performances. Barring such clauses, American courts

37. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS, § 13.20 (6th ed. 2009).

38. *Id.*

39. *Id.*

40. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1325 (One Volume ed. 1952).

41. JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS § 116 (5th Ed. 2011); PERILLO, *supra* note

37, § 13.23.

42. *Id.*

43. *Entzel v. Moritz Sport & Marine*, 841 N.W.2d 774, 777, 779 (N.D. 2014).

have generally taken the view that when a contract is discharged by impracticability under the elements analyzed below, the parties must make restitution for whatever benefits they may have received from the other party under the contract, although they are excused from any possible remaining performance.⁴⁴ Alternatively, courts may gap-fill with a term that is “reasonable in the circumstances.”⁴⁵

The closely related doctrine of frustration of purpose applies where the main purpose of a contract has become “frustrated or destroyed.”⁴⁶ A party may, in that case, seek to avoid its return obligation.⁴⁷ Thus, the doctrine of impracticability is asserted to avoid liability for a delayed or entirely missing contractual performance, whereas frustration of purpose applies in situations where a party is seeking an excuse for having to pay for a promised performance that has become virtually worthless to that party. In other words, impracticability is typically invoked by suppliers of goods and services, whereas frustration of purpose is invoked by buyers.⁴⁸

The same basic requirements apply to frustration and impracticability.⁴⁹ Frustration of purpose may be invoked under both the Restatement (Second)⁵⁰ and the UCC. Although the UCC contains no *explicit* provision for frustration of purpose, the UCC intends that the common law doctrine also applies under the Code.⁵¹ Further,

Because the rules . . . might otherwise appear to have the harsh effect of denying either party any recovery following the discharge of one party’s duty based on impracticability or frustration, . . . several mitigating doctrines may be used to allow at least some recovery in a proper case.⁵²

44. PERILLO, *supra* note 37, § 13.23.

45. *Id.* As explained by Corbin: “If the contract contains no words of express condition to either party’s duty of performance, the court may have to fill the gap and determine whether the continued availability of certain means of performance should be deemed a constructive or implied condition.” 14 CORBIN ON CONTRACTS § 75.7 (Perillo rev. 2001).

46. *See, e.g.*, JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass’n, 67 A.3d 702 (N.J. Super. Ct. App. Div. 2013); Phillips P.R. Core, Inc. v. Tradax Petroleum, Ltd., 782 F.2d 314, 319 (2d Cir. 1985); *see also* United Equities Co. v. First Nat’l City Bank, 52 A.D.2d 154, 161 (N.Y. App. Div. 1976).

47. PERILLO, *supra* note 37, § 13.12.

48. The modern impossibility/impracticability doctrine is well known from cases such as *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966) (plaintiff ship operator not entitled to additional payment because of closing of Suez Canal due to political unrest in region), whereas the frustration of purpose doctrine is most well known from the seminal case of *Krell v. Henry*, (1903) KB 740, 754 (Eng.) (renter excused from paying two-day rent to view the coronation procession of King Edward VII, who fell ill and whose coronation was thus postponed).

49. PERILLO, *supra* note 37, § 13.12.

50. RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. LAW INST. 1981).

51. Alternatively, but outside the scope of this Article, a party may seek to be excused from an express condition if the condition would result in “extreme forfeiture” and the condition is not a “material part” of the agreed exchange. *Id.* §§ 11.35, 13.10; RESTATEMENT (SECOND) OF CONTRACTS § 271 (AM. LAW INST. 1981); PERILLO, *supra* note 37, § 13.12.

52. RESTATEMENT (SECOND) OF CONTRACTS § 272 cmt. a (AM. LAW INST. 1981).

These include the rule on part performances as agreed equivalents, restitution, and supplying a term to avoid injustice.⁵³

A question that arises in this context is whether and how such risks affect contract law. As a starting point, parties are free to allocate their risks as they wish under the principle of freedom of contract. Contracting parties are often presumed by courts to be sufficiently sophisticated and rational to address this area of concern in the contract formation process. Further, courts typically also consider whether parties are “represented by counsel who [were] at liberty to define the nature of force majeure in whatever manner they desire.”⁵⁴ But is this truly the case in general? And, what are the risks to not only the contracting parties, but also to society if these assumptions do not match reality?

Often, force majeure clauses are only an afterthought and are precisely *not* the subject of meaningful or extensive negotiations.⁵⁵ Sometimes parties find themselves too busy to draft solid, tailored force majeure clauses. At other times, parties either do not want to address the realities, cannot reach an agreement on what to do if certain events should arise, or simply fail to realistically foresee problematic events. Frequently used boilerplate clauses such as “act of God” and force majeure clauses may turn out *not* to be sufficiently clear or tailored to offer adequate protection for a party. Some parties simply do not have the sophistication, experience, and resources that other parties do. That is arguably the very nature of contract law. That, of course, does not entitle one party to take opportunistic advantage of another party’s ignorance. Even when the matter may not rise to the level of one party taking outright advantage of another, the risk remains that one party may enjoy a much stronger bargaining position than the other, which can lead to the execution of contractual stipulations that are not as “freely” negotiated as some courts may presume. With the concentration of business power in a seemingly growing number of larger and larger corporations, this concern is relevant when it comes to contractual allocations of weather-related risk, as will be analyzed below.

If a case goes to trial, triers of fact may also not be sufficiently rational or sophisticated to reach the result to which a given party may consider itself entitled under existing law. This could be quite costly. Where parties may not have been able to reach an agreement on the issue at all, or have not clearly allocated their risks in relation to weather, a risk allocation scheme that is more modern and fair than what is arguably the case today should be considered by courts.

53. *Id.*

54. Specialty Foods of Ind., Inc. v. City of S. Bend, 997 N.E.2d 23, 27 (Ind. Ct. App. 2013).

55. Meyers & Sheinkin, *supra* note 26, at 1.

A question in this context is thus, whether it matters *who* pays for the financial effects of non-performances or delayed contract performances. This matters greatly to parties who thought that they would be able to escape a contract performance given certain events as well as to the opposing party who is relying on the performance. If, as happens, a party is held liable for the consequences of nonperformance contrary to that party's expectations, the situation could turn out to be very dire for that party in light of the increasing severity of some weather events—recall Hurricane Sandy. Often, insurance or other types of financial protections could be procured ahead of time, but parties may neglect to do so. The insurance industry is well aware of the financial risks posed to it by climate change and is already limiting coverage in some contexts or greatly increasing premiums.⁵⁶ Insurance may simply not be available for certain types of contracts or in some geographical areas to the same extent as it has been before, thus making it more necessary to consider the risks of extreme events to a contractual performance more carefully than ever before.

This problem is not a new one. Natural disasters and the problem of extreme weather have long raised legal issues in contract law. However, the issue has become much more pressing than before because of our rapidly changing climate. Climate change is causing a tipping point in relation to not only our natural environment, but also in relation to the contractual excuse doctrines. Legal change is needed to match the new on-the-ground realities and scientific understanding of risks posed by weather.

Finally, a “moral hazard” problem exists: even though both parties to a contract may understand the risks involved, a contract may allow only *one* of the parties—arguably the one with the stronger bargaining power—to reap the benefits of a force majeure clause. This may not be equitable under the circumstances and bears judicial scrutiny.

In short, the doctrine of impracticability of performance has functioned well for quite some time, but a shift in public consciousness is taking place in relation to climate change. Time has come for contracting parties and legal practitioners to more carefully consider the legal risks

56. After Hurricane Sandy, for example, the annual insurance premium for a resident of Queens, New York, was predicted to jump from \$458 to \$15,000. Jenny Anderson, *Outrage as Homeowners Prepare for Substantially Higher Flood Insurance Rates*, N.Y. TIMES (July 28, 2013), http://www.nytimes.com/2013/07/29/nyregion/overhaul-and-a-hurricane-have-flood-insurance-rates-set-for-huge-increases.html?_r=0 (last visited Aug. 5, 2016). In January 2016, FEMA proposed a rule to establish a disaster deductible, requiring a predetermined level of financial or other commitment from grantees (generally state, tribal, or territorial governments) before FEMA will provide assistance. This rule “would incentivize Recipients to make meaningful improvements in disaster planning, fiscal capacity for disaster response and recovery, and risk mitigation” *Establishing a Deductible for FEMA’s Public Assistance Program*, FED. REG. (Jan. 20, 2016), <https://www.federalregister.gov/articles/2016/01/20/2016-00997/establishing-a-deductible-for-femas-public-assistance-program> (last visited Aug. 5, 2016).

posed by climate change. Time has also come for the judiciary to take a hard look at the doctrine of impracticability as well as individual force majeure clauses to ensure that the law matches modern scientific knowledge about climate change as well as the public policy implications of judicial holdings in this context. The law always develops over time. It should in this context as well.

II. HISTORY OF “ACTS OF GOD” AND THE IMPRACTICABILITY DOCTRINE

In English-language common law, the notion that “acts of God” could provide a defense to liability first appeared in 1581 in the famous English “Shelley’s Case.”⁵⁷ There, the perceived act of God was the death of one of the parties.⁵⁸ The court stated: “[I]t would be unreasonable that those things which are inevitable by the Act of God, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person in whom there was no laches.”⁵⁹ The phrase reappeared in the 1702 case *Coggs v. Bernard*, which analyzed liability for a bailment by a common carrier.⁶⁰ In this, Justice Holmes noted that “[t]he law charges this person thus entrusted to carry goods, against all events but acts of God, and of the enemies of the King.”⁶¹

The concept quickly took hold in the common law, although the early cases did not specify *what* constituted an “act of God.” One attempt to do so was, however, made in 1875 by Lord Mansfield in *Forward v. Pittard* as follows:

Now what is the act of God? I consider it to mean something in opposition to the act of man . . . the law presumes against the carrier, unless he shows it was done by the King’s enemies or by such act as could not happen by the intervention of man, as storms, lightning and tempests.⁶²

The notion of acts of God evolved in tort law from the early almost literal construct to mean something beyond human agency and control, such as windstorms, lightning, accidental fires, floods, and heavy rain. For example, in a case involving the failure of a reservoir after a violent thunderstorm with rainfall “greater and more violent than any within the memory of the witnesses,”⁶³ the appellate court found that the resulting destruction of three bridges downriver was an act of God and thus not the result of negligence in either failing to predict the storm or in ensuring the safety of the embankments and weirs under ordinary, foreseeable conditions.

57. Shelly’s Case (1579–81) 76 Eng. Rep. 199.

58. *Id.* at 220.

59. *Id.*

60. *Coggs v. Bernard* (1703) 92 Eng. Rep. 107, 112.

61. *Id.*

62. *Forward v. Pittard* (1785) 99 Eng. Rep. 953, 956.

63. *Nichols v. Md.* [1875] QB 255, 256 (Eng.).

In contrast, other early tort cases held that although rainfall was “heavy,” “extraordinary,” and “unprecedented,” it was *not* a supervening act of God.⁶⁴ For example,

[F]loods of extraordinary violence must be anticipated as likely to take place from time to time. It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. Such damage is not in the nature of *damnum fatale*, but is the direct result of the obstruction of a natural watercourse by the defenders' works followed by heavy rain.⁶⁵

Fault thus played, and still plays, a major role in relation to the doctrine in tort and also bears some relevance to the overlapping concept in modern contract law.

A survey of more recent English tort cases found a remaining reluctance on the part of the courts to “formulate any clear, rule-defined, theory of what is to be accounted an act of God in law.”⁶⁶ However, “the involvement of man in anticipating and averting the danger”⁶⁷ was and, to some extent still is, critical. In other words, the alleged incident must be due to direct and exclusive natural causes so that the incident “could not have been prevented by any amount of foresight and pains and care reasonably to be expected” from a party.⁶⁸

American cases adopted 200 years of English jurisprudence.⁶⁹ An 1868 California contract case borrowed from tort law and laid out the governing principle of what constituted an “act of God” in contract law: “The expression excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to have been the act of God, but must be regarded as the act of man.”⁷⁰ Even then, experts discussed whether a potential “act of the elements” was distinguishable from and potentially more comprehensive than a mere “act of God.”⁷¹ In at least one case, however, the court found that there was no difference between the two phrases and that the same test was to be applied.⁷² Today, the notion has, of course, developed, and should continue to, as will be analyzed below.

64. *Greenock Corp. v. Caledonian Ry. Co.* [1917] HL 556, 580 (Eng.).

65. *Id.* at 572.

66. C.G. Hall, *An Unsearchable Providence: The Lawyer's Concept of Act of God*, 13 OXFORD J. LEGAL STUD. 227, 238 (1993).

67. *Id.* at 241.

68. *Nugent v. Smith*, 1 C.P.D. 423, 444 (1876).

69. Denis Binder, *Act of God? or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law*, 15 REV. LITIG. 1, 13 (1996).

70. *Polack v. Pioche*, 35 Cal. 416, 423 (1868).

71. *Id.*

72. *Id.*

The notion that climatic events like storms, traditionally considered to be beyond the control of humans, could shield a defendant from liability for damages worked its way beyond contracts and tort law into admiralty and federal environmental law. For example, at least three federal acts allow for an “act of God” defense, namely the Clean Water Act,⁷³ the Oil Pollution Act,⁷⁴ and the Comprehensive Environmental Response, Compensation, and Liability Act.⁷⁵ These acts impose strict liability on parties responsible for oil spills, releases, or threatened releases of hazardous substances. However, parties may avoid liability if they can “establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by an act of God.”⁷⁶ The United States Congress defines an “act of God” as “[a]n unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.”⁷⁷ In contrast to tort and contract law, the “act of God” defense has so far not succeeded under American statutory environmental law. Litigants have simply not been able to prove by the required preponderance of the evidence that the environmental damage—often toxic releases—was caused *solely* by an unforeseen act which could not have been prevented by humans.⁷⁸ For now, the concept is thus practically inapplicable in American environmental case law, although it officially remains alive in the statutes.

Internationally, the concept is known as force majeure, which is “a general principle of law. It has been recognized throughout the history and geography of the legal systems of the world.”⁷⁹ It operates as an affirmative defense to not only private liability, but also nation state liability for the consequences of supervening irresistible or unforeseen events.⁸⁰ Recall that for purposes of this Article, only climatic events such as hurricanes, heavy rain, windstorms, blizzardss and floods will be analyzed to find out the extent to which these may relieve a contractual party of liability.

73. Clean Water Act, 33 U.S.C. § 1321(f)(1) (West 2016).

74. Oil Pollution Act, 33 U.S.C. §§ 2702, 2703 (a)(1)–(4) (West 2004).

75. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(b)(1)–(3) (West 2016).

76. 42 U.S.C. § 9607(b)(3) (West 2016).

77. See Clean Water Act, 33 U.S.C. § 2701(1) (West 2016); 42 U.S.C. § 9601(1) (West 2016).

78. Myanna F. Dellinger, *Rethinking “Fuerza Mayor” in a World of Anthropogenic Climate Change*, 42 *Derecho & Sociedad* 45, J.L. of the Pontificia Universidad Católica del Perú, No. 42, 50–51 (2014).

79. Federica I. Paddeu, *A Genealogy of Force Majeure in International Law*, 82 *BRITISH YEARBOOK OF INT’L L.* 381, 384 (2011).

80. *Id.* at 383–84.

From where does the notion that some acts are caused by “God” or “nature” and others by “man” stem? I will briefly examine this issue next in order to demonstrate that excuses based on “acts of God” or impracticability are becoming less factually and legally supportable as knowledge about weather related events and climate change is developing.

III. CLASSIC “HUMAN/NATURE” SEPARATION

Traditionally, “nature” has been seen as separated from “man”—as two different ends of a spectrum of the world we inhabit. In spite of Darwin’s models of evolution, we still distinguish between what is “man-made” and what is “natural” in many contexts. We think we “react” to—or adapt to—natural events rather than “create” them. Culturally, this division has been so strong that nature has consistently been idealized as something “untainted” by humans.⁸¹ This continues to this day, and has become a selling point for many businesses, for example, in the hospitality, food, and real estate sectors.

For example, some foods are marketed as “natural” or “organic,” indicating a lack of human intervention, implying they are somehow healthier than what people could create. In the context of recent American food and drug law developments, the “human vs. nature” dichotomy is relevant to product labeling using terms such as “organic,” “natural,” or “unprocessed.” But does it make sense to label products accordingly? After all, all foods require *some* forms of human participation from picking and shipping, roasting and freezing, to dyeing, waxing, and even genetically altering the raw ingredients.⁸² Separation of the “human” and the “natural” is increasingly being recognized as more of a continuum than a sharp division.⁸³

We also tend to think of ourselves as superior to both nature and animals. This too is a viewpoint that is becoming archaic and that is challenged to an increasing, although still somewhat controversial, extent. Our thoughts about what “nature” is and is not generate consequences for humankind and for our environment. Nonetheless, even though critiques of the human/nature dichotomy have been accepted by some as logical, even deeper and more difficult questions remain. For example, if “human” and “nature” are not separate, discrete categories, how can we accurately understand the concepts and their overlap, connection, or integration?⁸⁴ We have to consider these aspects

81. Jill M. Fraley, *Re-examining Acts of God*, 27 PACE ENVTL. L. REV. 669, 676 (2010).

82. *Id.* at 682.

83. *Id.*

84. *Id.* at 679.

as we develop our physical and metaphysical surroundings, including the common and statutory law.

In turn, law is itself a human construct, often supporting and further developing the ideal of “nature” through legal texts, statutes, and court decisions. In the United States, the law has reinforced the idea that wilderness excludes humans.⁸⁵ For example, the Wilderness Act of 1964 defines wilderness regions as being “in contrast with those areas where man and his own works dominate the landscape.” The Wilderness Act defined the purpose of wilderness not in terms of any inherent value, but in terms of its value as a “resource” for human use, enjoyment, and consumption.⁸⁶ The Wilderness Act outlawed development, permanent settlement, and road construction. As this demonstrates, the law produces culture, but simultaneously, the law is also reproductive and referential and incorporates widely accepted cultural notions and scientific conclusions.⁸⁷

Public land use law in the United States is also marked by a significant debate about what is “natural” and what is “human.”⁸⁸ Traditionally, the definition of “wilderness” in federal law has incorporated a sharp separation of human and natural activities; wilderness is a place “untrammeled by man.”⁸⁹

The plain meaning of “natural” may be seen to raise as many questions as it answers. “In particular, it fails to indicate the line between something forming by nature and something being artificially made—the line between humans acting *within* nature and acting outside or *upon* nature.”⁹⁰ In many ways, trying to separate the anthropogenic from the natural has led to a “muddled jurisprudence.”⁹¹ At least in contract law, the demarcation between the concepts is proving to be without significance because of the recognized impact of mankind on climate change.

The gist of the matter is that many, if not most, events of both a large and small magnitude that are important to us today have origins in *human* action or inaction. We are simply *not* separate from nature; we are an integral physiological part of it. Just as nature has an effect on us, so do we have a clear effect on it. We are unique, but not so unique as to continue seeing us as more or less entirely removed from our natural surroundings apart from when we seek to “visit” it for work or pleasure.

85. *Id.* at 681.

86. *Id.*

87. *Id.*

88. See, e.g., Sean Kammer, *Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration*, 43 ENVTL. L. 83, 109 (2013).

89. Wilderness Act, 16 U.S.C. § 1131(c) (West 2016).

90. Kammer, *supra*, note 88, at 109.

91. *Id.* at 123.

Humans do not operate in a factually implausible vacuum, separated from “nature” and “animals.”⁹² Because we have a demonstrable effect on nature and vice versa, we need to consider how we, with our modern understanding of our surroundings, should continue to apply legal doctrines, such as impracticability, that traditionally relied on a then-supportable differentiation between “man” and “nature,” that is arguably no longer in existence. We must take the implications of the relationship between human identity and nature seriously.⁹³ “We,” of course, also include the legal profession including legal practitioners and the judiciary.

Changes in our perception of the law and in judicial applications of the law occur over time as our understanding of our natural surroundings improves. For example, where underground water flows were once also seen as almost “mysterious” and inexplicable phenomena, science has now documented how and where water flows. Water law changed with this understanding. Similarly, our understanding of weather patterns and climate change has changed drastically over recent years. The law should reflect current understanding of the impacts of climate change and what has so far been seen as “extreme” weather events.

Nowhere is the connectivity between human activities and nature more pressing today than when it comes to the anthropocentricity of climate change. The potential implications on private law are clear. Below, the Article analyzes how contractual impracticability can and should be modernized in this context.

IV. IMPRACTICABILITY AND FORCE MAJEURE IN MODERN CONTRACT LAW

Turning to the modern doctrinal aspects of the impracticability and frustration doctrines in United States law, I will analyze several aspects ripe for reconsideration by the judiciary and more careful contract negotiation and drafting by practitioners.

A. DEFINITIONS AND OTHER THRESHOLD MATTERS

Courts and the general literature often use the phrases “force majeure” and “act of God” interchangeably in relation to an attempted and contractually agreed-upon excuse for having to perform under a

92. Even Pope Francis has weighed in on this debate. For example, in his September 25, 2015, speech to the United Nations General Assembly, the Pope stated that “[m]an, for all his remarkable gifts, which are signs of a uniqueness which transcends the spheres of physics and biology . . . is at the same time a part of these spheres. He possesses a body shaped by physical, chemical and biological elements, and can only survive and develop if the ecological environment is favorable. Any harm done to the environment, therefore, is harm done to humanity.” Pope Francis, Address at U.N. General Assembly (Sept. 25, 2015).

93. Fraley, *supra* note 81, at 680.

contract given events that have made the performance impracticable, or where the purpose of the contract has been frustrated.

Black's Law Dictionary defines an "[a]ct of God" as "[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado."⁹⁴ In tort, an "act of God" is "an operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it."⁹⁵

In contract law, a leading treatise points out that "[t]he kinds of impossibility that [may excuse a performance] in many instances are caused by human beings, although the court might still refer to the event as an 'act of God.'"⁹⁶ "Acts of God" refer to natural disasters such as storms, droughts, floods, heavy rains, snowstorms, and earthquakes. In the English common law, the term "is limited to natural events."⁹⁷

The term "force majeure" similarly denotes "[a]n event or effect that can be neither anticipated nor controlled, especially an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do."⁹⁸ "Generally speaking, the term 'force majeure' refers to an event such as an 'Act of God,' beyond the parties' reasonable control that intervenes to create a contractual impossibility and thereby excuses contract performance."⁹⁹ Often, the two phrases are used synonymously, but the term "force majeure" includes both acts of God *and* acts of people such as riots, strikes, civil unrest, and wars.¹⁰⁰

Although clauses expressly allocating contractual risks are known as "force majeure" clauses, courts in English-speaking countries typically refer to the underlying events as "acts of God." The Restatement (Second) also uses the phrase "act of God" for the impracticability defense.¹⁰¹ In non-English speaking countries, the term "force majeure" is used.¹⁰² It should be noted that in today's increasingly secular world, some doubt has been cast on the desirability of the use of a legal phrase

94. *Act of God*, BLACK'S LAW DICTIONARY (10th ed. 2014).

95. P.H. WINFIELD, A TEXTBOOK OF THE LAW OF TORT § 16 (5th ed. 1950). See R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 330 (17th ed. 1977) ("If an act could not have been prevented by reasonable care, it is an act of God.")

96. CORBIN, *supra* note 40, § 74.4.

97. Paddeu, *supra* note 79, at 389.

98. *Force Majeure*, BLACK'S LAW DICTIONARY (10th ed. 2014).

99. *Id.*; see *Payne v. Hurwitz*, 978 So. 2d 1000, 1005 (La. Ct. App. 2008) ("*Force majeure* is defined as 'an event or effect that can be neither anticipated nor controlled.' It includes such acts of nature as floods and hurricanes. It is essentially synonymous with the common law concept of 'act of God'" (citations omitted)).

100. See, e.g., *Va.a Power Energy Mktg. v. Apache Corp.*, 297 S.W.3d 397, 400 n.3 (Tex. App. 2009); *Force Majeure*, *supra* note 97.

101. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981).

102. The Latin phrase "*vis major*" is preferred by some.

in English that relies on the existence of a God.¹⁰³ For these reasons, and because this Article proceeds from a secular point of view, the phrases “force majeure” or “impracticability” will be used, when possible, throughout this Article.

Parties often allocate the risk of the occurrence of potentially problematic events expressly in their contracts in the form of force majeure clauses. These are “contractual provision[s] allocating the risk of loss if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled.”¹⁰⁴ Force majeure clauses “provide a means by which the parties may anticipate in advance a condition that will make performance impracticable. Such a clause conditions a party’s duty to perform upon the non-occurrence of some event beyond its control and serious enough to interfere materially with performance.”¹⁰⁵ A leading treatise explains the importance of force majeure clauses in modern contract law as follows:

Because most courts have held that failure to cover a foreseeable risk in the contract deprives a party of the defense of impossibility, the best way to protect a party’s interests is to address the risk of supervening events expressly in the agreement. Such a clause can take many forms and serve many purposes. It may be a force majeure clause discharging the party, an excusable-delay clause giving the party additional time to complete performance, a termination clause granting the party the right to terminate if certain events transpire, or a flexible-pricing clause allowing it to pass on increased costs to the other party.¹⁰⁶

Today, the scope and application of the “act of God” concept is thus governed “more by the terms of the contract than by common law theory.”¹⁰⁷ However, even if a contract does not expressly provide that a party will be relieved of the duty to perform if a condition arises that makes performance impracticable, some courts may still relieve the party of that duty. Other courts, as mentioned, find that the impracticability

103. *Bowman v. Columbia Tel. Co.*, 179 A.2d 197, 206 (1962); *See Goldberg v. R. Grier Miller & Sons, Inc.*, 182 A.2d 759 (Pa. 1962). For both people of religion and otherwise, Pope Francis’ Recent Encyclical Letter on “Care for Our Common Home” discusses environmental issues including climate change law and governance issues from a Christian point of view. *See generally* Pope Francis, Encyclical Letter, *Laudato Si’* (May 24, 2015), http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

104. *Force Majeure*, *supra* note 97.

105. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981); *see* M.J. Paquet, *Inc. v. N.J. DOT*, 749 A.2d 141, 152–53, (N. J. 2002); *Facto v. Pantagis*, 915 A.2d 59 (N.J. Super. Ct. App. Div. 2007).

106. *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, No. 06-CV-6155-CJS-MWP, 2009 WL 368508, at *6 (W.D.N.Y. Feb. 13, 2009) (quoting CORBIN ON CONTRACTS § 74.19); *see* PERILLO, *supra* note 37, § 13.19.

107. *Tejas Power Corp. v. Amerada Hess Corp.*, No. 14-98-00346-CV, 1999 WL 605550, at *4 (Tex. App. Aug. 12, 1999).

defense will not be available if the parties have not addressed the issue expressly in a contractual force majeure clause.¹⁰⁸

B. EXAMPLES OF FORCE MAJEURE CLAUSES

Express risk allocation can be accomplished via force majeure clauses. Very often, “extreme” or “unforeseen” weather events (“acts of God”) trigger an attempt to seek exculpation from contractual performance liability. Exactly *what* is meant by such events may differ based on the type and wording of the agreement at issue. Precise risk description thus becomes highly important if a party seeks exculpation from a promised contractual performance.

The types of clauses used vary depending on the industry in which the parties operate. In the construction industry, for example, weather-related events and other “acts of God” often allow for extensions of time, but typically not for money damages.¹⁰⁹ In financing agreements or in merger and acquisition contracts, extreme weather events occurring between the signing and closing may provide a buyer, seller, or financing party with an opportunity to terminate the proposed transaction or claim breach for which monetary damages may be due.¹¹⁰ Insurance coverage may, incidentally, often mitigate monetary issues caused by weather-related problems, but even where insurance is available, the key remains acute risk awareness and precise contract and insurance policy negotiation and drafting.

Clauses addressing force majeure typically do so by way of exhaustive lists, carefully tailored limits, or negative inferences. A typical force majeure clause in the form of an “exhaustive list” looks like this:

108. See, e.g., *Miller v. Durham*, No. 07-14-00087-CV, 2014 WL 4101762, at *10 (Tex. App. Aug. 19, 2014) (“Ultimately, the question of whether the drought forced the removal of the cattle from the leased premises is not before the Court because the record is clear about one aspect: the contract at issue did not contain an act of God or force *majeure clause*. Therefore, the drought would not be an excuse for performance of the contract.”); *Miller v. Parker McCurley Props., L.L.C.*, 36 So. 3d 1234, 1240 (Miss. 2010) (“We find the common law rule, on this subject, stated in the following manner: ‘[w]here the law casts a duty on a party, *the performance shall be excused, if it be rendered impossible by the act of God*. But where a party, by his own contract, engages to do an act, it is deemed to be his own fault and folly, *that he did not thereby expressly provide against contingencies, and exempt himself from liability in certain events*; and in such case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable accident or other contingency, although not foreseen by, or within the control of the party.’”) (emphasis added) (quoting *Hendrick v. Green*, 618 So. 2d 76, 78 (Miss. 1993)).

109. Meyers & Sheinkin, *supra* note 26, at 18.

110. *Id.*

Force Majeure Event . . . means any act, event or circumstance . . . which prevents, hinders or delays the affected Party in its performance of all (or part) of its obligations under this Contract . . . without limiting the generality of the foregoing, a Force Majeure Event may include any of the following . . . an Act of God, including drought, fire, earthquake, tsunami, volcanic eruption, landslide, flood, hurricane, lighting strike, cyclone, tornado, typhoon or other natural disasters or . . . any act, event or circumstance of a nature analogous to any of the foregoing.¹¹¹

In other instances, parties do not seek to explain what is meant by an “act of God” at all. This could be problematic. An example is as follows:

In the event [either of the parties] shall be delayed or hindered or prevented from the performance of any obligation required under this Agreement by reason of strikes[,] lockouts, inability to procure labor or materials, failure of power, fire or other casualty, acts of God, restrictive governmental laws or regulations, riots, insurrection, war or any other reason not within the reasonable control of [the parties], then the performance of such obligation shall be excused for the period of such delay¹¹²

Yet other contracts make no use of either the phrase “act of God” or “force majeure” at all, but simply state a list of events that qualify, often concluded with a phrase such as “or as the result of any cause whatsoever beyond the control of [one of the parties].”¹¹³

Contracts that feature carefully tailored limits typically attempt to evaluate and quantify the expected weather for a given region and then define “extreme” or “unforeseen” weather as any event that falls outside a pre-determined measure above or below the norm.¹¹⁴

An example of a clause that makes use of a negative inference may, for example, state that “the following shall not constitute Force Majeure Events . . . delays resulting from weather conditions that could reasonably be expected to occur in the geographic region in which the Project is located.”¹¹⁵

Finally, in some industries such as construction and power generation, “prudent industry practices” include standards that may be implicated by extreme weather events. These should thus be considered carefully not only at the contract negotiation and drafting stages, but should also be revisited throughout the life of the agreement as well to ensure compliance.¹¹⁶

111. *Id.*

112. *Specialty Foods of Ind., Inc. v. City of S. Bend*, 997 N.E.2d 23, 27 (Ind. App. 2013) (second alteration in original).

113. *See, e.g., Sun Operating P’ship v. Holt*, 984 S.W.2d 277, 280 (Tex. App. 1998).

114. *Meyers & Sheinkin, supra* note 26, at 18.

115. *Id.*

116. *Id.*

C. ELEMENTS

When conducting research for this Article, I analyzed approximately 100 contract law cases addressing weather-related events after Hurricane Katrina (2005). I set my parameters accordingly to examine whether and how the modern-day applications of the established doctrines of impracticability and frustration of purpose, through either force majeure clauses or in the form of stand-alone common law doctrine, have changed. Seeing how courts currently apply the law may help practitioners avoid the legal pitfalls they may otherwise encounter given the increasing frequency and severity of weather events. The analysis may also assist the judiciary in realizing ways in which the doctrine could and arguably should be modernized in the context of weather-related contractual performance problems. I present my recommendations in order of the modern-day elements of the doctrine.

The Restatement (Second) of Contracts sets forth the legal implications of impracticability as follows:

Where, after a contract is made, a party's performance is made impracticable without his[her] fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his[her] duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.¹¹⁷

This includes an analysis of whether “the existence of a specific thing is necessary for the performance of a duty” and its “destruction, or . . . deterioration . . . makes performance impracticable”¹¹⁸

Section 2-615 of the UCC similarly provides that “except so far as a seller may have agreed [to] a greater obligation,” delivery delays or non-deliveries will not constitute contractual breach by sellers if the “performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.”¹¹⁹ Although the UCC by its literal terms only excuses “sellers” whose performance has become commercially impracticable, it applies to both buyers and sellers via the Official Comments and by analogy.¹²⁰ Contractual obligations may also be avoided “[w]here the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer.”¹²¹ Unless displaced by

117. RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981)

118. *Id.* § 263; *see Brauer v. Hyman*, 98 N.J.L. 743, 746 (1923).

119. The Official Comments indicate that section 2-615, not 2-614, is to be applied to force majeure situations. U.C.C. § 2-615 cmt. 8 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

120. *Id.* § 2-615 cmt. 9.

121. *Id.* § 2-613.

the particular provisions of the UCC, the principles of common law and equity supplement its provisions.¹²²

I. Impossibility/Impracticability

Modernly, exculpation from contractual liability may be warranted where a performance has become “impracticable” because of extreme and unreasonable difficulty, expense, injury, or loss to one of the parties.¹²³ “Impracticability” means more than mere “impracticality.”¹²⁴ In other words, “[m]ere impracticality or unanticipated difficulty is not enough to excuse performance”¹²⁵ unless this difficulty is “well beyond the normal range.”¹²⁶ Similarly, under the UCC, “[i]ncreased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance.”¹²⁷ Even though the doctrine is sometimes phrased in terms of “impossibility,” it has long been recognized that it may operate to discharge a party’s duty even though the event has not made performance absolutely impossible.¹²⁸ Further, “a party is expected to use reasonable efforts to surmount obstacles to performance, and a performance is impracticable only if it is so in spite of such efforts.”¹²⁹

How much difficulty will render a finding that the performance has become impracticable? Increases in costs amounting to 33.3%, 100% and 300% have been held to be insufficient.¹³⁰ Mere market fluctuations and difficulties are also not enough. Ten to twelve times the usual cost has—in at least one case—been deemed to suffice.¹³¹ Both Restatements state that a party assumes the risk of increased cost within a normal range, but might not assume the risk of “extreme and unreasonable difficulty.”¹³² “The UCC is more forgiving [and thus ‘only’ requires that the contingency] alters the essential nature of the performance.”¹³³ In relatively few cases has the defense been founded solely on increased

122. *Id.* § 1-103(b).

123. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981).

124. *Id.*

125. *Phibro Energy, Inc. v. Empresa de Polimeros de Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

126. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981); CORBIN, *supra* note 40 § 74.7 (“Financial difficulties growing out of a general business slowdown or recession may cause personal inability to perform but do not usually constitute an excuse by impossibility of performance.”).

127. U.C.C. § 2-615 cmt. 4 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

128. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981).

129. *Id.*

130. PERILLO, *supra* note 37, § 13.9(a).

131. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 291, 293 (1916).

132. RESTATEMENT (FIRST) OF CONTRACTS § 454 (AM. LAW INST. 1932); RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981).

133. PERILLO, *supra* note 37, § 13.9(a).

costs. “A large number of cases dealing with inflationary rises in cost have reiterated the traditional notion that increased costs alone do not give rise to the defense of impracticability.”¹³⁴

In a few jurisdictions, actual impossibility of performance may still be required for the defense to be available, at least in the weather context. In Louisiana, for example, a party can only prevail on an excuse when encountered by an “insurmountable obstacle that make[s] the performance actually impossible . . . regardless of any difficulty [the party] might experience in performing it.” Thus, for example, even “[t]he unexpected and unforeseen damage of Hurricane Katrina does not change the agreement between the[] parties; therefore, th[e] agreement [] can still be performed.”¹³⁵ In Louisiana, “[t]he nonperformance of a contract is not excused by a fortuitous event where it may be carried into effect, although not in the manner contemplated by the obligor at the time the contract was entered into.”¹³⁶ This was arguably a harsh result given the then-unexpected effects of Katrina. On the other hand, results such as this do signal to parties to fully prepare pragmatically, legally, and financially for even highly unexpected weather. In light of how volatile the global weather is becoming, this more traditional doctrinal outcome may once again be warranted. It would at least create clarity in contrast to the slippery slope that is impracticability.

Even though requiring actual impossibility stands in contrast to the law in many, if not most, other jurisdictions, even the states that do so still require an analysis of whether a party acted “in good faith, responsibly, and in a timely fashion” when arguing impracticability or impossibility.¹³⁷ No changes seem currently warranted in relation to the degree of difficulty required for a finding of impracticability.

2. “Basic Assumption” of the Contract and Foreseeability

For the defense to be granted, both the Restatement (Second) (“Restatement 2nd”) and the UCC require that the non-occurrence of the supervening event must have been a “basic assumption” on which both parties executed the contract.¹³⁸ A party who assumed the risk of a certain event occurring cannot later claim impracticability. As an example of what may constitute a “basic assumption,” the Restatement 2nd provides for the “destruction of a specific thing necessary for

134. *Id.*

135. *Associated Acquisitions, L.L.C. v. Carbone Props. of Audubon*, 962 So.2d 1102, 1107 (5th Cir. 2007 (citations omitted)).

136. *Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.*, 161 La. 1077, 1078–79, (La. 1926).

137. *Ziegler v. Pansano*, No. 2008 CA1495, 2009 WL 1879355, at *6 (La. Ct. App. June 30, 2009).

138. RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981); U.C.C. § 2-615 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

performance.”¹³⁹ The UCC similarly provides that a contract “may be avoided where no-fault casualty to the sold goods result in a total loss.”¹⁴⁰

An issue in this context is whether foreseeability forms parts of the doctrine. At first blush, this does not seem to be the case; only a bare “basic assumption” analysis seems to be required. However, foreseeability is highly relevant under the UCC, the Restatement 2nd, and case law. For example, the Official Comments to the UCC note that commercial impracticality may arise because of “unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting,” and refers to “unforeseen shutdown of major sources of supply or the like.”¹⁴¹ Similarly, the Restatement (Second) encompasses foreseeability by stating that “[i]f the supervening event was not reasonably foreseeable when the contract was made, the party claiming discharge can hardly be expected to have provided against its occurrence.”¹⁴² In similarity with the UCC, the Restatement also mentions “unforeseen shutdown of major sources of supply, or the like” as an example of an event that may constitute impracticability.¹⁴³

Importantly, the Restatement also warns that “[t]he fact that the event was foreseeable, or even foreseen, does not necessarily compel a conclusion that its non-occurrence was not a basic assumption.”¹⁴⁴ In other words, parties may not have contractually allocated the risk of a certain foreseeable event happening, but instead simply shared the basic assumption that it would not. Conversely, if a given risk *was* anticipated or expected, the performance obligation should, as a starting point, *not* be excused.¹⁴⁵ Under this view, “if a risk was foreseeable, it is reasonable to assume that the parties contracted on that basis. That assumption, however, may not be warranted if the foreseeable event was nonetheless a contingency so improbable that reasonable parties may not have expressly or impliedly addressed in their agreement.”¹⁴⁶

139. RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981).

140. U.C.C. § 2-613 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

141. *Id.* § 2-615 cmt. 1.

142. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b (AM. LAW INST. 1981).

143. *Id.* at cmt. d.

144. *Id.* at cmt. b.

145. *See, e.g.*, MURRAY JR., *supra* note 41, § 113(C)(3); PERILLO, *supra* note 37, § 13.18.

146. *See, e.g.*, MURRAY JR., *supra* note 41, § 113(C)(3); PERILLO, *supra* note 37, § 13.18.

A pure foreseeability analysis is thus

an incomplete and sometimes misleading test. Anyone can foresee, in some general sense, a whole variety of potential calamities, but that does not mean that the or she will deem them worth bargaining over . . . The risk may be too remote, the party may not have sufficient bargaining power, or neither party may have any superior ability to avoid the harm Foreseeability or even recognition of a risk does not necessarily prove its allocation. Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often because they are too busy. Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs.¹⁴⁷

That begs the question of what, exactly, may be said to be “unforeseeable.” One source defines an “unforeseeable” event as “an event so unlikely to occur that reasonable parties see no need explicitly to allocate the risk of its occurrence.”¹⁴⁸ “Foreseeability” thus does not simply mean any “conceivable” event. If that were the case, anything could, in theory, be said to be “foreseeable.” Instead, a reasonability requirement is interjected into the analysis. The defense will thus be lost if a promisor should have provided for a contingency that was reasonably foreseeable.¹⁴⁹ This is so because “[f]ailure to provide for the reasonably foreseeable contingency demonstrates that the promisor assumed the risk.”¹⁵⁰ In the words of one court, “[w]hen a performance becomes impossible by reason of contingencies which *should have been foreseen* and provided against in the contract, the promisor is held answerable.” Accordingly, “a seasonable event, one which is likely to happen and which common prudence would provide for, is not such an extraordinary event as will constitute an act of God excusing nonperformance.”¹⁵¹ In short, “absolute unforeseeability of a condition is not a prerequisite to the defense of impracticability.”¹⁵²

From an early stage to today, the foreseeability aspect is important, but is not the only determinative question in the overall analysis of whether the contractual defense will be awarded by a court of law.¹⁵³ While perhaps the most important factor, it “is at best one fact to be considered in resolving first how likely the occurrence of the event in question was and, second whether its occurrence, based on past experience, was of such reasonable likelihood” that the obligor should

147. *Specialty Tires of Am., Inc. v. The CIT Group/Equip. Fin., Inc.*, 82 F. Supp. 2d 434, 438–39 (W.D. Pa. 2000).

148. PERILLO, *supra* note 37, § 13.18.

149. *See, e.g.*, LA. CIV. CODE ANN. art. 1875 (2015); *Fla. Power Corp. v. Tallahassee*, 18 So. 2d 671, 678 (1944).

150. PERILLO, *supra* note 37, § 13.18.

151. *Fla. Power Corp.*, 18 So. 2d at 679 (Fla. 1944) (emphasis added).

152. *Facto v. Pantagis*, 915 A.2d 59, 64 (N.J. Super. Ct. App. Div. 2007).

153. PERILLO, *supra* note 37, § 13.18.

have taken practical steps against it or expressly provided for non-liability of the risk.¹⁵⁴ It is also important to note that the foreseeability standard is *not* the same as the one applied in tort.¹⁵⁵

Notwithstanding the fact that foreseeability is only one of several elements to be analyzed, many, if not most, courts still adhere to the view that the supervening event must have been unforeseeable.¹⁵⁶ In one government contracting case, the U.S. Supreme Court held that the event at issue not only had to be listed in the force majeure clause, but be unforeseeable as well.¹⁵⁷ In a case where the contract referenced both “acts of God” and “other unforeseen events or circumstances,” the court found that even just a power outage, although not an act of God, “still would constitute an unforeseen event or circumstance that would excuse performance” under the circumstances.¹⁵⁸

In Louisiana, home of many recent weather-related cases, an “act of God” is one that, at the time the contract was made, could not have been reasonably foreseen.¹⁵⁹ For example, in a recent case, the Louisiana Supreme Court thus noted, “that it was difficult, if not impossible, to know prior to [Hurricane Katrina] what areas would and would not flood, due to the unforeseen and unprecedented extent of the flooding in the aftermath of [the storm].”¹⁶⁰ Unforeseeability is required in New Jersey as well.¹⁶¹ In New York, “[t]he impossibility must be produced by an unanticipated event that could not be foreseen or guarded against in the contract.”¹⁶² But, since “[a]lmost any inclemency of weather causing property damage is an ‘act of God,’ the phrase has been limited to a disturbance of such unanticipated force and severity as would fairly preclude charging a party with responsibility occasioned by that party’s failure to guard against it.”¹⁶³

A recent case demonstrates just how closely courts continue to analyze foreseeability even though it is only one part of the overall

154. *Opera Co. of Boston, Inc. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094, 1102–03 (4th Cir. 1987).

155. *See generally Facto*, 915 A.2d at 62 (discussing the application of the foreseeability standard in contract law).

156. MURRAY JR., *supra* note 41, at § 113(C)(2); CORBIN, *supra* note 40, § 74.19; PERILLO, *supra* note 37, at § 13.18.

157. *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 122–23 (1943).

158. *Facto*, 915 A.2d at 64.

159. LA. CIV. CODE ANN. art. 1875 (2015).

160. *Dollar Thrifty Auto Group, Inc., Inc. v. Bohn-DC, L.L.C.*, 23 So. 3d 301, 305 (La. Ct. App. 2008).

161. *Facto*, 915 A.2d at 63 (“When an unforeseen event affecting performance of a contract occurs, such a clause will be given a reasonable construction in light of the circumstances.”).

162. *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 385 (N.Y. 1987); *see Brooks-Callaway Co.*, 318 U.S. at 122–23; *Phibro Energy, Inc. v. Empresa de Polimeros de Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).

163. *NYCHA Coney Island Houses v. Ramos*, 971 N.Y.S.2d 422, 431 (Civ. Ct. 2013).

analysis. In *TGI Office Automation v. Nat'l Elec. Transit Corp.*, a warehouseman stored \$770,000 worth of photocopiers in a low-lying warehouse in a marshy area of New Jersey.¹⁶⁴ Close to the warehouse were several bodies of water such as tidal pools, creeks, the Hackensack River, and a tidal estuary.¹⁶⁵ The warehouse parking lot and other areas immediately surrounding the warehouse frequently flooded as a result of “nor’easters,” hurricanes, and tidal surges.¹⁶⁶ In spite of numerous warnings about oncoming Hurricane Sandy, the warehouseman took only a few precautions the morning of the onset of the storm, such as placing mattresses in front of the doors to the warehouse. The warehouseman considered the facts that the warehouse was built to applicable codes, passed yearly inspections, and that the actual warehouse floor had never flooded before to be more important than facts about the actual dangers to the warehouse due to its low elevation.¹⁶⁷ The warehouse flooded, destroying the copiers.¹⁶⁸ The copiers were not insured, so the defendant sought to become absolved of liability arguing that Hurricane Sandy was an act of God.¹⁶⁹

The court held that although Hurricane Sandy was undisputedly an act of God, the defendant was precluded from invoking the act of God defense because of the defendant’s own negligence.¹⁷⁰ Although the case was one of warehousemen’s legal liabilities in particular, it is still highly illustrative of several broader points in the overlapping area of contract law as well. The court carefully analyzed the foreseeability aspect, calling the “primary” or “ultimate” inquiry in relation to the defense whether “the ‘occurrence of the natural phenomenon renders unavoidable the damages that resulted’ or whether ‘the storm condition could reasonably have been anticipated or foreseen and its consequences further prevented or avoided by human agency.’”¹⁷¹ The court demonstrated in no less than eighteen pages how well the hurricane had been forecast by entities such as the National Hurricane Center, the National Weather Service, the National Oceanic and Atmospheric Administration, as well as local and national media.¹⁷² This demonstrates just how seriously some courts take the aspect of foreseeability.

Part of this inquiry is, of course, also the affected party’s due diligence in avoiding the problem. Having found that this particular

164. *TGI Office Automation v. Nat'l Elec. Transit Corp.*, No. 13-CV-3404, 5–6, 51 (E.D.N.Y. Sept. 14, 2015) (Westlaw citation forthcoming).

165. *Id.* at 5–6.

166. *Id.* at 21.

167. *Id.* at 9.

168. *Id.* at 17.

169. *Id.* at 1, 17.

170. *Id.* at 34, 51.

171. *Id.* at 32.

172. *Id.* at 18–31.

defendant failed to take sufficient preliminary actions on hearing the weather forecasts, the court noted that “defendant cannot put its head in the sand and then scream [A]ct of God when a storm comes.”¹⁷³ Further, that although defendant might not have needed to empty the entire warehouse days before the storm, conducting “‘business as usual’ until mid-morning on Monday, well after storm surge flooding had become foreseeable, demonstrated an unreasonable obliviousness to (or dismissiveness of) the time, effort, and planning required to implement effective hurricane response strategies ‘[I]f you’re failing to plan, you’re planning to fail.’”¹⁷⁴ Parties should be aware of the intensifying judicial scrutiny of not only what parties knew, but also what they should have known and done, about a certain weather-related issue. Failing to do so could, as this case and others show, result in legal outcomes that do not follow the traditional mold, even in cases of extreme weather such as this. This is even more so because this court, for example, emphasized that “[f]oreseeability may be determined by considering [weather] forecasts . . . media reports and *other evidence introduced at trial*.”¹⁷⁵

Courts also take the broader consequences of a finding of unforeseeability into account. For example, the closing of the Suez Canal, America’s entry into World War II, and OPEC price increases were all held to be reasonably foreseeable, arguably because of the tens of thousands of contracts that would have had to be dissolved or otherwise disrupted had those events been held to be unforeseeable (not to mention the fact that the events truly *were* foreseeable to parties following regular world news reports).¹⁷⁶ Stability in both national and international contracting relations informs judicial holdings in this area.¹⁷⁷

Some authorities argue that risk allocation on the basis of foreseeability should be abandoned or at least modified.¹⁷⁸ An effective method to accomplish this would be to allow a promisor to explain why there was no clause in the contract covering the contingency—such as in the case of standard forms used by parties with superior bargaining power.¹⁷⁹ Authority also exists for the proposition that even a “failure to deal with an improbable or insignificant contingency, even though foreseen, should not be deemed to amount to an assumption of the risk.”¹⁸⁰ Under an “even more liberal” view, “foreseeability is of no

173. *Id.* at 45–46.

174. *Id.* at 47.

175. *Id.* at 41 (emphasis added).

176. PERILLO, *supra* note 37, § 13.18.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

importance when it is clear that the parties did not intend that the risk of the occurrence should be assumed by the promisor.”¹⁸¹

Of course, parties often allocate the contractual risks expressly in force majeure clauses. In those cases, a requirement of unforeseeability is not imposed in order to enforce the parties’ negotiated agreements.¹⁸² Thus, a recent Texas oil and gas leasing case found

[t]hat the force majeure event be unforeseeable is not a prerequisite, however. Indeed, to imply an unforeseeability requirement into a force majeure clause would be unreasonable. This is so because in 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.¹⁸³

The crux of the matter is risk allocation. Contracting parties should be aware of the potentially extensive ramifications of a court applying a foreseeability analysis absent force majeure clauses. Many events are, in fact, reasonably foreseeable today. This is especially so when it comes to weather-related events. Recall that in one of the leading cases in this context, the court found that the Suez Canal crisis was foreseeable.¹⁸⁴ This finding was influenced by public policy. Public policy is greatly implicated in the context of climate change. Parties should be aware that courts may well, for that reason, and given today’s knowledge about the severity and frequency of “extreme” weather events, be more likely to find that such events were indeed reasonably foreseeable and that the parties thus contracted on the basis that the event might occur. The excuse will then not be available.

While weather has always had the potential to cause problems for contracting parties, the issue is now one of increased frequency and severity. Where before, “extreme” events happened only occasionally, parties could more reasonably expect them *not* to occur. This is no longer the case; in fact, it is quite the opposite. It is now more reasonable to expect severe weather to affect a contractual performance in most geographical locales than to expect that it will not. As demonstrated by Superstorm Sandy, even major, modern urban areas such as New York City may be severely affected by the sheer forces of nature. In very few

181. *Id.*; In one leading case, for example, defendant sold real property to the plaintiff with a lease-back provision. A tax benefit expected by both parties to accrue was very important to defendant. The IRS, however, issued a revenue ruling disallowing the tax advantage. Plaintiff argued that defendant should not be able to invoke the defense of frustration of purpose as it was foreseeable that the IRS might disapprove the tax benefits. The court, however, held that the defense was available despite the foreseeability aspect because it was clear that the parties intended that neither party should assume the risk. *W. L.A. Inst. for Cancer Research. v. Mayer*, 366 F.2d 220 (9th Cir. 1966); see *Krell v. Henry* (1903), 2 Eng. Rep. 754 (K.B.)

182. *Kodiak 191 Drilling P’ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 720–21 (Tex. App. 1987).

183. *Sun Operating Ltd. P’ship v. Holt*, 984 S.W.2d 277, 288 (Tex. App. 1998).

184. *Am. Trading & Prod. Co. v. Shell Int’l Marine Ltd.*, 453 F.2d 939, 943 (2d Cir. 1972).

places can one reasonably expect to be separated from the potentially devastating effects of severe weather.

Some ambiguity in the word “extreme” should, however, be recognized in the weather context. “Extreme” could mean both “exceeding the norm” or simply “severe,” in the sense that the weather event hampers normal human endeavors regardless of whether it is more commonplace than before. Under both interpretations, the outcome may be the same: Courts may find that the parties could have foreseen the events and thus should bear the risk of their occurrence, or disregard the foreseeability aspect and simply find that the parties must have operated under a basic assumption that the events might occur.

The view that risk allocation on the basis of foreseeability should be abandoned or at least modified is sound when it comes to weather events and their effects on contractual performance. First, the fact that weather-related events are very foreseeable today holds true not only in relation to their geographical occurrence, but also to their intensity—weather events are now often more intense than ever before—frequency—they occur more frequently than before—the time of year of their occurrence—they occur both early and late during what was previously considered to be the relevant seasons—and the extent of their damage—think Hurricanes Katrina and Sandy. Parties bound to perform under almost any type of contract should foresee that “extreme” weather will simply not be considered to be so as often in the future as it has been in the past. Whether it is tornadoes and hail in Los Angeles, tsunamis in coastal areas, increasingly severe snowstorms in the Midwest and New England, or a range of what was previously considered to be “extreme” weather events, the previously “non-normal” has become or is becoming the new normal. Weather events may thus present a significant obstacle to a promised contractual exchange.

Whereas contracting parties should, in general, be free to make certain assumptions in relation to their executory performances, reality demonstrates that it is becoming more and more unsound for parties to assume that weather will not play a role in their performances. It follows that courts would not be exceeding parties’ reasonable expectations by either excluding the issue of foreseeability from their impracticability analyses entirely, or by taking a much more skeptical view of what a *reasonable* party in the situation at hand should have expected given the availability of modern science, including meteorology, at the time of contract formation. Just as parties also cannot escape liability in tort or under statutory environmental law if the given event was “reasonably foreseeable,” the same should arguably be the case in modern contract law when it comes to weather events.

The problem with judicial holdings that continue to refer to whether parties, based on their “past experience,”¹⁸⁵ should have practical or legal precautions against a potential weather calamity is that it becomes too easy to make the argument that, subjectively, the parties have not experienced anything of the relevant nature. The inquiry should not be a subjective one. Rather, the inquiry should always be an objective one, asking what reasonable parties in the given position and location must and should have assumed when contracting. This is not always the case today, but it should be.

3. *Causation and Control*

A party who is guilty of contributory fault is denied the contractual defense of impracticability.¹⁸⁶ “The excusing event must not be within the ‘reasonable control’ of the party asserting the excuse, that is, a party may not affirmatively cause the event that prevents his[/her] performance, nor may a party rely on an excusing event if he[/she] could have taken reasonable steps to avoid it.”¹⁸⁷ Many force majeure clauses also incorporate specific language requiring that the supervening event be “beyond the control of” one or both of the parties.

Section 2-615 OF THE UCC has, however, been found *not* to incorporate a “control” aspect per se.¹⁸⁸ Unless parties explicitly agree that a certain event must, with no exceptions, have been “beyond the control” of either of the parties, courts may thus not be willing to impose a control requirement on force majeure clauses under the UCC. Any contractual stipulation narrowly ties the hands of the courts. Thus, where a force majeure clause stated that “either seller or buyer will be excused from performance [because of] circumstances . . . reasonably beyond its control or by . . . explosion,” the court excused the seller from performance in the case of an explosion even though this was not “beyond the reasonable control” of the seller.¹⁸⁹

In the context of severe weather events, the question becomes whether such events are truly just acts of God or nature, or whether they can be traced to humankind. As the law currently stands, that leads to a further analysis of the role the contracting parties played in this context

185. *Opera Co. of Boston, Inc. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094, 1102–03 (4th Cir. 1987).

186. PERILLO, *supra* note 37, § 13.15; see RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. e (AM. LAW INST. 1981).

187. MURRAY JR., *supra* note 41, § 113(C)(3).

188. *PPG Indus., Inc. v. Shell Oil Co.*, 919 F.2d 17, 19 (5th Cir. 1990) (finding that in cases where courts have refused to excuse the nonperforming party because the problematic event was within its control, the reasonable control requirement was supplied by the terms of the contracts rather than the dictates of the law).

189. *Id.* at 18 n.1.

and whether they can be said to have been in realistic control of the problem. The human/nature dichotomy is thus highly relevant here. The “act of nature” (or “God”) notion is sometimes broadly referred to as a “natural occurrence over which *humans* have no control and were not involved in creating.”¹⁹⁰ A leading contracts treatise also considers whether human beings have contributed to the event by noting that “[t]he kinds of impossibility that [excuse performance under a contract] in many instances are caused by human beings”¹⁹¹ Earlier courts considered acts of God to cover not just natural events such as storms but to comprehend “all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent”¹⁹² They found that the supervening event “must be the sole proximate cause of the nonperformance, without the participation of man, whether by active intervention or negligence *or* failure to act.”¹⁹³ Even recently, some courts still look closely at human causation, at least as the defense relates to torts. For example, in the words of one:

Any misadventure or casualty is said to be caused by the “Act of God” when it happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention. It must be of such character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by the aid of any appliances which the situation of the party might reasonably require him to use.¹⁹⁴

Nowadays, however, courts analyze this element based on the action or inaction by the contracting parties specifically, rather than merely by “man” in general. Since “[a]lmost any inclemency of weather causing property damage is an ‘act of God,’” the phrase has been limited to “a disturbance of such unanticipated force and severity as would fairly preclude charging a party with responsibility occasioned by *that* party’s failure to guard against it in the protection of property committed to its custody.”¹⁹⁵ In older contracts cases, courts also tied their analyses to the actions of the specific contracting parties and not, more broadly, man. For example, these courts found that “[t]o excuse nonperformance of a contract on the ground of an act of God, there must . . . be no admixture of negligence or want of diligence, judgment, or skill *on the part of the promisor*.”¹⁹⁶ It is the party that seeks to rely on a force majeure clause to excuse performance who “bears the burden of proving that the event was

190. NYCHA Coney Island Houses v. Ramos, 971 N.Y.S.2d 59 (Civ. Ct. 2013) (emphasis added).

191. Facto v. Pantagis, 915 A.2d 59 (N.J. Super. Ct. App. Div. 2007).

192. Meyer Bros. Hay & Grain Co. v. Nat’l Malting Co., 11 A.2d 840, 841 (N.J. 1940).

193. Fla. Power Corp. v. Tallahassee, 18 So. 2d 671, 678 (1944) (emphasis added).

194. Butts v. City of S. Fulton, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977).

195. NYCHA Coney Island Houses v. Ramos, 971 N.Y.S.2d at 432 (Civ. Ct. 2013).

196. Fla. Power Corp., 18 So. 2d at 678 (emphasis added).

beyond its control and without its fault or negligence.”¹⁹⁷ Newer cases, however, demonstrate how some courts continue to differentiate between what is considered “natural” and what is considered “human” even though as analyzed above, such differentiation has to a large extent become factually implausible in the weather context. For example, in a post-Hurricane Sandy case, the court stated that for a loss to be considered the result of an act of God, “human activities cannot have contributed to the loss in any degree” and that the losses must be caused exclusively by “natural events.”¹⁹⁸

When seeking exculpation from contractual liability, a party must also affirmatively demonstrate that the performance was impracticable despite the existence of reasonable diligence, skill, and good faith.¹⁹⁹ Thus, “a party is expected to use reasonable efforts to surmount – obstacles to performance . . . and a performance is impracticable only if it is so in spite of such efforts.”²⁰⁰ A major treatise also urges that “if the promisor’s wrongful conduct was responsible for the [issue], the defense will be disallowed because of contributory fault.”²⁰¹

As can be seen, some overlap with the tort negligence doctrine exists. Thus, in a case where a contract stated both that a party could be liable for its own acts of negligence, but that it was not liable for acts of God, the court found that it was “called to examine the interplay between acts of God and negligence.”²⁰² If a party’s negligence has caused the performance problem, courts are likely to hold that the contractual problem did in fact stem from a circumstance “within its reasonable control[.]”²⁰³ and would thus also *not* allow for the defense in contract law. For example, in a construction case where a particularly rainy spring had caused several project delays and disruptions, the court nonetheless concluded that the delays *were* within the control of the city and thus not the result of adverse weather conditions as the contracting city argued. The court stated:

197. *Id.*; see *Entzel v. Moriz Sports & Marine*, 841 N.W.2d 774, 778 (N.D. 2014) (quoting Black’s Law Dictionary) (“An express *force majeure* clause in a contract must be accompanied by proof that the failure to perform was proximately caused by a contingency and that, in spite of skill, diligence, and good faith on the promisor’s part, performance remains impossible or unreasonably expensive.”); see also CORBIN, *supra* note 40, § 74.16 (stating that contracting parties are under a duty to exercise reasonable diligence and effort, and should not be excused from liability if they have displayed willful or negligent conduct).

198. *TGI Office Automation v. Nat’l Elec. Transit Corp.*, No. 13-CV-3404, 56, 33 (E.D.N.Y. Sept. 14, 2015) (Westlaw citation forthcoming).

199. See, e.g., *id.*

200. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (AM. LAW INST. 1981).

201. PERILLO, *supra* note 37, § 13.15.

202. *Garofoli v. Whiskey Island Partners Ltd.*, 25 N.E.3d 400 (Ohio Ct. App. 2014).

203. *Sun Operating P’ship v. Holt*, 984 S.W.2d 277, 288 (Tex. App. 1998).

[W]e conclude that the delays were within the control of the City. The trial court specifically found that the delays and disruptions on the project were not the result of adverse weather conditions as the City insisted. Rather, the delays and disruptions were caused more by the City's selection of a poor, unsuitable project site, with bad soil conditions than bad weather.²⁰⁴

Similarly, where a contract clause exculpated a contractor from liability for "any damages for the project resulting from rain, flood, fires, earthquake, swelling of ground, hydrostatic pressure, or other acts of the elements, acts of other persons, government controls, acts of God, and non-issuance of permits[.]" the contractor proceeded with work in spite of inclement weather during an unusually rainy season after assuring the project purchasers that it would be safe to do so.²⁰⁵ The appellate court found that the trial court had misconstrued this exculpatory clause to exclude the contractor's liability for its own negligence.²⁰⁶ The court emphasized that "[t]he law generally looks with disfavor on attempts to avoid liability or to secure exemption for one's own negligence."²⁰⁷ Therefore, the concept of negligence is important in contracts as well as in tort cases.

An alleged "act of God" or, conversely, negligence, may more correctly be seen as one of timing. For example, "one who contracts to supply water for irrigation knows that the purpose of the other party is to supply the deficiency in natural rainfall and that drought must be expected." A failure to provide such water is then a "cause of [the party's] non-performance, not the drought that was unusually severe."²⁰⁸ A failure to perform timely under circumstances that could be foreseen is arguably negligent and should thus also not be excused under contract law. By way of contrast, water compacts and other water agreements at the government scales have for a long time addressed the issue of drought well *before* the occurrence of the problem. Contracting parties should more accurately address the increasing risks posed by weather to their executory performances as well.

The fact that there is overlap between the tort and contract applications of the doctrine is not surprising given its historical origins. Nor is this necessarily problematic. A given legal doctrine does not have to sound only in one area of the law or the other. At bottom, the "extreme weather" issue is one of proximate cause and traceability.

204. Lee Masonry, Inc. v. City of Franklin, No. M2008-02844-COA-R3-CV, 2010 WL 1713137, at *7 (Tenn. Ct. App. Apr. 28, 2010).

205. Ungar v. Skinner Swim Pool Plastering, No. B196602, 2008 WL 1809689, at *1 (Cal. Ct. App. Apr. 23, 2008).

206. *Id.* at *6.

207. *Id.* at *5.

208. CORBIN, *supra* note 40, § 1329.

Are severe weather events caused by humankind or do they simply remain purely “natural” events? And, what role should the answer to this question play in the contract law context, if any? First, readily available reports show that there can currently be little realistic doubt that “man” has caused or at least contributed very significantly to climate change. To be sure, drastic weather events have always occurred. However, science demonstrates that human beings have caused these to occur more frequently than ever before. Thus, the admixture of human action and the events causing contractual performance problems to which courts refer does exist. Nonetheless, the current judicial view is that the contractual defense will only fail if the problem is traceable to the *particular* party claiming impracticability. That is more problematic in the weather context since relating any particular climatic event to any particular contracting party is not yet feasible or realistic. As human beings, we *all* contribute to the problem, but the exact “slice of the pie” attributable to anyone in particular is simply not currently demonstrable. The proximate causation chain may thus be broken under both existing contract and tort law principles.

At the same time, a more probing look into this aspect that also takes public policy concerns into account reveals that a finding that a party could not “control” the underlying issue may be said to depend on just *who* the contractual party claiming the defense is. Granted, if the party is a regular business actor conducting a run-of-the-mill business transaction, that party cannot reasonably be said to have been able to have had much of a chance to “control” the global climate, at least not to any yet discernible extent compared to the literally millions of other climate change contributors around the world. Climate change is, to be sure, a “super-wicked”²⁰⁹ problem with a large number of private and governmental parties contributing to the underlying problem, and much difficulty in pinpointing exactly who should do what to solve it. But what if the party invoking the defense is a government unit, such as a city, county, state, or part of a branch of the federal government?²¹⁰ That would, arguably, change the situation.

209. Kelly Levin, Benjamin Cashore, Graeme Auld, and Steven Bernstein introduced the distinction between “wicked problems” and “super wicked problems” in their article, *Overcoming The Tragedy of Super Wicked Problems: Constraining Our Future Selves To Ameliorate Global Climate Change*, 45 POLICY SCI. 123 (2012).

210. For examples of the force majeure doctrine analyzed in the context of contracts between government entities and private parties, see *Specialty Foods of Ind., Inc. v. City of S. Bend*, 997 N.E.2d 23, 27 (Ind. App. 2013); *Roger Johnson Constr. Co. v. Bossier City*, 330 So.2d 338 (Ct. App. La. 1976); *Lee Masonry, Inc. v. City of Franklin*, No. M2008-02844-COA-R3-CV, 2010 WL 1713137 (Tenn. Ct. App. Apr. 28, 2010).

a. Governmental Causation and Control

Governments at various scales could, and should, from a public policy and precautionary point of view, have taken much more action against climate change than they have. In fact, government entities have had, and still have, a chance to curb the climate change problem via laws and regulations, although precious time is running out. However, they have to a very large extent failed to do so. For example, the United States only introduced a federal climate change action plan in 2013.²¹¹ In spite of the European Union having announced its support of broad and deep climate change action for years, the United States and China only in November 2014 announced their mutual interest in climate change and clean energy cooperation.²¹² More than twenty years after the United Nations Framework Convention on Climate Change took effect, few of the 196 signatories have taken any meaningful steps to mitigate climate change, although they have, as mentioned above, now finally recognized the need to limit the global temperature increase to 1.5 or 2°C. Few states in the United States have enacted climate change legislation, although some action is now being taken at the local and regional levels such as by cities and states either individually or in cooperation with each other.

Thus, if China or the United States were parties to a contract (in China, for example, many companies are government-owned), could the nation(s) be held responsible for severe weather partially caused by CO₂ emissions from government-owned or -supported power plants, and thus be unable to invoke impracticability? Arguably yes. For reasons of public policy, courts could and should hold that contracting government units may not use the impracticability defense in the case of weather calamities to the extent they have been able to before. This is because it makes little common sense for governments to, on the one hand, assert that they should escape contractual liability in a situation involving extreme weather events when they at the very same time are one of the biggest contributors to the problem—excessive carbon emissions—via their inaction in curbing such emissions through regulatory means.

At the end of the day, governments exist to *actively* govern for the benefit of *all* of society given *all* actual societal problems that arise on a

211. EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (June 2013).

212. Press Release, The White House Office of the Press Secretary, FACT SHEET: U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation, THE WHITE HOUSE: OFFICE OF THE PRESS SEC'Y (Nov. 11, 2014) (on file with author), <http://www.whitehouse.gov/the-pressoffice/2014/11/11/fact-sheet-us-china-joint-announcement-climate-change-and-clean-energy-c>. Although more legal and on-the-ground action by both the United States and China is necessary to reach a breakthrough in international negotiations, treaty history shows that as few as two or three parties may provide the "magic number" necessary to pave the way for broader agreements. See, e.g., Dellinger, *Narrowed Constellations*, *supra* note 18.

variety of fronts, whether controversial or not, and whether initially difficult to address for technical or other reasons. One problem in this respect is that contracting governance entities are not coextensive with the legislatures that have failed to take appropriate regulatory action. Even if a successful argument was brought that the “actor” is the “government” in general, an argument will undoubtedly also be made that few emissions stem directly from government entities. Rather, they can be traced to companies. A counterargument to this would be easiest in a nation such as China, where many corporations are government-owned or controlled. Again, the facts and logic in this area are difficult to dispute: governments could have regulated corporate activities earlier. Granted, the political will to do so was lacking. In the United States, it still may be. But, with enough information and effort from the government to the electorate, sufficient political will could arguably have been created in this nation as it was in others.

Extending contractual liability for the failure to take action in this respect, from a narrow body comprised of only the contracting government entity—such as a city purchasing or promising to undertake certain services—to broader governance units such as cities, states, or branches of the federal government might well operate as impetus for corrective action at the legislative and regulatory levels. This is precisely what is needed today. The judiciary serves a valuable function in this context. Many legal practitioners and judges have noted over time that the law is adapting too slowly to the realities of modern life and that the general public is losing faith in the judiciary. For example, a recent Gallup Poll on governance shows that only fifty-three percent of Americans have a “great deal or fair amount” of trust in the judiciary.²¹³ Given this perception, courts could regain some faith in the context of contract law and impracticability. The risk to the judiciary of continuing to excuse governmental and even other entities from liability because they could not have “controlled” the underlying problem is, setting aside the issue of *which* actual government entity could have taken action, that such holdings increasingly appear to be a mere rubberstamping of the doctrinal elements involved; almost a case of letting the fox get away with stealing the chickens. Holding at least governments accountable for contractual liability in the impracticability context in spite of current precedent does require quite some judicial courage and new thinking, but time has come for that for the public policy reasons to which courts have also looked for a long time. In the words of one court: “an

213. Survey, Jeffrey M. Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP (Sept. 18, 2015), <http://www.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx>.

exculpatory contract is valid only if the public interest is not involved.”²¹⁴ It clearly is here.

For the limited purpose of contractual liability, holding government units accountable may be a novel and controversial, but not extreme, step in order to help bring about the awareness of necessary governance action that is so urgently needed in relation to climate change. In France, for example, a court recently took the much more significant step of holding a mayor and his deputy mayor *criminally* accountable—even imposing jail time—for deliberately hiding the dangers of floods in a known flood prone area in order to prompt property development there.²¹⁵ In Holland, a trial court recently ruled that the Dutch state must take more action to reduce greenhouse gas emissions than what had been planned.²¹⁶ Thus, the state must reduce such emissions by at least twenty-five percent—the lower limit of the twenty-five percent to forty percent norm for developed nations deemed necessary in climate science and international climate policy—and not just seventeen percent under the state’s policy. The case is on appeal, but demonstrates some newfound judicial willingness to set aside otherwise established concepts such as the separation of powers and political question doctrines. This may well be the case in the United States as well, especially in less controversial contract law cases.

Times are changing. It may well take some currently unusual legal steps to make on-the-ground actors and policymakers aware of the severe problems being caused around the world by climate change. Some judges are just beginning to take such steps. If society has to wait until each “slice of the pie” can be precisely allocated to each responsible actor, that may never happen or certainly not until it is too late to curb climate change. That is not the issue here. Here, the issue is whether contracting parties should be able to continue to find cover under the doctrine to the extent they have been able to in the past, when they have, in fact, “contributed” to it.

b. Private Party Causation and Control

The causation and control issue also arises in relation to sectoral players such as, in particular, corporations in the fossil fuel, transportation, meat production, concrete, and construction sectors, all of which have produced very significant carbon emissions over time and

214. *Ungar v. Skinner Swim Pool Plastering*, No. B196602, 2008 WL 1809689 (Cal. Ct. App. Apr. 23, 2008).

215. *French Mayor Rene Marratier Jailed for Role in Deadly Flood*, BBC NEWS (Dec. 12, 2014), <http://www.bbc.com/news/world-europe-30453552>.

216. *Urgenda Found. V. Netherlands*, Hague District Court, June 24, 2015, HA ZA 13-1396, (Neth.).

thus certainly “contributed” to climate change.²¹⁷ However, the challenge in claiming that such players have been in “control” of or caused the problem for purposes of contractual impracticability is that arguably the companies in these sectors merely acted as any other market players would have. They neither violated existing statutory law—as this is still very underdeveloped in most jurisdictions when it comes to climate change—nor majority case law. These actors could and should for both societal reasons and reasons of corporate social responsibility consider voluntary steps to reduce their carbon emissions. Some are doing just that. However, corporations tend to act in their own self-interest, which is first and foremost to make money. That is understandable, as their mandates require them to do so. They thus often do not do what they arguably “should” do from society’s point of view *just* to do so. It is simply implausible to expect corporations to stop emitting carbon out of goodwill and concern for, in this case, the global environment. Instead, as the situation currently presents itself, what is needed in relation to these players is both clearer regulations and common law liability.

This brings the issue full circle: without more legislation and regulations, it may be difficult for the judiciary to hold that individual businesses—even as members of highly polluting sectors—caused or could have controlled the extreme weather events underlying an impracticability defense. It is, however, worth examining this from a new angle. Prior courts did not have much reason to question the applicability of the doctrine to severe weather-related events; there simply was not much, if any, doubt that “man” had *not* caused such events. In the modern age, however, courts and contracting parties have much different knowledge at their disposal and should take that into consideration. Limiting the excuse may be warranted in situations today where this was not the case until recently. Reluctance in granting a contractual impracticability defense to certain sectors of the economy, such as those in the fossil fuel industries or certain government entities may, granted, still be a radical idea. However, as has also been widely recognized recently, major changes of our current thinking and behavior are urgently needed to solve the increasingly pressing and difficult problem of climate change.

Some newer case law frames the issue as one of whether a party has undertaken a “wrongful act.”²¹⁸ Under a broad, yet common sense, interpretation of this notion, the actors in sectors such as the fossil fuel, concrete, and construction sectors are, arguably, undertaking precisely

217. For examples of force majeure applied to energy sector companies, see *Perlman v. Pioneer P’ship*, 918 F.2d 1244 (5th Cir. 1990); *Tejas Power Corp. v. Amerada Hess Corp.*, No. 14-98-00346-CV, 1999 WL 605550 (Tex. App. Aug. 12, 1999); *Va. Power Energy Mktg. v. Apache Corp.*, 297 S.W.3d 397 (Tex. App. 2009).

218. *NYCHA Coney Island Houses v. Ramos*, 971 N.Y.S.2d 422 (Civ. Ct. 2013).

such “wrongful acts” by continuing their extremely carbon-intensive activities in spite of modern knowledge of the detrimental effects of their actions. What makes matters worse is that many of these companies are reluctant to voluntarily take any sufficient, practical steps to assist in a potential technical solution that would allow them to continue their activities, but with a lesser impact on society. In fact, several have known about the dangers of their activities for years, but spent hundreds of millions of dollars in attempts to keep the general public uninformed about the matter.²¹⁹ One study, for example, found that 140 foundations funneled \$558 million to almost 100 climate denial organizations from 2003 to 2010.²²⁰ The largest, most-consistent money fueling the climate denial movement are a number of well-funded conservative foundations built with so-called “dark money,” or concealed donations,²²¹ aimed at hiding the true donors—clearly a sign of a culpable mindset. Thus, “[t]he climate change countermovement has had a real political and ecological impact on the failure of the world to act on global warming.”²²²

In this area, an analogy can be drawn to the civil liability for which tobacco and asbestos companies were eventually held despite having also initially claimed—often falsely so—that they did not know of the ultimately catastrophic effects of their activities on human beings, or that they were merely market players producing a product for which there was a demand. Although the liability for those actions sounded in tort, there is, as mentioned, clear overlap between tort and contract law in relation to impracticability. Finding that some companies—even if only the major players—in certain sectors should no longer be able to invoke the impracticability doctrine under contract law principles to the same extent as before makes common sense and finds support in case precedent from the tort arena.²²³ One cannot both have one’s cake and

219. See, e.g., Timothy Egan, *Exxon Mobil and the G.O.P.: Fossil Fools*, N.Y. TIMES (Nov. 5, 2015), <http://www.nytimes.com/2015/11/06/opinion/fossil-fools.html> (last visited Aug. 5, 2016). Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, N.Y. TIMES (Feb. 21, 2015), http://www.nytimes.com/2015/02/22/us/ties-to-corporate-cash-for-climate-change-researcher-Wei-Hock-Soon.html?_r=0 (last visited Aug. 5, 2016).

220. Douglas Fischer, “Dark Money” Funds Climate Change Denial Effort, SCIENTIFIC AMERICAN, (Dec. 23, 2013), <http://www.scientificamerican.com/article/dark-money-funds-climate-change-denial-effort/> (last visited Aug. 5, 2016).

221. *Id.*

222. *Id.*

223. For example, although asbestos litigation proved to be an often lengthy process that may not be ideal as an “ex post” method of regulating business liability, the use of that dangerous product was, after all, discontinued by 1980, and a total of fifty-four billion was paid to claimants by 2002. See, e.g., Paul D. Carrington, *Asbestos Lessons: The Unattended Consequences of Asbestos Litigation*, 26 REV. LITIG. 583 (2007). In the tobacco context, although plaintiffs may have to pursue their claims individually and not via class action lawsuits, millions of dollars have, however, been awarded to tobacco victims just as the Florida Supreme Court just ruled that punitive damages may be awarded as well. See, e.g., *Soffer v. R.J. Reynolds Tobacco Co.*, No. SC13-139, 2016 WL 1065605 (Fla. Mar. 17, 2016); *Engle M.D. v. Liggett Group, Inc.*, 945

eat it too. Historically some sectors have contributed significantly to the causation of the very same events for which they now often seek to exculpate themselves in contract cases. That simply does not follow logically and thus arguably should no longer find broad legal support. Common sense and the law often go hand in hand. It should here as well.

Thus far, judges in the United States have not held that companies in sectors contributing heavily to climate change cannot also exculpate themselves from contractual liability based on extreme weather events. However, the day has come to question the ability of some companies in such sectors to rely fully on the doctrine in the context of weather problems. These industries may rely on the argument that they are simply meeting the demands of modern society as businesses in free markets do.

However, the “business as usual” model is, and must be, questioned from numerous angles, including by the judiciary. As demonstrated above, courts have begun to do so.²²⁴ Science demonstrates that if we want to prevent dangerous climate change, fossil fuel-intensive activities must be severely limited, if not discontinued altogether. This may mean that companies in these sectors have to cease operations altogether or shift to other corporate activities. Currently, many companies see this as a threat to their very existence. A wiser view would be to focus *not* on protecting the status quo, but on how to develop alternative revenue streams before, one day, regulations mandate extensive changes anyway or market demands simply shift away from outdated fossil-fuel intensive products and services on their own.²²⁵ This has happened before and may happen again. For example, in addition to tobacco, market demand also shifted away from such previously lucrative industries as train transportation, typewriters, film, and even many recently invented, but already obsolete, electronics products. That times are changing is a plus, but only if society is willing to change too. With societal change comes

So.2d 1246 (Fla. 2006); *What is the “Engle Progeny” Litigation?*, TOBACCO CONTROL LEGAL CONSORTIUM (2015), <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-engle-progeny-2015.pdf>.

224. *TGI Office Automation v. Nat'l Elec. Transit Corp.*, No. 13-CV-3404, 5–6, 47 (E.D.N.Y. Sept. 14, 2015) (Westlaw citation forthcoming).

225. This trend is already underway. For example, traditional fossil fuel stocks are performing poorly with oil prices plummeting from ninety dollars a barrel in late 2014, to forty-five dollars a barrel in late 2015. Heather Long, *Dumping Fossil Fuels was Great Move for Rockefeller Brothers Fund*, CNN MONEY (Oct. 26, 2015, 10:29 AM), <http://money.cnn.com/2015/10/26/investing/fossil-fuel-divestment-rockefeller-brothers-fund/> (last visited Aug. 5, 2016). Investment organizations such as the Rockefeller Brothers Fund, which founded its fortune based on oil revenues, are divesting from fossil fuels to a greater and greater extent. *Id.* Listen also to *Asset Owners Disclosure Project*, THE GLOBAL ENERGY & ENVIRONMENTAL LAW PODCAST (Sept. 21, 2015), <http://theglobalenergyandenvironmentallaw.podbean.com/e/asset-owners-disclosure-project/>. Recently, there has been a rebound of green energy investments worldwide with a surge of seventeen percent to \$270 billion in 2014. *Global Trends in Renewable Energy Investment 2015*, FRANKFURT SCHOOL-UNEP COLLABORATING CENTRE FOR CLIMATE & SUSTAINABLE ENERGY FIN. (2015), <http://fs-unep-centre.org/publications/global-trends-renewable-energy-investment-2015> (last visited Aug. 5, 2016).

judicial change. Such change is likely to come about in relation to contractual impracticability as well. Proactive companies may wish to heed the warning signs that are surfacing in this area in both the regulatory and common law liability contexts.

Seen from society's point of view in general, albeit not from the individual contracting parties' positions, contractual impracticability is an area of the law in relation to which it may be fruitful, to adhere to an analysis of whether *humans*, broadly seen, have been involved in creating the occurrence. Recall that this is how some courts previously viewed the issue. It does not follow to argue that a party should be allowed to escape contractual performance liability for so-called "acts of God" or "natural" calamities when these are precisely, and to a very large extent, caused by humankind *including* the party at issue. We are all contributing to climate change, even to just a slight extent.

Rarely are "natural" forces exclusively so anymore. Even smaller human contributions add up to the problem. Courts dealing with contracts should take a harder look at the interface between human and natural causation in general. Continuing to hold that parties may not face potential contractual liability because of the very same events that we have all caused only further contributes to climate change as a tragedy-of-the-commons problem. At the end of the day, we are all at "fault" for climate change and may have to face at least some liability for this in one legal form or another. Careful contract drafting may, as will be analyzed below, alleviate this problem. Parties should no longer couch excusing impediments in terms of "acts of God" or "nature" if they want to include severe weather that may be partly human-caused. More accurate contract drafting is key.

At a minimum, courts should carefully scrutinize whether parties have taken reasonable steps to avoid the consequences of the contractual performance problems. Under the Restatement (Second), "[a] commercial practice under which a party might be expected to insure or otherwise secure himself[herself] against a risk also militates against shifting it to the other party."²²⁶ Courts have thus found that, for example, "where drought or flood is claimed to be an act of God it shall not be excused where the same could have been reasonably anticipated and provided against."²²⁷ Similarly,

[Wh]ere a party, by his own contract, engages to do an act, it is deemed to be his[her] own fault and folly, that he did not thereby expressly provide against contingencies, and exempt himself from liability in certain events; and in such case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable accident or other contingency, although not foreseen by, or within the control of the party.²²⁸

226. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. c (AM. LAW INST. 1981).

227. Fla. Power Corp. v. Tallahassee, 18 So. 2d 671 (Fla. 1944).

228. Miller v. Parker McCurley Props., L.L.C., 36 So. 3d 1234 (Miss. 2010).

There are several practical steps that prudent parties can take to guard against the negative impacts of extreme weather events on their performances. Insurance is highly relevant. Contracting parties increasingly are looking not only to weather insurance, but also new products such as “weather derivatives” and other types of “prediction markets” to mitigate the risk of greatly increased costs or losses, especially as “the evolution and proliferation of these products has made them more transparent, more broadly acceptable, and more accessible.”²²⁹ It is outside the scope of this Article to analyze the impacts of climate change on prediction markets or the insurance industry in depth. Suffice it to say that the insurance industry is facing and recognizing potentially tremendous risk under both first-party coverage (such as for personal and commercial property policies), business interruptions, and builders’ risks, but also under third-party theories such as for commercial general liability coverage, products liability, environmental liability, professional liability, and directors and officers (“D&O”) coverage.²³⁰ D&O coverage is particularly relevant to this discussion because some regulators have begun taking action on climate change disclosures just as shareholders may sue for the failure to sufficiently disclose a company’s climate change causing-activities. Thus, “[i]nsureds facing claims related to concealment, misrepresentation, and mismanagement of climate-change related risk may look for reimbursement of defense costs and indemnification provisions pursuant to D&O policies.”²³¹ Shareholders are unlikely to continue to pay for insurance or liability for events which corporate officers could have foreseen and prevented.²³²

The insurance industry recognizes that “[g]iven the challenges facing plaintiffs in climate change tort litigation, climate change risk disclosure issues may become the focal point of the plaintiffs’ bar’s efforts”²³³ in the future. The chairman of Lloyd’s of London thus stated that “climate change is the number one issue for the insurance market.”²³⁴ The leading global reinsurance company Swiss Re has similarly acknowledged that no less than eighty-five percent of insured

229. Meyers & Shreinkin, *supra* note 26, at 5. “Prediction markets—also called ‘idea futures’ or ‘information markets’—are designed to aggregate information and produce predictions about future events: for example, a political candidate’s re-election, or a box-office take, or the probability that the Federal Reserve will increase interest rates at its next meeting. To elicit such predictions, contract payoffs are tied to unknown future ‘event outcomes.’ For example, a contract might pay \$100 if George W. Bush is re-elected in 2004, or nothing if he is not. Thus, until the outcome is decided, the trading price reflects the traders’ collective consensus about the expected value of the contract, which in this case would be proportional to the probability of Bush’s re-election.” Emile Servan-Schreiber et al., *Prediction Markets: Does Money Matter?*, 14–3 ELEC. MKTS. 243, (Sept. 2004).

230. CHRISTINA M. CARROLL ET AL., CLIMATE CHANGE AND INSURANCE 135 (2012).

231. *Id.* at 138.

232. *Asset Owners Disclosure Project*, *supra* note 225.

233. *Id.*

234. Greg Munro, *Insurance and Climate Change*, UNIV. MONT. SCH. L. FACULTY J. ARTICLES & OTHER WRITINGS 27 (Summer 2010).

losses in the property casualty arena are “coming out of the atmosphere.”²³⁵ Thus, climate change will either be an “opportunity for the insurance industry or a threat to it.”²³⁶ Time will tell which it will be. But for contracting parties, insurance coverage is highly relevant. If insurance is available to cover a certain risk, parties are well advised to take out such insurance rather than merely relying on contractual provisions, thus arguably using a contractual partner as “insurance.”

4. Risk Allocation

Both the UCC and the Restatement (Second) of Contracts recognize the right of the parties to contractually allocate the risks in a way that differs from the risk allocation doctrines that would apply without such an agreement. This is so because the risk allocation principles of the Restatement (Second) are post-qualified by the phrase “unless the language or the circumstances indicate the contrary.”²³⁷ The UCC prequalifies its risk principles as follows: “Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance”²³⁸

Today, many of the theory’s “historic underpinnings have fallen by the wayside” with the result that force majeure is now “little more than a descriptive phrase without much inherent substance.”²³⁹ Thus, what is of foremost importance to courts when considering an impracticability argument is exactly *how* the parties themselves have allocated the risk of the supervening event, if at all. Courts examine whether the parties have allocated the risk either explicitly or implicitly.²⁴⁰ Some courts apply the common law defense of impracticability even if parties have not addressed the issue expressly. One court recognized, for example, that in the absence of a force majeure clause, a power failure is the kind of unexpected occurrence that may relieve a party of the duty to perform if the availability of electricity is essential for satisfactory performance.²⁴¹ However, because many courts have held that the failure to cover a foreseeable risk in the contract deprives a party of the defense of impracticability, the best way to protect a client from this rule is to provide against foreseeable risks in the agreement with as much foresight

235. *Id.* at 29.

236. *Id.*

237. RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981).

238. *Id.* § 2–615 (Comment 8 indicates that in spite of the words “greater obligation,” the provisions of the section may both be enlarged upon or supplanted entirely).

239. Specialty Foods of Ind., Inc. v. City of S. Bend, 997 N.E.2d 23. (Ind. Ct. App. 2013).

240. MURRAY JR., *supra* note 41, § 113(C)(4).

241. Opera Co. of Boston v. Wolf Trap Found. for Performing Arts, 817 F.2d 1094 (4th Cir. 1987) (remanding the case to the district court to make findings of whether the possible foreseeability of the power failure in the case was of such a degree of reasonable likelihood that the defense of impossibility of performance could be invoked).

and accuracy as possible. This is further so because courts consistently hold that

[w]here the parties have defined the nature of force majeure in their agreement, that nature dictates the application, effect, and scope of force majeure with regard to that agreement and those parties, and reviewing courts are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended.²⁴²

Because of this well-known freedom of contract principle, courts very typically enforce the contracts as written. Elaborated one court: “Since impossibility and related doctrines are devices for shifting risk in accordance with the parties’ presumed intentions, . . . they have no place when the contract explicitly assigns a particular risk to one party or the other.”²⁴³ However, where parties do not allocate the risk with sufficient clarity, course of dealing, course of performance, or trade usage may also be used to identify the parties’ intent.²⁴⁴

Courts are at liberty to, and indeed must, solve the exculpation issue where the contract is not as descriptive of a particular problem as could have been the case. The cases analyzed for purposes of this Article demonstrate that this is surprisingly often the case with respect to weather-related events. Accordingly, courts have some leeway to bring the doctrine into a greater degree of conformity with weather-related reality than what appears to be the case at first blush, given notions of freedom of contract.

It is worth noting that at least some courts take a very narrow view when examining whether or not the parties intended a certain event to be covered by an express force majeure clause. For example, New York courts have held that non-performance based on a force majeure clause is excusable “only if the force majeure clause *specifically* includes the event that actually prevents a party’s performance.”²⁴⁵ This may be said to be a judicial oversimplification of the issue because,

242. *Specialty Foods of Ind. Inc.*, 997 N.E.2d at 27; see *Va. Power Energy Mktg. Inc. v. Apache Corp.*, 297 S.W. 3d 397, 398, 402 (Tex. App. 2009) (“The scope and effect of a ‘force majeure’ clause depends on the specific contract language, and not on any traditional definition of the term.” “Courts may not rewrite parties’ contract under the guise of interpretation.”); *Entzel v. Moriz Sport Marine*, 841 N.W.2d 774, 784 (N.D. 2014) (“To determine which party bears the risk of loss, we look to the provisions of the contract itself.”); “Force majeure clauses are to be interpreted in accord with their function, which is to relieve a party of liability when the parties’ expectations are frustrated due to an event that is an extreme and unforeseeable occurrence, that was beyond the party’s control and without its fault or negligence.” 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2009).

243. MURRAY JR., *supra* note 41, § 113(C)(4).

244. *Id.*

245. *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295 (N.Y. 1987) (emphasis added).

[n]o matter how complete a force majeure clause may appear, an unlisted event may occur on which the promisor may base [his/]her claim for excusable nonperformance. After . . . September 11, 2001, major issues arose concerning the effectiveness of war exemption and other insurance clauses in the absence of an officially declared war and the necessity for new terrorism exemption clauses in insurance policies.²⁴⁶

Contracting parties should thus be aware of the fact that drafting force majeure clauses is no longer a matter of simply classifying something as an “act of God” or “force majeure” and hoping that courts will give effect accordingly:

That a party labels a condition or event a “force majeure” in a contract does not make that event a force majeure in the traditional sense of the term. Therefore, courts should not be diverted by this “red herring.” Instead, they should look to the language that the parties specifically bargained for in the contract to determine the parties’ intent concerning whether the event complained of excuses performance.²⁴⁷

The latter may, however, be a circular argument in relation to weather events. This is so because the impracticability defense very often in actuality leads courts to analyze whether the parties could or should reasonably have foreseen the event *regardless* of the language used in the contract. As will be discussed further below, this is sound policy given not only current weather reality, but also bargaining power and adhesion contract issues.

In spite of much foresight and careful contract drafting, doubt may arise to the exact nature and extent of the intended risk allocation. In that case, regular contract interpretation principles apply. Force majeure clauses will, like any other contractual provision, be construed in light of “the contractual terms, the surrounding circumstances, and the purpose of the contract When an unforeseen event affecting performance of a contract occurs, such a clause will be given a reasonable construction in light of the circumstances.”²⁴⁸ Similarly, the principle of *ejusdem generis* applies. Thus, for example, where “‘the event that prevents performance is not enumerated, but the clause contains an expansive catchall phrase in addition to specific events, the precept of *ejusdem generis* as a construction guide is appropriate’—that is, ‘words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned.’”²⁴⁹ In drafting contracts, it is thus “wise to follow the listing of specific items with a phrase such as ‘including but not limited to’ so as to preserve the general protection that would be

246. MURRAY JR., *supra* note 41, § 113(C)(4).

247. *Perlman v. Pioneer P’ship*, 918 F.2d 1244, 1251 n.5 (5th Cir. 1990).

248. *Facto v. Pantagis*, 390 N.J.Super 227, 232 (2007).

249. *Team Mktg. US Corp. v. Power Pact, LLW*, 41 A.D.3d 939, 942–43 (N.Y. App. Div. 2007) (quoting *Kel Kim Corp. v. Cent. Mkts.* 131 AD.2d 945, 950 (N.Y. App. Div. 1987)).

automatically afforded . . . without such a clause.”²⁵⁰ Some authority indicates that the rule of *ejusdem generis* may be avoided by using the phrase “including but not limited to” rather than simply “including.”²⁵¹

Further, when a general provision in a contract conflicts with a specific provision, the specific provision controls. Thus, in a case where a contract contained both a general force majeure clause (exculpating a marina from liability for damages for “acts of God or any other cause”) and an exception from that in cases of the promisor’s own negligence (“unless such damage or loss is directly caused by the negligent act or omission of the marina”), the court found that the more specifically worded exception determined the outcome.²⁵² Importantly, many courts have, as analyzed above, concluded that exculpatory provisions that are phrased in general terms only excuse *unforeseen* events that make the performance impracticable.²⁵³ Thus, the foreseeability aspect is key in this respect as well.

Some courts still classify an event as being an “act of God” without analyzing *why* this is the case. For example, where parties did not dispute that freezing weather was an act of God, the court simply held this to be the case without conducting any analysis.²⁵⁴ Superstorm Sandy has also been held to “unquestionably” be an “act of God”²⁵⁵ although scientists have cast serious doubt on this claim. Such conclusory judicial findings are, however, proving undesirable given the rapidly changing natural climate. More judicial scrutiny into whether an event truly can be said to be extreme and potentially unforeseen, or conversely, whether the parties cannot reasonably be said to have contracted on the basis of the assumption the subsequently complained-of event would not occur would arguably promote a more careful risk assessment and allocation. As is often the case, parties still frequently use anachronistic force majeure clauses with courts appearing to, at least in some instances, merely rubberstamp these as effective. This is inexpedient if the goal is to further a business climate that more closely takes the risk of severe weather events into account in the contracting stages.

Even if courts find the weather event to be an “act of God,” this does not end the inquiry. Along with the other elements, negligence often forms part of either the common law argument, the contract, or both.²⁵⁶ Further, even though a certain event is not referred to as either

250. MURRAY JR., *supra* note 41, § 113(C)(4).

251. PERILLO, *supra* note 37, § 13.19.

252. *Garofoli v. Whiskey Island Partners Ltd.*, 25 N.E.3d 400, 407 (Ohio Ct. App. 2014).

253. PERILLO, *supra* note 37, § 13.19.

254. *Tejas Power Corp. v. Amerada Hess Corp.*, No. 14-98-00346-CV, 1999 WL 605550 at *8 (Aug. 12, 1999).

255. *Garofoli*, 25 N.E.3d at 407.

256. *See, e.g., id.*

an “act of God” or force majeure by the court or the parties, it may still simply be considered to be the “event” that made the performance impracticable, no matter what it is called. For that reason, courts arguably do not have to determine whether the event was an act of God at all. They could simply consider it the “act” that caused the impracticability.

Setting aside phraseology, the impracticability defense often requires extensive factual judicial analyses to determine whether the problematic event warrants the excuse. Recent cases illustrate just how fact-specific such analyses may be. For example, where rain delayed a construction project, one court meticulously analyzed the total level of precipitation causing the delay compared to the previous five-year totals and twenty-four year average. In doing so, it carefully scrutinized scientific testimony made by a National Oceanic and Atmospheric Administration (“NOAA”) expert.²⁵⁷

In a construction case, extensions of time were expressly allowed by contract for construction delays caused by “adverse weather conditions not reasonably anticipated.”²⁵⁸ The contract also stated that the “contractor shall not allow reasonably foreseeable weather conditions to impede the progress of the work.”²⁵⁹ The contractor sought first an extension of time, and when that was denied, sought \$266,828 in additional compensation for overtime work because of an alleged “unusually high level of precipitation” during two winter months.²⁶⁰ The court carefully analyzed data from NOAA showing that there were a total of nineteen days of measurable participation (twelve of which involved snow) during the thirty-six day period in question. The court noted that the total level of precipitation was

13% below normal when compared to the previous five years, and 29% below normal compared to the past twenty-four-year average. Moreover, during the [relevant] time period, there were 13 rain days with a minimum of 0.1 inch of rainfall, compared to the average 12 rain days occurring during the past five years.²⁶¹

On this basis, the court found that the higher levels of precipitation for the relevant time period could have been reasonably anticipated by the contractor and noted that it “should have come as no surprise to [the contractor] that it rains and snows a good deal during the winter in northern Virginia.”²⁶² Even assuming *arguendo*, that the rain and snowfall that winter were greater than the mean for the preceding

257. *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906, 911–12 (E.D. Va. 1989).

258. *Id.* at 913.

259. *Id.*

260. *Id.* at 910.

261. *Id.* at 912 (citation omitted).

262. *Id.* at 915.

twenty-year period, they were “far from the highest recorded and not so unusual as to have been beyond reasonable anticipation.”²⁶³ The contractor was thus not excused under the force majeure clause.²⁶⁴ This also demonstrates the specificity with which some courts will undertake the above-mentioned foreseeability analyses.

In another construction case, the contract at issue stated that the contractor would not be charged with liquidated damages or any excess cost when the delay in completion was due to, among other things, “unforeseeable cause . . . including, but not restricted to, acts of God . . . and severe weather[.]”²⁶⁵ The contractor sought exculpation from performance liability based on “unusually wet weather conditions.”²⁶⁶ In rejecting the defense, the court found that during the entire eight month period at issue, there was only a “‘plus departure’ of 2.82 inches. The total normal rainfall for the period is 30.99 inches.”²⁶⁷ The court closely analyzed the following weather data from the National Weather Service, demonstrating the harder look modern courts are taking towards claims of unforeseeability and alleged acts of God:

TABLE I: DEVIATION FROM RAINFALL NORMS

MONTH	NORMAL RAINFALL	ACTUAL RAINFALL	DEVALUATION FROM NORM
Jan.	4.04	5.65	+ .85
Feb.	3.71	1.52	-2.57
Mar.	4.10	5.01	+ .86
Apr.	5.19	6.44	+1.87
May	5.04	2.00	-2.79
June	3.34	5.84	+2.50
July	2.89	7.63	+3.88
Aug.	2.68	0.77	1.78
Total	30.99	29.21	+2.82

An expectation and analysis of clarity in contract drafting also pertains in Louisiana. Thus, where a contract specifically referred to “abnormal weather” but did not define it, the court found that mere “adverse” weather in the form of rain causing flooding after Tropical

263. *Id.*

264. *Id.*

265. *Roger Johnson Constr. Co. v. Bossier City*, 330 So. 2d 338, 340 (Ct. App. La. 1976).

266. *Id.*

267. *Id.* at 341.

Storm Allison did not amount to an “abnormal” weather condition.²⁶⁸ Courts look very carefully not only at any applicable force majeure clause, but also for example, at what are deemed to be “normal” or “average” and “extreme” weather patterns in any given geographical locale at the time of year in question. It stands to reason that some natural occurrences are quite foreseeable and even expected in certain areas. “Thus, hurricanes in Florida would not constitute a sufficient *implied* cause for impracticability of performance in Florida, though they may be sufficient in Nebraska.”²⁶⁹

Of course, courts analyze *all* contractual provisions carefully, and not just those pertaining to weather. Thus, where a contract stated that “[n]either party shall be entitled to the benefit of the provisions of *Force Majeure* to the extent performance is affected by . . . the loss or failure of Seller’s gas supply or depletion of reserves,” a very fact-specific inquiry into what constituted a “gas supply” followed.²⁷⁰ Contractual accuracy is always important, but perhaps especially so in relation to severe weather.

The more specific parties can be when allocating weather risks to contractual performances, the more likely it is that they can accurately control the outcome of potential litigation without courts resorting to gap-filling or other contract interpretation methods. Parties should undertake a realistic risk evaluation at the contract drafting stage and specify exactly under *which* conditions *who* should be able to escape *which* promised performance(s), if any. Instead of merely making use of the boilerplate phrase “act of God” or even “extreme weather events” as currently is often the case, parties should specify exactly *what* is meant by such phrases. For example, do potentially liability-exculpating events include earthquakes or tornadoes in areas where these have not so far been common? Do they include hurricanes or storm surges above, but not below, a certain level? How about snowstorms that continue for a certain length of time or that happen at what was previously unusual times of the year? Droughts that exceed certain levels, time periods, or that occur in traditionally more rain-prone areas?

Although courts in general are not free to interpret contracts against the parties’ intent, they may gap-fill as needed. Courts will not treat contractual clauses as dispositive without examining the circumstances of the case in order to ensure the creation of intended and equitable outcomes. This, for example, also holds true for various other standard contractual clauses, such as “time is of the essence” clauses, merger clauses and personal satisfaction clauses. However, specificity of contract

268. *Hartec Corp. v. GSE Assocs.*, 91 So. 3d 375 (La. Ct. App. 2012).

269. *Thrifty Rent-A-Car Sys. v. S. Fla. Transp.*, No. 04-CV-0751-CVE-SAJ, 2005 Dist. LEXIS 38489, at *13–14 (N.D. Okla. 2005).

270. *Va. Power Energy Mktg. Inc. v. Apache Corp.*, 297 S.W. 3d 397, 403 (Tex. App. 2009).

drafting will be key to ensuring as much predictability and certainty of judicial outcomes as is possible in this particular area. Parties may also benefit from revisiting the provisions throughout the contractual performance, and adjusting the contract as necessary and feasible²⁷¹. This may be particularly relevant where the contractual performance runs over more than just a few months, as is the case of many power and warranty contracts.

Under established principles of contract law, parties can, with few limits, determine their own “law of the contract.” Courts are not at liberty to construe contracts in a manner that goes against the clear intent of the parties. In the words of Judge Posner:

[A]n essential function of contracts is to allocate risk, and would be defeated if courts treated the materializing of a bargained-over, allocated risk as a misfortune the burden of which is required to be shared between the parties . . . rather than borne entirely by the party to whom the risk has been allocated by mutual agreement.²⁷²

It is unlikely that courts will disturb this principle. They should not do so where parties explicitly and truly reached a mutual agreement upon a certain risk allocation. However, if—as often happens—parties fail to bargain over and accurately allocate their risks, courts should examine the defense much more critically than before for reasons of contractual clarity and expectations as well as for public policy purposes. The doctrine was developed to encompass certain very unusual situations and should not be broadened beyond this. If anything, as previously mentioned, it should be narrowed.

Where courts have sometimes appeared willing to more or less “rubberstamp” a weather event as an “act of God” or force majeure, this may become less and less likely to remain so. Contracts have, after all, also been recognized to serve as *more* than a mere risk allocation vehicle:

[C]ontracts do not just allocate risk. They also . . . set in motion a cooperative enterprise, which may to some extent place one party at the other’s mercy. “The parties to a contract are embarked on a cooperative venture, and a minimum of cooperativeness in the event unforeseen problems arise at the performance stage is required even if not an explicit duty of the contract.”²⁷³

To a large extent, the matter is one of the enforceability or limitation of contractual terms for reasons of public policy notwithstanding how parties have phrased them. Other contract clauses that were broadly held enforceable for a long time have modernly been held unenforceable for reasons of public policy. Non-compete clauses, for example, were traditionally considered a matter of purely private

271. Meyers & Shreinkin, *supra* note 26, at 2.

272. Mkt. St. Assocs. Ltd. P’ship v. Frey, 941 F.2d 588, 595 (7th Cir. 1991).

273. *Id.*

contracting without much scrutiny of their broader consequences for society. Whereas this is still the case in some states, other states have started to question the desirability of non-compete clauses seen from a broader societal point of view. The California Supreme Court, for example, has unanimously held that Business & Professions Code Section 16600, which states that “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void” means, for reasons of public policy, that non-compete clauses are invalid.²⁷⁴ “Indeed, no reported California state court decision has endorsed the Ninth Circuit’s reasoning [otherwise], and we are of the view that California courts have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat.”²⁷⁵

Another example of the same tension is also apparent in arbitration clauses where the interface between the right to remedy one’s injury in court and contractual stipulations to the contrary is evident. In these and other cases, the law is “flipping” to better take employees and private individuals into account instead of merely relying on the express provisions of the contract. Similarly, in the case of force majeure clauses, courts should more closely scrutinize whether such clauses were freely bargained for or, as has been the case with many arbitration clauses, the result of more one-sided, uneven bargaining powers. They should also take a hard look from society’s point of view at the desirability of allowing contract parties to exculpate themselves from liability for events that have become an almost everyday occurrence. The costs of weather calamities must, simply, be better internalized by all societal players including contracting parties.

The normative values of law including concerns of fairness and public policy are at issue with many contracts clauses and certainly among them force majeure clauses. As Judge Posner pointed out: Contract law should not protect opportunistic behavior when such behavior exceeds taking advantage of superior market knowledge and ventures into bad faith conduct.²⁷⁶ If, for example, one party has more knowledge about the potential implications of severe weather on a contractual performance, yet does not disclose this and perhaps even takes advantage of it, an issue of bad faith arises. So will the issue of whether the parties have truly “mutually” agreed upon the force majeure term to begin with. In short, simply because a contract contains a certain term, an analysis of potentially overshadowing issues is not precluded.

274. *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 293 (Cal. 2008) (providing examples of non-compete and other restrictive contract clauses that were held invalid).

275. *Id.* at 297.

276. *Mkt. St. Assocs. Ltd. P’ship*, 941 F.2d at 595.

Merely concluding that parties are “sophisticated” and could have negotiated a term differently is another binary falsity that should be considered when analyzing force majeure terms. Some parties simply have more resources than others. Some negotiating and drafting attorneys are more sophisticated than others. The circumstances behind the drafting of the clauses should, in short, be taken into account by courts in the context of climate and beyond. The view that the contractual language binds is simply too narrow for reasons of contractual fairness. This has been widely recognized in the area of unconscionability, which is alive and well in many states. It should be in relation to the drafting and application of force majeure clauses as well.

Where no force majeure clause is at issue, courts should apply a critical examination of the overall doctrine of impracticability and more sparsely allow for this defense in the case of severe weather events. This will send a signal to contracting parties that they should be prepared to internalize even arguably unexpected costs of impracticable events in their bargains. This could, for example, be accomplished via insurance coverage. On the one hand, such cost internalization may be passed on to clients and thus be unwelcome by many. On the other hand, a more careful risk evaluation and potential acceptance of the true costs of climate change by contracting parties and the business sector in general would force a higher awareness of the by-now established financial consequences of climate change at both the government, but also at the private levels. Impracticability is, granted, an established doctrine, even in relation to “extreme” weather. But importantly, it is one that originated under very different knowledge bases than are available now.

Courts serve not only a dispute-resolution function, but also an important signaling function. For the public policy justification of creating the broader awareness of climate change necessary in order to timely alleviate the problem or, as is unfortunately becoming more realistic, to prepare to adapt to climate change and the severe costs stemming from it, courts could and should be alert to the shift in realities—scientific, economic and otherwise—that is happening in this area. Thus, courts should, for both contractual and public policy purposes, more carefully than before examine whether a given weather calamity conforms to the notions of impracticability for which the doctrine was developed.

Time has come to discard legally and factually outdated phrases such as “acts of God” and “force majeure” in relation to severe weather events. Such events are to an increasing extent manmade. Thus, drafting parties should be prepared to allocate possible contractual risks much more accurately than before, avoiding such generic, anachronistic descriptions. Courts should also no longer discuss the excuse in such terms, but rather reference the modern impracticability doctrine in

general. By doing so, courts may reach the desired results without resorting to outmoded legal language that has arguably become an undesirable legal fiction. This and other broader concerns will be discussed in the following Part.

V. BROADER REASONS FOR CHANGE

Above, I set forth some of the considerations that warrant taking a new, hard look at the closely related doctrines that support exculpation from contractual liability based on weather calamities. Broader reasons exist as well.

Contracts may not be an area of the law that frequently changes, but it does also change over time as it should. The doctrine of impracticability has already changed much over time. Where at its very early stages, it only covered deaths or unavoidable illness in personal services contracts and supervening changes of the law that made performances unlawful and thus legally impossible,²⁷⁷ the doctrine now covers many more circumstances. Similarly, where actual “impossibility” was once required, courts now grant the excuse where severe performance difficulties have arisen. Commercial risks are, with technological and other innovations, currently very different than those of even just a few decades ago. Courts should narrow the applications of the impracticability defense in the context of so-called “extreme” weather events. This would send a signal to contracting parties to conduct more careful risk evaluations before—and with more time-extensive contracts, during—their contractual performances. Crucially, narrowing the implications of the doctrine would act as an impetus for parties to draft force majeure clauses more carefully than ever before in order to avoid courts allocating the costs of delayed performances or non-performances in manners that the parties did not predict. It would also encourage parties to take further steps to prevent or overcome the negative effects of weather events rather than resorting to after-the-fact litigation.

Although parties take precautions to avoid contractual performance difficulties, cases on this issue, of course, may nonetheless proceed to trial. In that case, parties should be prepared to propose jury instructions that adequately and accurately describe how the contract allocated the risk of weather events as well as what an “act of God” or force majeure is considered to be in the particular location in question. Jury members can neither be expected to have sufficient knowledge of climatic trends in general or if the impact of severe weather on the particular parties’ promised performances. Jury instructions should carefully match the contract at issue. This should be obvious, but is not always so. For

277. PERILLO, *supra* note 37, § 13.1.

example, in one case, the jury was instructed that before an occurrence may constitute force majeure, certain workmen “must have exercised due diligence and taken all reasonable steps to avoid, remove and overcome the effect of ‘force majeure.’”²⁷⁸ However, because nothing in the contract “expressly obligated” the workmen to actually exercise due diligence in order to take steps to avoid the effects of force majeure, the court refused to impose such a duty on the party, emphasizing that the parties had “merely agreed that when certain specified acts occurred, any resulting delay or interruption . . . was not to ‘be counted against Lessee.’”²⁷⁹

A deterrent to invoking impracticability in the context of weather-related contractual problems could be achieved by the implementation of attorney’s fee-shifting provisions or statutes. Under the “American Rule,” each party bears its own attorney’s fees in litigation absent a statutory or contractual exception.²⁸⁰ If parties were required by law or by contract to bear the costs of a failed attempt to seek the excuse based on severe weather unless the contract was clear on the issue, they may be more likely to consider the potential impacts of severe weather on their contractual promises more carefully, and take further precautions against such problems at the drafting stage. As mentioned, clearer contractual stipulations are currently needed in relation to weather disasters. At a minimum, fee-shifting provisions may be more likely to settle any problems out of court; a desirable result from a judicial efficiency point of view.

The question has been raised whether it matters *who* ultimately ends up being financially liable for contractual problems as long as the outcome is based on existing legal theory. To unsuspecting parties, this may very well matter. Whereas parties ought, of course, to conduct a careful risk evaluation before contracting, it is also true that some parties will necessarily find themselves at the weaker end of the negotiation spectrum and thus ultimately unable to reach a different risk allocation even if they *have* predicted the risks accurately. For example, just as courts hearing arbitration and unconscionability cases generally take the relative bargaining positions and sophistication of the parties into account, so it is relevant for courts to consider whether force majeure clauses should be given as much weight as is currently the case where the party seeking exculpation is that with the stronger bargaining power. Risk allocation in the weather context is not one of the issues to which contracting parties and thus courts have given much weight until now. As

278. *Sun Operating P’ship v. Holt*, 984 S.W.2d 277, 281 (Tex. App. 1998).

279. *Id.* at 283.

280. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975); *see also Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000).

this situation is changing, weaker parties in the bargaining equation should be aware that this issue could turn out to be as financially important as other aspects of the bargain. In turn, courts should take a very close look at not only the language of the parties, but also whether both parties' intent and expectations were, in fact, as freely bargained for as is often the presumption.

Because of the already existing overlap between the applications of force majeure in tort and contract law, it makes sense for courts hearing contract cases to follow a recommendation by tort scholars, namely that a separate "act of God" or force majeure notion is not even needed at all. In tort, regular negligence analyses amply cover the problems caused by an alleged failure to take the potential for adverse effects of severe weather into account when parties interact with each other in ways that may result in legal liability. "The time has come to recognize the act of God defense for what it is: an anachronistic, mirror image of existing negligence principles. The defense no longer serves an independent useful purpose and should be subsumed into the duty issue of general negligence analysis."²⁸¹ In cases of alleged breaches of contract, the notion of negligence may thus not only overlap, but maybe even cover the disputed problem on a standalone basis. Where parties have not specifically allocated their risks, the interrelated notions of foreseeability and basic assumption of the risk will, when analyzing the matter in conjunction with negligence, cover the matter. Archaic phrases such as "act of God" and "force majeure" in the contractual weather context have proved to be insufficient without deeper analyses of who should, under the circumstances, bear the responsibility for the contractual mishap.

Importantly, time may have come to borrow another concept from tort, namely the notion of relative liability similar to the tort system of comparative negligence. Historically, if a party contributed to the problem underlying tort liability in any way, that party would not be able to obtain damages ("pure contributory negligence"). Today, only four states and the District of Columbia apply that doctrine.²⁸² Instead, the majority of states now examine the extent to which a party may have contributed to the problem and reduce the available damages

281. Binder, *supra* note 69, at 4; see RESTATEMENT (THIRD) OF TORTS § 3 comments (AM. LAW INST., Proposed Final Draft No. 1) ("[c]ases involving serious and unusual adverse natural events—'acts of God'—essentially call for application of the factors that enter into an ordinary analysis of negligence. Accordingly . . . a separate instruction on act of God may not be necessary"); DAN B. DOBBS, THE LAW OF TORTS (2000) ("Courts often speak of natural forces as if special rules are needed in those cases, but . . . the decisions comport with the general rules of negligence and proximate cause. It is thus entirely possible to drop terms like 'act of God' altogether").

282. See, e.g., GARY L. WICKERT, AUTOMOBILE INSURANCE SUBROGATION IN ALL 50 STATES, § 4.01[15] (2nd ed. 2014).

accordingly (“comparative negligence”). In contract law, courts could introduce the notion of “comparative risk allocation.” Instead of the current binary solution of either exculpating a party completely from contractual performance liability, or not at all, when parties have failed to expressly allocate their risks, courts could examine the extent to which that party should have foreseen the event at issue and taken appropriate precautions against it. On this basis, damages could also be allocated proportionally between the parties. This may lead to a more equitable risk allocation.

In other words, just as tort litigants share negligence by judicial allocation, so could contracting parties be made to share the risk based on a modernized framework of relative, and thus not pure, risk allocation. To be sure, contract law is, in contrast to tort law, based on the observance of antecedent risk agreements. However, where parties have either not addressed the issue of risk with sufficient accuracy or not done so at all (in which case the common law doctrine of impracticability still applies), judges would not run afoul of the law of the contract or, arguably, established contract law principles by allocating the risk equitably under the circumstances. At bottom, this is because the doctrine of impracticability is precisely geared towards courts conducting an after-the-fact investigation into who should be responsible for financially unexpected outcomes. Nothing in existing contract law requires an all-or-nothing result such as is frequently the case today. Rather, the relevant analysis and actual outcomes should be shifted towards a more equitable risk *sharing* system, taking into consideration such factors as who was in the better position to have avoided the contractual problem in the first place, the relative bargaining powers of the parties, and, crucially, the principle of reasonable foreseeability given modern scientific knowledge of the causes and effects of extreme weather.

Similarly, cases are often said to sound in either “tort law” or “contract law.” This may also be an overly restrictive binary framework that does not sufficiently reflect the complexity of today’s business situations. Instead of such “either/or” solutions, “both/and” solutions would better reflect the reality of modern contract law. This is especially so in relation to climatic problems where both parties may actually be at “fault” for not predicting or preventing the problem at issue, although to varying degrees. Although a new comparative risk allocation system may be seen to break with established contract law and tradition, modern reality warrants this.

Just as tort law moved away from a system that was considered to no longer be efficient and equitable, so can and should contract law be modernized in relation to impracticability caused by extreme weather events. Society has now developed a much greater and more multi-

faceted understanding of this issue than even just a few years ago. Both the judiciary and legal practitioners are struggling with the general public's lack of faith in the the legal system's ability to respond appropriately and quickly to some of today's most pressing and urgent problems. As mentioned, only fifty-three percent of Americans have a "fair" or "great deal" of faith in the judiciary today. Climate change is an area where the judiciary has the chance to regain some relevance in relation to at least the contractual implications of one of the worst contemporary problems of modern society. For the general public to retain or regain its faith in the judicial system and the law in general, the law must reflect on-the-ground reality. The judiciary itself started questioning the modern-day applications of the doctrine to weather problems decades ago.²⁸³ For this and other reasons, the time has come to reconsider the impracticability doctrine as it relates to severe weather events.

However, the greater question remains: *who* may and should ultimately be held responsible for climate change: Civil society actors who have created much of the underlying problem or governments failing to implement rules sufficiently curbing the problem? If governments are considered to be ultimately responsible, should litigants be able to implead government entities as third-party defendants in relation to claims of contractual liability for weather-related problems thus proximately caused by the government's inaction? Alternatively, may litigants implead sectoral players such as those in the energy generation and fossil fuel extraction industries for their very significant role in the problem? This may not currently be legally feasible because of the difficulty of proving proximate causation by each individual corporation or government entity's contribution to climate change; the so-called "slice of the pie." The broader legal implications of this problem on other areas of the law such as civil procedure and evidence, however, are apparent.

In this Article, I promote taking a new, hard look at contractual impracticability for contractual, equitable, and public policy reasons. The most important of the policy reasons is arguably the fact that climate change is recognized as a tragedy-of-the-commons type problem. Something must be done about it, but it is not yet clear *who* must do what. Many parties at many private and governance levels are responsible for the underlying pollution problem. Nations have very divergent technological, financial, and other resource-based capabilities for implementing action against climate change. Some nations are more motivated to do so than others. Meanwhile, the problem is rapidly getting worse. As insufficient action is being taken to curb the problem at

²⁸³ Joseph Resnick Co. v. Nippon Yusen Kaisha, 241 N.Y.S.2d 134 (N.Y. Civ. Ct. 1963).

the purely private level and, arguably, regulatory levels, action should be incentivized by all branches of the government including, to the extent possible, the judiciary. Granted, judicial action in this context will require some courage. However, the judiciary must respond to the realities of society at any given point in time. This is surely the case when it comes to something as relatively uncontroversial as the contractual aspects of climate change.

Public policy arguments already play an important role in contract law cases and should continue to do so. Recall, for example, the general rule that parties cannot excuse themselves contractually from their own negligence. In a case where an applicable statute dictated that

[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own . . . violation of law, whether willful or negligent, are against the policy of the law,” the court noted that “an exculpatory contract is valid *only if the public interest is not involved*.”²⁸⁴

In the case of climate change, the public interest *is* precisely involved. In contrast, a Texas court found that where a contractual force majeure clause said nothing about requiring a party to “exercise due diligence and take all reasonable steps to avoid, remove and overcome the effects of ‘force majeure,’” instructing a jury to consider whether this had been done was erroneous.²⁸⁵ However, while the Texas court noted that “there is no need for us to provide further remedy by implying into every force majeure clause the requirement that [a party] exercise diligence to overcome the effects of force majeure once it occurs,” it also emphasized the fact that the public policy reasons weighing in favor of requiring diligent, reasonable conduct to avoid the effects of force majeure were, in that case, adequately addressed via other bodies of oil and gas law. Where no other body of law adequately addresses the issue of whether a contracting party has acted diligently and reasonably in relation to their performances given potentially problematic weather events, public policy warrants a result that ties the analysis closely to the concept of negligence given modern knowledge of weather patterns and risks. Some courts still hold, in an almost per se manner, that “[i]t would be against public policy to hold one liable for acts of God” and that “inclement weather[] [is] . . . ‘obviously outside of [a party’s] control[,]”²⁸⁶ without analyzing whether the event at issue was truly an unforeseeable event—whether considered an “act of God” or simply an impracticability—and whether granting an excuse for contractual liability

284. *Ungar v. Skinner Swim Pool Plastering*, No. B196602, 2008 WL 1809689, at *5 (Cal. Ct. App. Apr. 23, 2008).

285. *Sun Operating P’ship v. Holt*, 984 S.W.2d 277, 284 (Tex. App. 1998).

286. *Krautsack v. Anderson*, 861 N.E.2d 633, 639 (Ill. 2006).

would support the underlying rationale for such holdings. Doing so is counter to public policy today.

Taking the promoted hard look at the doctrine of impracticability as it relates to severe weather events begs the question of whether doing so would be considered a “political question” best left to be addressed by legislatures at various levels in various nations. Further, if courts take action in this context, would they violate the separation of powers doctrine?

Both can be answered in the negative. First, the legislative branch is, of course, responsible for enacting the positive laws of the state. It can do so or refrain from doing so as regards climate change regulation as voters demand it to do. However, the change promoted in this Article relates much more narrowly to the common law of contract. The doctrine of impracticability in contract law is well established, but nonetheless can be interpreted and thus eventually changed as the judiciary finds appropriate in the absence of contrary legislation given how relevant societal norms and situations change. Courts always interpret existing law—including, of course, the common law—to determine what the law is at any given point in time. This principle of American law has been established for hundreds of years since the days of *Marbury v. Madison*.²⁸⁷ Such interpretation must necessarily take into consideration new situations and facts such as anthropogenic climate change. The common law has always evolved and continues to do so as well as it should. In today’s marked absence of positive law on climate change, courts can and indeed must address the effects of reality on the common law of contracts. Further, it is fair and frankly realistic to note that “[n]o democratic system exists with an absolute separation of powers or an absolute lack of separation of powers. Governmental powers and responsibilities intentionally overlap; they are too complex and interrelated to be neatly compartmentalized.”²⁸⁸ Judges are, within limits, at liberty to (re)interpret the doctrine of impracticability so long as they do not violate legislation on point.

Reinterpreting the impracticability doctrine would also not violate the political question doctrine. This doctrine is invoked by the judiciary in four situations: (1) when there is a lack of judicially discoverable and manageable standards to decide the case on the merits; (2) when judicial intervention might show insufficient respect for other branches of government; (3) when the issue is otherwise best left to other branches of the government to resolve; or (4) when a judicial decision might threaten

287. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

288. *Separation of Powers—An Overview*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> (last visited Aug. 5, 2016).

the integrity of the judicial branch.²⁸⁹ In other words, when courts believe that the issue properly belongs to the decisionmaking powers of elected government officials, they may refrain from ruling on the issue at all.²⁹⁰ They have frequently done so in relation to climate change arguments made under, for example, private and public nuisance theories and the public trust theory. Such claims have also faltered on issues of separation of powers, causation, and the practicability of judicial relief. The issue addressed in this Article is, importantly, *not* a matter of citizen relief or of extending the common law of contracts to issues of regulatory action. Rather, it is simply a matter of developing already existing contract law principles while addressing harm to particular contracting parties caused by weather events. The solutions propounded in this Article are tied narrowly to existing contract law, although offering a new take on some of those aspects of law. Other much more “controversial” issues have been resolved by courts in recent decades: abortion rights, affirmative action, interracial marriage, and LGBT issues. Contract law is arguably much less controversial than these turned out to be in the United States. Its interface to climate change events can thus be judicially reviewed without violating the political question doctrine.

Finally, seeing extreme weather events as “acts of God” is arguably an outmoded legal fiction; “[a]n assumption that something is true even though it may be untrue, made especially in judicial reasoning to alter how a legal rule operates”²⁹¹ or “false factual suppositions that serve as the basis for judge-made legal rules.”²⁹² They derive their legitimacy from their origins as ad hoc remedies forged to avoid overly harsh legal outcomes or unforeseen and undesirable situations. Recall that in contract law, this is precisely how the impracticability doctrine was originally applied, namely to excuse parties from liability to perform given certain unforeseen and uncontrollable events, even though the law otherwise would have required the contractual performance agreed upon. Courts still use legal fictions as a mechanism of reaching equitable results when this would not be possible via other venues. But, legal fictions should not be used to circumvent facts that *can* be addressed otherwise. They should not be extended beyond the plausible. And, they should not be allowed to work an injustice.²⁹³

289. See *Baker v. Carr*, 369 U.S. 186 (1962); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

290. *Luther v. Borden*, 48 U.S. 1 (1849).

291. *Act of God*, *supra* note 94.

292. Peter J. Smith, *New Legal Fictions*, 95 *Geo. L.J.* 1435 (2007) (giving examples of modern legal fictions such as corporate personhood, constructive eviction, considering adoptive parents to be the parents of their children, consent given by others on behalf of children and the mentally ill, and the reasonable person standard).

293. For example, even though the notion of the “corporate entity” protects much behavior, courts nonetheless “pierce the corporate veil” when it is warranted in order to avoid using a legal fiction to circumvent existing law.

Further, a “serious question”²⁹⁴ has been raised as to whether the often unarticulated rationales used by judges when applying legal fictions outweigh the general interest in judicial candor. It is outside the scope of this Article to go in depth with whether the “act of God” doctrine is for sure a legal fiction with respect to contractual problems caused by weather events. To the extent that it is, it becomes especially important to recall that whereas until recently, weather was—for then-good reason—considered to be something beyond the control of man, much awareness of the falseness of this supposition has arisen. We are deceiving ourselves if we continue to disregard modern climate knowledge. Courts should certainly not do so given their role in creating equitable and rational results. Whether or not it is fair to exculpate a contracting party from performance liability given extreme weather under the circumstances will remain a fact-specific inquiry. However, it stands to reason that continuing to treat extreme weather events as “acts of God” or force majeure is becoming implausible without at least taking the extent to which man is now known to contribute to the problem, as well as the foreseeability of extreme weather, into full consideration. Said one court:

This court has applied the traditional common law principle embodied in the tried if not tired phrase “act of God.” . . . Is it not time to relieve Nature of even the formal blame for many acts which now seem to be within the scope of man’s prowess? Perhaps the term “act of God” should be replaced by a concept which reflects the possibility of human causality as well as that of the Divine. In determining liability . . . what is more important than the identification or nomenclature of the unknown cause is the answer to the question of whether there was any intervention or foreseeability or control on the part of defendant. If there is a negative answer to this question, then the result simply must be *damnum fatale*, in that the damage to plaintiff’s goods must be borne by him and not by the [thus excused defendant].²⁹⁵

Modernly, however, the answer to this question is positive: parties often have had a chance to foresee the problem and intervene. Some courts seem to rely on a contemporarily inappropriate and inexpedient extent on standard contract phrases and traditional holdings of contract law that, as demonstrated, have become or are rapidly becoming outdated. Because what used to be seen as unpredictable and uncontrollable weather events are now much less so, the contractual doctrine of impracticability should be reconsidered in relation to extreme weather.

294. Smith, *supra* note 292.

295. Joseph Resnick Co. v. Nippon Yusen Kaisha, 241 N.Y.S.2d 134 (N.Y. Civ. Ct. 1963).

CONCLUSION

Anthropogenic climate change is rapidly blurring what used to be a factually and rationally supportable distinction between “natural” and “man-made” weather events. Severe weather events that were traditionally considered to be “extreme” and unpreventable “acts of God” can no longer be said to be so to nearly the same extent as before. It makes little legal or logical sense to attribute costly and otherwise detrimental weather events to “superior forces” or “God” to which we now know that we—mankind—have contributed to a very large extent. Whereas such events may not be completely preventable by man, we now know that they are not completely unpreventable by mankind either. If the global community decided to take effective action against climate change, the dangerous track upon which we currently find ourselves could still be reversed, preventing many events with very costly consequences.

In the meantime, everyone—including contracting parties—must pay heed in order to better protect themselves both practically and legally from the realities of an increasingly volatile climate. The judiciary should reconsider the impracticability doctrine and potential contractual force majeure clauses in contract law as these concepts relate to weather. Even though the doctrine is well established, the law is never static and should not be. The common law must be reexamined and potentially changed when circumstances warrant it. This is such a time. Three aspects stand out in relation to impracticability based on extreme weather: prediction, preparedness, and risk allocation.

First, contracting parties should assess the risks posed by climatic events more carefully than ever before. In today’s world, increasingly volatile weather is to be expected in most geographical locations as well as at different times of the year than before. Weather is becoming increasingly “extreme” both in relation to degree and level of unexpectedness. Parties should carefully negotiate, assess, and contractually allocate risks posed by severe weather events and not assume that such events will *not* affect their contracts. They may very well do so.

Second, parties should become better prepared to take both legal and practical steps to protect themselves against potential negative effects of weather events on their contractual performances *before* these become reality. Such protections should consist of more closely preparing for the performance to be undertaken given the time of year and location of the executory promises and, in the case of contracting performances of longer durations, reevaluating the risk allocation during performances. Insurance is highly advisable, if available. If a climatic event happens, parties should of course take immediate steps to alleviate the negative impacts to the furthest extent possible. Contracting parties

are expected to exercise reasonable diligence, skill, and good faith in their interactions. These factors are more relevant in relation to the effects of extreme weather events on contractual performances than ever before. Gone are the days when parties could generally expect to be exculpated from liability simply because of an extreme weather event referenced (or not) in the contract. Instead, parties must now be prepared to much more precisely articulate what risks they anticipated ahead of their performances than before and, if the risks turn into reality, what they did to avoid negative outcomes. This is sound, modern judicial interpretation of the common law applied to new situations and facts. Parties should expect closer scrutiny of their weather-related arguments in the future. Parties may also wish to consider pricing issues in response to potentially having to internalize the costs of weather events on their performances to a larger extent than before.

In turn, the judiciary should more closely scrutinize arguments that parties did not actually foresee or could not reasonably have foreseen the problematic weather event. Exculpating a party from contractual liability based on the argument that the party assumed a certain supervening event would *not* become reality is troublesome from both a legal and a public policy point of view. At bottom, impracticability arguments on the basis of weather problems are becoming increasingly implausible. Parties should thus exercise more caution in this respect than in even recent decades. The law is likely to change.

Third, the time has come to reconsider the current risk allocation framework. Instead of the existing binary approach, a comparative risk allocation system could be devised similarly to how tort law moved away from contributory, towards comparative, negligence in almost all states. It may in many cases be more equitable to require parties to share the financial problems caused by the effects of severe weather events. This is especially so in cases of significant disparities in sophistication and bargaining powers. In today's market place and economic climate, with a seemingly ever-increasing amount of large corporations seemingly weighing more and more heavily on the scale of market force, the traditional argument that parties have freely allocated their risks as each saw economically fit may not be factually supportable. The risk of one party strong-arming the other party into accepting a certain risk allocation that favors the more sophisticated party exists in this context as well as in others. The market may have traditionally accepted this situation, but for equitable and policy reasons, the judiciary may also take a harder look at this aspect of the doctrine than before.

Of course, where parties have allocated their risks fairly and precisely in antecedent agreements, these will typically be upheld because of the principle that courts will not rewrite the parties' contract. However, preciseness in risk prediction and allocation is currently often

not the order of the day. In such cases, courts have more freedom to allocate the risk in a more equitable, shared manner. Introducing a comparative risk allocation scheme would very likely have the additional advantage of increasing awareness not only by contracting parties, but also broader segments of society of the severe financial risks that climatic events are known to pose. Such a scheme might thus function as an additional driver for a more effective solution to climate change at the legislative and other governance levels where action arguably should be taken.

The use of such phrases as “act of God” or “force majeure” in boilerplate or closely drafted agreements is not and should not be dispositive. The crux of the matter is whether the event causing the alleged impracticability should have been reasonably foreseen and, at bottom, whether the parties were reasonable in assuming that the event would not occur. The issue may, in fact, not be the problematic weather event itself, but rather, the fact that the parties failed to take sufficient precautions against the potential negative consequences of it in hopes that the event would not take place. Failing to take such precautions against severe weather has become highly risky. Thus, courts should analyze causation and prevention more so in relation to the actor seeking the defense, rather than the nature of the event itself.

When it comes to impracticability as an excuse for contractual performances, not just one, but several notions of law collide. The matter is *not* just one of freedom of contract. It is also a matter of concerns of fairness and broader public policy considerations. For example, whether it is desirable to enforce certain contractual clauses in light of the way society is coming to view issues such as the effects of humans on the environment, as well as how nature—including more volatile weather situations—will save financial and other tolls on *us*. The common law of contracts often develops based on public policy reasons. Time has come to consider impracticability relating to extreme weather from that angle as well. What was the law for a long time should not necessarily remain judicially untouched simply because it is established law unless, of course, it is also still *good* law. With regards to the interface between weather problems and contract law, currently established law is not good law. It is becoming archaic and does not match on-the-ground reality.

Like clouds clearing after a storm, knowledge about most natural events is now clear: climate change is to a very large extent anthropogenic. With climate change comes more frequent and more severe weather events. Hopefully, regulatory and other action will be taken to stem the underlying substantive problem in a timely fashion. In the meantime, severe weather events have vast financial implications for private parties and government entities alike. Thus, the time has come to rethink the doctrine of impracticability in contract law in relation to weather-related problems.
