In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster

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I. INTRODUCTION

Every year the United States is devastated by multiple natural disasters. Whether it is a hurricane ravaging the coastline with its winds exceeding 100 miles per hour, extreme flooding leaving thousands stranded and

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homeless, an earthquake on the west coast, a fire, or a terrorist attack threatening the lives of many; natural disasters are not new and unfamiliar occurrences across the United States. In 2005, the Federal Emergency Management Agency declared sixty-eight natural disasters in the United States and its territories. Because natural disasters continuously occur, the impacts on contractual obligations become important to parties seeking relief from breach of contract claims that result from the inability to perform due to the occurrence of a disaster.

Typically, "[c]ontract liability is strict liability," and therefore, contracts are formed with the intention to be absolute. A party, as a result, may be liable for breach of contract even when the party is not at fault. A claim of force majeure can be asserted as an affirmative defense by a party in a suit arising out of nonperformance of contractual obligations. Force majeure is either used to describe an "event or occurrence, or [a] legal concept." "Force majeure" is a French term that is defined as a supervening force.


5. See id.


7. See Restatement (Second) of Contracts ch. 11 introductory note (1981).

8. See id. § 261.


Although force majeure is not a new concept to the area of contract law, the presence of force majeure clauses in contracts are becoming more important after natural disasters such as Hurricane Katrina occur. However, "not all contracts [include] force majeure clauses," and often, even if they do, the term is merely stated in the contract and is likely considered boilerplate because it is not bargained for.

After the 2005 hurricane season, merely including a force majeure clause in a contract is not enough. This could become a problem for parties faced with large penalties and damages for a breach of contract because typically a force majeure clause will excuse a party's performance under a contract when there is an unavoidable "event beyond the party's control," making the party's performance impossible. Additionally, considering that the occurrence of category four and five hurricanes, cyclones, and typhoons have significantly increased over the past thirty-five years, and many more regions of the United States may also be affected as a result, businesses and other parties are likely to depend on the ability to seek relief from performance of contractual obligations because of an event beyond its control. Furthermore, while there may not be many breach of contract lawsuits following disasters in 2005 that are currently published, they will continue to

\[\text{References}\]


13. Ned Bergin, Force Majeure Issues Relating to Katrina (Sept. 21, 2005), http://www.joneswalker.com/db30/cgi-bin/pubs/ForceMajeure.pdf. Hurricane Katrina affected many businesses and other parties to contracts and their "ability . . . to fulfill their contractual obligations." \[Id.; see also Reynolds & Steffan, supra note 3. Following September 11, 2001, it is likely that contracts will be reexamined and the definition of force majeure will be expanded to include "acts of terrorism" that may be either actual or threatened. Reynolds & Steffan, supra note 3. By expanding the definition of force majeure, contracting parties will be given extra protection against nonperformance. \] \[Id.\]


15. See Seely, supra note 11.


increase in the future.\textsuperscript{21} Like claims following the September 11 terrorist attacks, it could be a long time before claims resulting from Hurricane Katrina and other disasters “find their way through [our] court system.”\textsuperscript{22}

In the remaining sections of this article, other important concepts involving force majeure clauses will be discussed. Part II will give an overview of force majeure and why force majeure clauses are necessary in contracts. Part III will explain how a party to a contract seeking to have nonperformance of obligations excused is able to invoke a force majeure clause and the steps that need to be fulfilled in order for the force majeure clause to be a defense to breach of contract claims. Part IV will go into detail about the most common types of contracts affected by force majeure events. Part V will conclude the discussion and summarize all of the important concepts and issues that follow force majeure clauses.

II. A GENERAL OVERVIEW: THE FORCE MAJEURE CLAUSE DEFINED

Force majeure is considered “[a]n event or effect that can be neither anticipated nor controlled.”\textsuperscript{23} As a result, not all conditions or events are situations that will excuse performance of contractual obligations,\textsuperscript{24} and therefore contractual obligations can only be excused under force majeure in extreme and unusual circumstances, such as a hurricane.\textsuperscript{25} Likewise, force majeure is used all over the world to excuse obligations under a contract where causes beyond a party’s control create an inability for a party to perform.\textsuperscript{26} A party’s inability to perform under a contract must be determined based on an objective standard, which shows that no one could perform the party’s obligations under the contract.\textsuperscript{27} For example, “[e]xtraordinary circumstances may occur during the life of a contract and prevent a party from performing its obligations.”\textsuperscript{28}

\begin{footnotesize}
\begin{enumerate}
\item[22.] \textit{Id.}
\item[23.] \textit{BLACK’S LAW DICTIONARY} 673 (8th ed. 2004).
\item[24.] Nestel, \textit{supra} note 14, at 42.
\item[27.] \textit{HURRICANE KATRINA HELPING HANDBOOK, supra} note 17, at 17-9.
\end{enumerate}
\end{footnotesize}
Because force majeure refers to a superior or irresistible force, it is often used interchangeably with an "act of God." An act of God excuses events beyond the control of mere human agency and occurs when there is an intervention of an "extraordinary, violent, and destructive agent, [which because of] its very nature raises a presumption that no human means could resist its effect." Furthermore, when the subject matter of a contract is destroyed because of an act of God and the party seeking to be excused is not at fault, the contract will be terminated relieving both parties of any further obligations. In many instances, specific weather conditions have been considered acts of God when the necessary prerequisites were met. For instance, a "severe weather [condition] must be atypical, unexpected, and . . . have an adverse impact" on the party’s performance under the contract.

Although courts have found the two terms to be similar, they have also recognized that force majeure is a more expansive concept. A force majeure clause is placed in a contract so that the contracting parties know what types of events and circumstances will create an impossibility to perform as a result of an act of God. Additionally, a force majeure clause is included in a contract in order for the parties to expressly allocate risk and to provide notice to the parties that the occurrence of certain events may result in suspension of their performance, thereby excusing a party’s obligations without incurring any liability for damages. As a result, some parties may be wrongfully claiming force majeure as a defense when there is no express allocation of risk. Generally, if one party’s performance is excused, the

31. Louisville & N.R. Co. v. Finlay, 185 So. 904, 905 (Ala. 1939) (quoting Steele & Burgess v. Townsend, 37 Ala. 247, 256 (Ala. 1861)).
33. 1 AM. JUR. 2D Act of God § 4. Some weather conditions found to be acts of God are droughts, flooding, freezing temperatures, fog, high winds or a hurricane, ice storms, and lightning. Id.
35. 1 AM. JUR. 2D Act of God § 2.
other party's performance is also excused. However, a party cannot invoke a force majeure clause if the event causing nonperformance involved human intervention. This is a common occurrence when a party is not directly affected by the force majeure event, such as the inability to obtain materials because the supplier cannot provide and deliver the materials needed. Therefore, a force majeure clause is not an all-inclusive fixed rule of law that regulates every force majeure clause inserted in a contract; it will usually explain the specific types of circumstances that will excuse nonperformance.

Force majeure clauses do not apply in every situation where one party is unable to fulfill obligations under a contract. A party seeking excuse from performance as a result of a change in economic circumstances, greater expenses, fear of travel, or a threat of any type will not be granted relief from nonperformance. Consequently, when buyers of property in New York City executed an agreement and then defaulted because they feared traveling after the September 11 terrorist attacks, a court held that their obligations would not be excused. Furthermore, if fear and uncertainty were enough to constitute force majeure, thereby excusing performance, "contracting would no longer provide any stability and predictability."

III. THE PROCESS FOR INVOKING A FORCE MAJEURE CLAUSE

A force majeure clause can be invoked, excusing performance of obligations due to situations explained in the clause, when the situation provided in the contract does in fact occur and then prevents performance. Once an event that triggers a force majeure clause occurs, the party seeking relief

40. Bergin, supra note 13, at 1.
41. Fla. Power Corp. v. City of Tallahassee, 18 So. 2d 671, 675 (Fla. 1944). "[The 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." Id.
42. See Nestel, supra note 14, at 42.
43. Perlman v. Pioneer Ltd. P'ship, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990).
44. AM. HOTEL & LODGING ASS'N, supra note 25, at 7.
45. Id.
46. Uzan v. 845 UN Ltd. P'ship, 778 N.Y.S.2d 171, 172–73 (N.Y. App. Div. 2004); See also infra text accompanying note 211. If the parties in Uzan had not been able to get to the United States because flights were not operating, they may have had a force majeure excuse to nonperformance or delay of performance. See generally 1 AM. JUR. 2D Act of God § 4.
47. Uzan, 778 N.Y.S.2d at 178.
49. See Nestel, supra note 14, at 42.
50. Id. at 43.
must determine how it affects its obligations under the contract.\textsuperscript{51} For instance, if the force majeure event does not affect the parties' ability to fulfill any of their obligations and business can continue normally, the force majeure clause is not necessary and cannot be invoked as a defense to nonperformance.\textsuperscript{52} After a force majeure clause is officially invoked, "courts will enforce [the] clause unless it is 'manifestly unreasonable.'"\textsuperscript{53}

The party seeking excuse from nonperformance has the burden to prove that the force majeure clause should be invoked.\textsuperscript{54} Generally, in order for a force majeure clause to be invoked by a party seeking to excuse nonperformance, certain prerequisites must be met.\textsuperscript{55} First, the event has to be found to fall within the terms provided for in the clause.\textsuperscript{56} Second, the event must have reasonably been beyond that control of the party seeking to be excused from performance.\textsuperscript{57} Third, it must be determined what effect the force majeure event will have on the obligations of the party seeking to be excused.\textsuperscript{58} Finally, the party seeking relief must provide notice to the other party to the contract.\textsuperscript{59}

\textbf{A. Examining the Language Present in the Clause}

The language contained in a force majeure clause must be relied upon and analyzed in order to determine what constitutes a force majeure event, thus triggering the clause, and to figure out its effect on a party's contractual duties.\textsuperscript{60} Force majeure clauses should identify the effects of certain triggering events on each party's obligations.\textsuperscript{61} Often, the clause will provide that at the time a specific event or set of events occurs, each party's obligations are either suspended for the duration of the triggering event\textsuperscript{62} or may be ter-
minated along with the contract. "[T]he scope and application of a force majeure clause depend on the terms of the contract." For example, if the clause limits the events that trigger it to specific acts of God, then the event must be nonhuman and occur without any human intervention to become an excuse for nonperformance which the parties intended to be sufficient during contract formation. In Perlman v. Pioneer Ltd. Partnership, the court stated that when the language in the contract is unambiguous, it will trump the principals of force majeure because a court should not interject terms that the parties did not bargain for. Additionally, when a devastating force majeure event occurs, the language in the contract is important to the parties trying to escape liability because not all delays causing nonperformance will be excused and the clause will inform a party as to whether the performance of obligations under the contract are suspended, delayed, or terminated all together.

Many clauses are . . . limited to delays ‘in shipment’ of goods and [will] not cover shortages of supply [or] availability of [a] product. Thus, while the delays in shipments while export elevators re-open and catch up with back logs may be covered by most clauses, longer term shortages due . . . to the failure in the supply chain, crop failure, or lack of refining capacity may not.

1. Specificity of the Clause

Generally, a force majeure clause that is clearly drafted will be enforced according to the specific language provided, which will determine the interpretation a court will put on it. A clause’s wording can expand or limit the types of events that will be considered severe enough to warrant relief from

64. Zurich Am. Ins. Co. v. Hunt Petroleum, Inc., 157 S.W.3d 462, 466 (Tex. Ct. App. 2004). “Where a contract specifies that upon the occurrence of force majeure, the contractual obligations are suspended, it is clear that the parties intend that the present obligations to deliver and take gas are suspended through the duration of the force majeure.” Paulus & Meeuwig, supra note 51, at 311.
65. Nestel, supra note 14, at 42.
66. 918 F.2d 1244 (5th Cir. 1990).
67. Id. at 1248.
69. Id.
Whether the clause constructed in the contract is considered broad or narrow plays a big part in determining the types of events that will excuse contractual duties. Consequently, courts have held that the traditional definition of force majeure should not be relied upon when the parties indicate the effect, scope, and application of the term as applied to their contract. Furthermore, the precise language in the contract should be examined to provide evidence of the parties’ intent and to determine what events excuse performance under the force majeure clause.

When a clause is narrowly constructed, it will list specific events that prevent performance and include only a narrow catch-all phrase so that the contracting parties should not have any problem determining what events will qualify for excuse under the force majeure clause. If the force majeure clause specifically includes the event that actually prevents performance, then it will be excused. However, if the clause is constructed broadly, the wording will often create an ambiguity, and the events that are likely to be covered under the clause will be harder for parties to determine. This is because a broad force majeure clause only states a few events that will qualify as force majeure events and then provides a catch-all phrase like “or other events beyond its control” or “[other] unavoidable causes.” If this is the case, and the clause doesn’t specifically define “force majeure,” it will probably be considered a catch-all force majeure provision, resulting in the clause being construed against the drafter. Therefore, a broad force majeure clause will be narrowly interpreted, only encompassing the specific events or things stated in the contract, because “general words are not to be given expansive meaning; they are confined to [the] things of the same kind

71. Id.
72. HURRICANE KATRINA HELPING HANDBOOK, supra note 17, at 17-10.
73. R & B Falcon Corp., 154 F. Supp. 2d at 973.
74. Id.
75. HURRICANE KATRINA HELPING HANDBOOK, supra note 17, at 17-10.
77. Paulus & Meeuwig, supra note 51, at 307.
78. HURRICANE KATRINA HELPING HANDBOOK, supra note 17, at 17-10. “No party shall be liable for any failure to perform its obligations in connection with any action described in this Agreement, if such failure results from any act of God, riot, war, civil unrest, flood, earthquake, or other cause beyond such party’s reasonable control.” Force Majeure Clause in Contracts, ALLBUSINESS.COM, http://www.allbusiness.com/legal/contracts-agreements/541-1.html (last visited May 27, 2007).
79. Declercq, supra note 12, at 225.
or nature as the particular matters mentioned." Courts have concluded that if a party at the time of contracting wishes to receive protection beyond the impracticability doctrine, the clause should be written with particularity and not general language. Furthermore, unless the clause provides that the events are "without limitation," the events that are included in the contract as those that will excuse a party's obligations may not excuse nonperformance after all.

2. Contracts Without Force Majeure Clauses

Fortunately, the absence of a force majeure clause in a contract will not always be detrimental to a party seeking to be excused. The clause does not necessarily have to be written in the contract because it can be oral; however, it may then be subject to the Statute of Frauds. Additionally, a force majeure clause may be found to be an implied-in-fact risk allocation by the parties, which is evidenced by their intentions. A majority of jurisdictions will still excuse a party that cannot fulfill obligations under a contract as a result of a force majeure event, even when no force majeure clause can be found in the contract. Only a minority of jurisdictions continue to hold that a party who does not perform will still be held liable for their nonperformance when a force majeure clause is not present in the contract. Some courts will not even automatically excuse a party to a contract when the inability to perform their obligations is due to a force majeure event that was provided for in the clause. A court will likely expect the party seeking

85. Nestel, supra note 14, at 42.
86. Joan Teshima, Annotation, Gas and Oil Lease Force Majeure Provvisions: Construction and Effect, 46 A.L.R.4TH 976, 981 (1986). At least "one treatise claims that it does not view the absence of a force majeure clause from an oil and gas lease as having special significance." Id. at 983.
87. PERILLO, supra note 83, § 13.19.
88. Id.
89. Nestel, supra note 14, at 43.
90. Id.
91. Bund, supra note 38, at 400.
excuse to establish that it was actually prevented from performing its obligations and that the event causing nonperformance was not reasonably within its control.92

Likewise, without a force majeure clause in the contract, parties could be at the mercy of a court’s interpretation and application of legal principles to their contract.93 Sometimes, however, when there is not a force majeure clause in the contract, a party can look to applicable state statutes that address defenses to nonperformance of contract obligations.94 Parties affected by Hurricanes Katrina and Rita are able to consult the Louisiana Civil Code Articles to determine how they apply to nonperformance under their specific contract if the parties never addressed how a hurricane or other force majeure event would impact their obligations to each other.95 Similarly, parties to contracts faced with breach of contract claims in other states may also consult various state statutes for relief concerning force majeure issues.96

B. Reasonably Beyond the Control of the Breaching Party

In order for a breaching party to present a defense to the nonperformance of contractual obligations, the force majeure clause may be invoked if the event was beyond the control of the party seeking to be excused from performance.97 Under common law, the impossibility to perform, or events reasonably beyond a party’s control were essential to force majeure clauses.98 Events outside one’s control might include acts of God, sudden illness, fire, theft, natural disasters, or other situations where parties cannot take actions to protect themselves from risk.99 In proving that the event is beyond the breaching party’s control, this party must have performed in good faith and must show that no reasonable steps could have been taken to avoid the event.100 If an extraordinary event occurs, it will be characterized as a force majeure event if the party’s failure to perform—not the event itself—

92. Id.
93. See Wilkinson, supra note 63, at 5.
95. Id.
96. Bergin, supra note 13, at 1.
97. Nestel, supra note 14, at 42.
98. Porter & Hedges LLP, supra note 16.
99. Seeley, supra note 11.
100. Delclerq, supra note 12, at 238.
could not have reasonably been prevented.\(^\text{101}\) Merely claiming that the event could have been prevented is immaterial.\(^\text{102}\) In \textit{Atkinson Gas Co. v. Albrecht}, \(^\text{103}\) the force majeure clause in a gas and oil lease was not triggered when the Railroad Commission required a well to be shut in because the company failed to comply with specific regulations that were within its reasonable control.\(^\text{104}\)

Another way a court can determine whether the nonperformance of the contract was reasonably beyond the control of the breaching party is to look at whether the parties contemplated the event at the time of contracting.\(^\text{105}\) Generally, the parties will be found to have either contemplated or not contemplated the supervening event.\(^\text{106}\) Although contemplation of the force majeure event is technically a subjective concept, it has been transformed into an objective concept through a reasonableness test.\(^\text{107}\) When a party’s performance is objectively impossible, it literally cannot perform due to circumstances beyond its control.\(^\text{108}\) However, when a party’s performance is only subjectively impossible, performance is technically possible, and a party may be responsible in some way for the nonperformance.\(^\text{109}\) In \textit{Perlman}, the party’s nonperformance was not excused because the event creating nonperformance was reasonably within its control and was foreseeable at the time of contracting.\(^\text{110}\) Furthermore, Perlman’s performance had not been rendered impossible or untenable—an important prerequisite needed to invoke a force majeure clause excusing nonperformance.\(^\text{111}\)

1. Foreseeability

Many force majeure clauses require an event to be unforeseeable at the time the contract is formed.\(^\text{112}\) This is because “under some circumstances, a party may have [actually] assumed the risk of an unforeseen force majeure

\(^\text{102}\) \textit{See} \textit{Atkinson Gas Co. v. Albrecht}, 878 S.W.2d 236 (Tex. App. 1994).
\(^\text{103}\) \textit{Id.} at 236.
\(^\text{104}\) \textit{Id.} at 241.
\(^\text{105}\) 2 \textit{BRUNER & O’CONNOR, BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 7.230.53 (2002).}
\(^\text{106}\) \textit{Id.}
\(^\text{107}\) \textit{Id.}
\(^\text{108}\) \textit{ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 305 (2004).}
\(^\text{109}\) \textit{Id.}
\(^\text{110}\) 918 F.2d 1244, 1248–49 (5th Cir. 1990).
\(^\text{111}\) \textit{Id.} at 1248, 1250.
\(^\text{112}\) Nestel, \textit{supra} note 14, at 42–43.
The concept of foreseeability, when used to invoke a force majeure clause as an excuse to performance, can often be controversial, especially if the event that causes nonperformance was foreseeable at the time of contracting. Many cases have held that a party cannot use a force majeure defense when the contract failed to cover a foreseeable risk. As a result, if steps were not taken to protect against the breach and the parties did not discuss the impact of the event on the parties’ contractual obligations, relief will not be granted to the party seeking to be excused.

Because a force majeure event may be generally foreseeable, but not specifically, the foreseeability test is based on the parties’ hindsight and is often ambiguous in its application. This is likely to be an issue following Hurricane Katrina and other natural disasters where the event itself may have been foreseeable, but not the unexpected mass destruction that inadvertently results from it. The possibility of such catastrophic flooding that occurred as a result of a Category 4 hurricane hitting New Orleans on August 29, 2005, was incredibly slim, despite the foreseeability that a Category 4 or 5 hurricane could hit New Orleans straight on.

Consequently, courts have expressed greater “concern for the reasonableness of the parties’ foresight” regarding specific circumstances rather than the objective foreseeability of the actual event occurring. This may work in favor of a party who is seeking to excuse its nonperformance under a contract as a result of Hurricane Katrina because, from an objective perspective, “over a period of many years, scientists had predicted that a strong storm could breach the levees,” and even a relatively weak storm coming from the right direction would push a wall of water into the heart of New Orleans. However, it is also possible that the parties could have reasona-

113. Bergin, supra note 13, at 1.
114. 2 BRUNER & O’CONNOR, supra note 105, § 7.230.53.
116. Id.
117. Id.
118. Bergin, supra note 13, at 1.
120. Bergin, supra note 13, at 1; see also Farnsworth v. Sewerage & Water Bd. of New Orleans, 139 So. 638, 641 (La. 1932) (holding that the contractor assumed the risk of the excessive rainfall, but not the actual flooding that was caused by the abnormal rain and created a delay for timely performance).
121. Bergin, supra note 13, at 2.
123. Id.
bly foreseen the event occurring and just decided that it was not important enough to address it under the clause in the contract.\textsuperscript{124} Likewise, the fact that natural disasters may not be entirely predictable cannot be held as "an excuse for careless [contract]" formation.\textsuperscript{125} The "common thread running through [the doctrine of foreseeability] is that contractual nonperformance will be excused . . . due to unforeseen circumstances or events that are materially different from the basic assumptions of the parties when the contract was formed."\textsuperscript{126}

2. Fortuitous Event

"A fortuitous event is one that could not have been reasonably foreseen at the time the contract was made"\textsuperscript{127} because it is an event that "occurs only by chance."\textsuperscript{128} Fortuitous events will only relieve a party of its obligations under a contract when performance of those obligations is actually impossible.\textsuperscript{129} Therefore, if the fortuitous event only makes performance more burdensome, nonperformance will not be excused under the force majeure clause.\textsuperscript{130}

In coastal regions of the United States that may be susceptible to being hit by hurricanes, it is important to note that there is authority which provides that "hurricanes are \textit{ipso facto}\textsuperscript{131} fortuitous events," and as a result, not reasonably foreseeable by parties at the time of contracting.\textsuperscript{132} However, if the contracting parties indicate in their agreement "that they foresaw the risk of a hurricane or flooding," then a hurricane that hits and causes flooding will not be held to be a fortuitous event.\textsuperscript{133} This is because, in some cases, a seemingly fortuitous event, such as a flood, will not excuse delays caused by the event if the flooding was was foreseeable.\textsuperscript{134} Because of the nature of a hurricane, disputes are likely to arise regarding whether the catastrophic flood-

\textsuperscript{124.} Bergin, supra note 13, at 2.
\textsuperscript{126.} 6 BRUNER & O'CONNOR, supra note 26, § 21:6.
\textsuperscript{127.} Lockridge & Cazenave, supra note 94.
\textsuperscript{128.} BLACKS LAW DICTIONARY 680 (8th ed. 2004).
\textsuperscript{129.} See id. Some state statutes may provide that a party is not liable to perform when nonperformance of obligations "is caused by a fortuitous event that makes performance impossible." L.A. CIV. CODE ANN. art. 1873 (1987).
\textsuperscript{130.} Lockridge & Cazenave, supra note 94.
\textsuperscript{131.} BLACKS LAW DICTIONARY 847 (8th ed. 2004). \textit{Ipso facto} means "[b]y the very nature of the situation." \textit{Id}.
\textsuperscript{132.} Lockridge & Cazenave, supra note 94.
\textsuperscript{133.} \textit{Id}.
\textsuperscript{134.} Gregory & Harris, supra note 34.
ing and damage that resulted from the hurricanes in 2005 were reasonably foreseeable at the time of contracting.\textsuperscript{135} Furthermore, like insurance companies following a natural disaster such as a hurricane, although the hurricane itself may not be reasonably foreseeable because it is an \textit{ipso facto} event, the flooding that resulted from it might have been considered foreseeable leaving parties with no relief when there is an impossibility to perform.\textsuperscript{136}

C. \textit{Effect of the Event on the Obligations Seeking to be Excused}

"There is no 'one size fits all' force majeure clause that will protect all [parties]."\textsuperscript{137} Because courts often construe terms present in a force majeure clause narrowly, many times the impossibility of a party to perform under a contract is not excused unless the event causing nonperformance is included "within the meaning of the clause."\textsuperscript{138} One of the most important questions is how "the contract define[s] force majeure."\textsuperscript{139} As shown in \textit{Maralex Resources, Inc. v. Gilbreath},\textsuperscript{140} if specific types of force majeure events are provided in the contract, a party will not be excused from its obligations if one of those events does not occur.\textsuperscript{141} Performance of the contractual obligations was not excused because the lease provided that the force majeure clause would only pertain to "external forces beyond the control of [the lease], such as [a] natural disaster[]."\textsuperscript{142} The event allegedly causing nonperformance of obligations was a result of internal mechanical operations, which was not addressed in the contract and was within the party's control.\textsuperscript{143}

Although many states rely on common law force majeure, others do not rely on common law concepts.\textsuperscript{144} In some states, force majeure depends upon what the contract defines it as, and therefore, parties affected by a natural disaster may be subject to whatever the contract provides if it is determined that another state law is applicable to the contract.\textsuperscript{145} For example, in

\begin{footnotesize}
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\item \textsuperscript{135} See Lockridge & Cazenave, supra note 94.
\item \textsuperscript{136} Hitch, supra note 21, at 2.
\item \textsuperscript{137} Porter & Hedges LLP, supra note 16.
\item \textsuperscript{138} HILLMAN, supra note 108, at 306.
\item \textsuperscript{140} 76 P.3d 626 (N.M. 2003).
\item \textsuperscript{141} Id. at 636.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id. at 636–37.
\item \textsuperscript{144} Porter & Hedges LLP, supra note 16.
\item \textsuperscript{145} Id.
\end{itemize}
\end{footnotesize}
Texas, if there is no force majeure clause in the contract, the party seeking excuse must still perform its obligations despite the fact that performance is impossible because of causes beyond the party’s control.\textsuperscript{146} This may become important for victims of Hurricane Katrina because Texas is so close by, and contracts could have been formed by parties from Louisiana with parties in the State of Texas.\textsuperscript{147}

Even though an event itself may excuse a party’s obligations under a contract because it falls within the language of the clause, if there was never a valid and enforceable contract at the time it occurred, the clause cannot be invoked.\textsuperscript{148} Furthermore, if an event does not directly affect a party’s performance, the obligations under the contract will not be excused.\textsuperscript{149} The blockade and traffic slow-down in one situation did not relieve a party of its contractual obligation for timely performance because the traffic did not trigger the force majeure clause.\textsuperscript{150} Sometimes an event may excuse obligations under the contract when a force majeure clause provides that upon the occurrence of an event there might be an exception regarding part of a party’s obligations.\textsuperscript{151} For example, although many leases extend the time for performance of the obligations when a force majeure event occurs, they often tend to carve out an exception for rent, by stating that the obligation will remain unaffected.\textsuperscript{152} This may affect people who cannot work to pay their rent because of the disaster occurring.\textsuperscript{153}

\subsection*{D. Notice to the Other Party to the Contract}

Sometimes, when stated in a contract, in order to successfully invoke a force majeure clause, the party seeking to be excused from contract obligations must give notice to the other party to the contract that the force majeure clause is being used as a defense to its nonperformance.\textsuperscript{154} Likely, this is because parties to a contract want to ensure that they will have an opportu-

\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} Goldstein v. Lindner, 648 N.W.2d 892, 899 (Wis. Ct. App. 2002). There was never a mining lease because the necessary permits were not obtained and therefore there was no performance that could have been prevented a party from occurring, thus allowing the party to invoke the force majeure clause under the contract. \textit{Id.} at 899–900.
\textsuperscript{149} Paulus & Meeuwig, supra note 51, at 306.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} Hitch, supra note 21, at 2.
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} Federal Response to Hurricane Katrina, supra note 2, at 9. Jobs have been scarce and the unemployment rate for evacuees of Hurricane Katrina was close to 28\%. \textit{Id.}
nity to cure or mitigate damages. Additionally, many clauses make notice a condition precedent to claiming force majeure or state that the failure to provide notice to the other party within the time given will waive a party’s claim to force majeure. When it is stated in a force majeure clause that notice must be given, often there are express time limits provided in the clause within which the party seeking to be excused must inform the other party in order to avail itself of the defense.

The consequences that follow from a party not providing notice within the time limitations are often a matter of contention. Often when the downside of nonperformance is greater, more importance is attached to a force majeure clause and thus it is more important for notice to be given. If notice is not given, the party will forfeit its right to invoke the force majeure clause and the clause may be rendered defective. The requirement for a party to give notice to the other party to the contract depends on “the form of the . . . clause itself; the relation of the clause to the whole contract; and general considerations of law.”

Furthermore, it is not enough that the entire world may be aware of the natural disaster that has occurred. If the contract specifies that notice must be given to the other party in the event one party wants to invoke the force majeure clause, then the party must be diligent in checking its contract because notice to the other party is what will trigger the force majeure protection. After Hurricane Katrina, in order for businesses to rely on force majeure as a defense to any breach of contract claims that might arise following the event, they were forced to post notices of force majeure on the internet to provide notice to everyone that either their performance would be delayed or that their offices would be closed.

155. Porter & Hedges LLP, supra note 16.
156. Id.
159. Porter & Hedges LLP, supra note 16.
160. Goldstein v. Lindner, 648 N.W.2d 892, 898 (Wis. Ct. App. 2002). In Goldstein, notice was never given to the other party, and therefore, even if the lease had been valid and enforceable, the lack of notice prevented the clause from being triggered. Id.
161. Godwin & Roughton, supra note 158. Many cases hold that the “[f]orce [m]ajeure clause [is] defective for being out of time.” Id.
162. Id.
163. Richards Butler, supra note 68.
164. Id. “[J]ust] because everyone knows about [Hurricane] Katrina, [doesn’t mean] notice provisions can be disregarded.” Bergin, supra note 13, at 1.
165. Wilkinson, supra note 63, at 6.
IV. FEELING THE EFFECTS: COMMON CONTRACTS AFFECTED

When a natural disaster occurs, contracts will inevitably be disrupted. 166 In the minutes, hours, and days following a disaster, cities, streets, ports, and rail lines may be closed, thereby preventing access in or out of the area. 167 This could lead to longer distances needing to be traveled, traffic congestion, and slower distribution. 168 After a hurricane or other natural disaster, parties may claim force majeure based on an unavailability of labor or goods. 169 Because “force majeure clauses are very common in construction and supply contracts,” 170 a party will likely try to invoke the clause after a disaster results due to a loss of power, loss of surface transportation, and damage or loss to business structures and facilities. 171

A. The Shipping Industry

Following a disaster such as Hurricane Katrina, there was concern that ports would be affected by a shifting of sandbanks and shipping channels leading through the delta to the Mississippi as a result of the high winds during the storm. 172 If this were to occur, 6000 vessels and rail hubs would be impacted by the inability for ships to reach their required destinations. 173 Consequently, the weekend after Hurricane Katrina hit, over 100 vessels were waiting to enter the Mississippi, while others were trapped up the river. 174 Force majeure clauses become important in such circumstances, which end up preventing timely performance either because carriers must wait until they can gain access to shipping routes, or they are forced to use alternate routes that will make delivery trips longer. 175 When the Port of New Orleans—a port which is used for more than half of the nation’s grain exports—was closed, shippers were forced to try to use railways or trucks to

167. See generally id. at 5.
168. Id.
169. Porter & Hedges LLP, supra note 16.
170. Bund, supra note 38, at 412.
171. Savaglio & Freitag, supra note 166, at 9.
172. Richards Butler, supra note 59.
173. Id.
174. Id.
175. Lisa Girion, Businesses Seek a Legal Escape from Terrorism, L.A. TIMES, Oct. 14, 2001, at C1. Shippers were forced with having to make longer trips in order to satisfy their delivery obligations during the Suez Canal Crisis. Id.
transport goods.\textsuperscript{176} However, this provided more problems for suppliers when trying to meet their time schedules after Hurricane Katrina, because two of the biggest railroads in the eastern United States could not reach New Orleans and Alabama.\textsuperscript{177} This caused trains to be halted on 500 miles of track, which is typically used by fifty freight trains a day.\textsuperscript{178}

Fortunately, force majeure clauses allow distribution and shipping companies to “avoid [large] penalties for failing to deliver products [because of] circumstances beyond [their] control.”\textsuperscript{179}

If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller may allocate its available supply among itself and all of its customers, including those not under contract, in an equitable manner. Such deliveries so suspended shall be cancelled without liability, but the contract shall otherwise remain unaffected.\textsuperscript{180}

Likewise, businesses and suppliers that are parties to sales contracts, and that become affected by a natural disaster, may be shielded from “failing to deliver products in the event [that their] factory [or facility] is unusable after a storm.”\textsuperscript{181} For example, after Hurricane Rita hit the coastline, many businesses and communities were still feeling the devastation of Hurricane Katrina and therefore some manufacturers were forced to shut down their plants which substantially reduced the amount of product available for manufacturing other items.\textsuperscript{182}

\textbf{B. Gas and Oil Production}

Gas and oil disruptions and shortages can affect many areas of the United States.\textsuperscript{183} After Hurricanes Katrina, Rita, and Wilma hit the Gulf Coast in the Fall of 2005, pipelines transporting refined products either “had

\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{180} MISS. CODE ANN. § 75-2-617 (2002).
\textsuperscript{181} Girion, \textit{supra} note 175.
\textsuperscript{182} Kaskey, \textit{supra} note 179. A plant used to produce more than 55% of the material used to make plastic car parts and bottle caps was shut down because of Hurricane Rita. \textit{Id.}
\textsuperscript{183} Storm's Wake: Hurricane Likely to Cause Harm Beyond Areas of Devastation, \textit{THE PRESS DEMOCRAT}, Sept. 4, 2005, at G2. “Katrina could have a wider impact on the nation than any other natural disaster in history.” \textit{Id.}
service outages or through-put reductions.”\textsuperscript{184} The disruption can be attributed to the destruction of 111 production platforms and 52 platforms being seriously damaged.\textsuperscript{185} Additionally, over a million barrels of oil per day were shut in as a result of the gulf hurricanes, amounting to 25\% of the United States source for crude oil production and 20\% of natural gas output being affected.\textsuperscript{186} This likely impacted many contracts because “[g]as production can [only recover] as fast as transport facilities return to service.”\textsuperscript{187}

In a gas and oil contract, a force majeure clause is used to relieve a lessee from the “harsh termination of the lease due to circumstances beyond its control [and which] would make performance untenable or impossible.”\textsuperscript{188} However, a gas and oil lease could also specify through a provision in the contract, that the lease cannot be terminated by a force majeure event occurring.\textsuperscript{189} If there is a force majeure provision in the contract, a force majeure clause must be read “in light of the whole contract.”\textsuperscript{190} When a contract involves a sale or supply of oil, coal or natural gas, a problem might arise when trying to invoke the clause because the contracts tend to include both a “take-or-pay” provision and a force majeure clause.\textsuperscript{191} Generally, a party’s performance under a gas and oil lease all depends on the degree to which the take-or-pay provision affects how the force majeure clause will be interpreted.\textsuperscript{192} In a take-or-pay provision, “a party can either . . . take the minimum purchase obligation of the oil, coal or natural gas, or . . . pay the minimum bill as determined by the contract.”\textsuperscript{193} In addition to the impact of the take-or-pay provision on the force majeure clause, courts have held that it is not proper to inject terms into a gas and oil lease when the force majeure clause does not specify that the event excusing performance must “be unforeseeable or beyond the control of the lessee,” which may help parties faced with the argument of whether the event was actually foreseeable.\textsuperscript{194}

Furthermore, a force majeure or similar clause may be included in an agreement to provide for a temporary cessation of production following expi-

\textsuperscript{184} Lawrence Kumins & Robert Bamberger, \textit{Oil and Gas Disruption from Hurricanes Katrina and Rita}, CONG. RES. REP., April 6, 2006, at 3.
\textsuperscript{185} Id. at 2.
\textsuperscript{186} Id. at 1.
\textsuperscript{187} Id. at 8.
\textsuperscript{188} 38 AM. JUR. 2D Gas & Oil § 91 (1999).
\textsuperscript{189} Id.
\textsuperscript{190} Delclerq, supra note 12, at 228.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id. (emphasis omitted).
\textsuperscript{194} 38 AM. JUR. 2D Gas & Oil § 91.
ration of the primary term.\footnote{Id. § 239.} If this is the case, “the lessee must exercise diligence to overcome the conditions that result in a cessation of the production, and resume production within a reasonable time.”\footnote{Id.} Ordinarily, a cessation in production will only be considered temporary in order to avoid termination of the contract when it is caused by a sudden stoppage of the well.\footnote{See id.}

C. Transportation

Transportation services, such as airlines, cruise ships, buses, and trains, are often suspended or delayed for a period of time after a natural disaster occurs because specific routes and departure-and-arrival stations may be closed.\footnote{See generally UNIVERSITY OF MISSISSIPPI CIVIL LEGAL CLINIC ET AL., HURRICANE KATRINA: LEGAL ISSUES § 15, http://katrinalegalrelief.org/katrina_manual.pdf (last visited May 27, 2007) [hereinafter HURRICANE KATRINA: LEGAL ISSUES].} After a hurricane, flights may be suspended until it is safe to fly travelers into an affected area.\footnote{See Ted Jackovics, South Florida Air Traffic: Still Reeling from Wilma, TAMPA TRIB., Oct. 26, 2005, at 1. Air travel was suspended after hurricane Wilma because of power outages at the airports in the areas affected. Id.} Additionally, rail transportation may be stopped for days, disrupting the normal schedule; also cruise ships may have to cancel their trips due to closed ports, and subsequently be forced to operate out of new ports as a result of the disaster occurring.\footnote{HURRICANE KATRINA: LEGAL ISSUES, supra note 198, § 15.}

Generally, because travelers’ reservations and tickets for airlines constitute enforceable contracts,\footnote{Ed Perkins, Where the Little Guy Has a Fair Chance to Win, THE RECORD, Dec. 4, 2005, at T3.} if an airline fails to perform under the contract the ticket purchaser may be able to sue for breach of contract.\footnote{Id.} However, this option is only available to ticket holders when an airline’s nonperformance is due to something “within the airline’s control”\footnote{George Hobica & Kim Liang, Airline Rules for Contract of Carriage Have Changed, DAILY HERALD, Aug. 28, 2005, at 2.} and not due to weather related conditions or force majeure events.\footnote{Perkins, supra note 201.} Even if a traveler is entitled to compensation, if he decides to accept the compensation that the airline immediately provides, then the right to seek additional compensation in the future through a suit in small claims court will be waived.\footnote{Id.}
When a force majeure event occurs and a person purchases a ticket prior to the event taking place, that passenger may or may not be able to reschedule their flight or get a complete refund without penalties.\textsuperscript{206} Even though most airlines accommodated rescheduling and refunds without penalties after Hurricane Katrina, they were subject to conditions and restrictions.\textsuperscript{207} Because travel policies for rescheduling and refunds are not federally regulated,\textsuperscript{208} when travel suppliers put together refund and ticket policies for flights to affected areas after the hurricane and for the months ahead, the policies differed from one carrier to the next.\textsuperscript{209} Consequently, it may be easier for travelers to re-book their flights for a later date than to cancel altogether and get their money back.\textsuperscript{210} This was a common problem following the September 11 terrorist attacks because ticket holders were skittish about flying.\textsuperscript{211} However, travelers seeking a full refund as a result of the force majeure event were out of luck five months later because there was no longer an immediate terrorist threat to air travel.\textsuperscript{212}

Similarly, it does not matter if the purpose of buying the ticket and traveling to the desired destination becomes pointless after the disaster occurs because in most situations, airlines will only refund the full ticket price if the scheduled flight did not operate.\textsuperscript{213} As a result, even though flights were providing service to New Orleans two months after Hurricane Katrina, if a person booked her ticket with the plan of having a wedding, she would likely only get an opportunity to reschedule, despite the fact that the purpose of her trip could not have taken place due to the catastrophic damage in the city.\textsuperscript{214} Additionally, even when some airlines revised their policies for passengers scheduled to travel into or out of New Orleans, rescheduling or a full refund was limited to a specified period.\textsuperscript{215} Some airlines stipulated that rescheduling and refunds were only applicable to flights scheduled from August 25, 2005 to September 30, 2005,\textsuperscript{216} and others provided that the refund or re-

\textsuperscript{206}. Hurricane Katrina: Legal Issues, supra note 198, § 15.1.
\textsuperscript{207}. Id.
\textsuperscript{208}. Id.
\textsuperscript{209}. Katrina Postponed Wedding, Leaving Plane Tickets up in Air, USA Today, Jan. 13, 2006, at D3.
\textsuperscript{210}. See Girion, supra note 175.
\textsuperscript{211}. Id.
\textsuperscript{213}. Katrina Postponed Wedding, supra note 209.
\textsuperscript{214}. See id.
\textsuperscript{215}. See United Airlines Revises Ticket Policies for New Orleans Area Travel Affected by Hurricane Katrina, PR Newswire, Aug. 31, 2005, at 1.
\textsuperscript{216}. Id.
scheduling had to occur within 180 days of when the original flight was scheduled, and that it only covered flights through 2005 and not after. 217

D. *Power Companies*

Storms and natural disasters can potentially devastate power infrastructures218 and when this happens parties may wish to find out what can be done about their loss of electricity. After Hurricane Katrina, there were about two and a half million people without power219 and a few months later, following Hurricane Wilma, there were over three million people without power.220 However, despite the number of people without electricity, power companies are not insurers of continuous service if the interruption is beyond their control.221

Generally speaking, an electric power company which contracts to supply current, although not an insurer of service, has an obligation to provide a patron with adequate and continuous service, arising either from express contract, regulatory enactments, or implied contract, and the supplier is, ordinarily at least, subject to a duty to exercise reasonable care to fulfill such an obligation.222

Furthermore, when there is no force majeure provision in the contract defining the company’s liability, and a consumer is trying to prove that the power company is liable, the consumer must show that the power company was negligent in some way when unintended interruptions occurred.223

Even if liability is based partly on the negligence of the power supplier or entirely on the contract, courts have typically held power companies not liable, and have relieved them from any penalties resulting from unintended interruptions “either as a matter of general principle or because of an express contractual or regulatory provision, where the interruptions resulted from an ‘act of God’ or from circumstances beyond the control of the supplier.”224 In

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217. *See Katrina Postponed Wedding, supra* note 206.
219. *Id.*
223. *Id.*
224. *Id.*
Florida Power Corp. v. City of Tallahassee, the Supreme Court of Florida held that a hurricane hitting the city for a period of hours was considered an act of God, thereby relieving the company from the failure to deliver power. Because the power company's failure to deliver power was directly traceable to the hurricane and one of the only justifiable reasons for an interruption, there was no breach of contract for which the power company could be held liable. Similarly, courts have not even definitively held a power company to be liable for an intentional interruption as a result of a maintenance test when there was a force majeure clause in the contract.

E. Construction Projects

Although unexpected events such as natural disasters may not have a direct effect on construction projects, the events could directly affect costs associated with a project. Hurricane Katrina dramatically increased the cost of materials for construction projects and the time needed to obtain the materials for those projects. Additionally, material shortages may cause project delays and increased costs for completion. Despite a contractor's inability to control the weather, nonperformance under the contract will not be excused because they can plan for what happens when an uncommon or unforeseen event occurs.

In many construction contracts, a force majeure clause will not relieve a contractor of its obligation to perform, unless the event preventing performance was unforeseeable at the time the parties formed the contract. When there is no force majeure clause in the contract, the risk of loss for any unexpected or unforeseen events generally falls on the contractor who is providing materials and labor. This is because when performance could be jeopardized by a particular event, the omission of that event and its effects on the

225. 18 So. 2d 671 (Fla. 1944).
226. Id. at 675.
227. Id. at 674–75.
228. Id. at 675.
229. Liability of Electric Power, supra note 222, at 608.
231. See id.
233. See MCAI, supra note 230.
234. Dirik, supra note 139.
235. See MCAI, supra note 230.
parties' contractual obligations may result in no relief being provided.\textsuperscript{236} However, many times even when there is a force majeure clause in the contract, a contractor's remedies will be limited after the force majeure event occurs.\textsuperscript{237} For instance, a contractor could be allowed a time extension for delays created by the force majeure event, but he could also "be prohibited from recovering any costs" resulting from the delay.\textsuperscript{238}

V. CONCLUSION

"Even if protection from force majeure events exists, the clause may not be captioned 'force majeure' or include this term."\textsuperscript{239} Therefore, it is important to know what they will look like so that force majeure and similar clauses can be reviewed periodically by parties.\textsuperscript{240} This will help make parties to contracts aware of what events are likely to be considered "force majeure" and whether notice must be given in order to invoke the clause if the event does fall within the terms of the clause.

Because of the magnitude of the 2005 hurricane season and other natural disasters across the United States, the increasing importance of placing force majeure clauses in contracts is becoming known.\textsuperscript{241} Additionally, because the language in the clauses plays such a huge part in a party's relief, parties no longer have the ability to rely on any common law concepts to fill in the gaps.\textsuperscript{242}

\textsuperscript{236} See Bell, \textit{supra} note 232.
\textsuperscript{237} See MCAI, \textit{supra} note 230.
\textsuperscript{238} Id.
\textsuperscript{239} Nestel, \textit{supra} note 14, at 42.
\textsuperscript{240} Godwin & Roughton, \textit{supra} note 158.
\textsuperscript{241} Porter & Hedges LLP, \textit{supra} note 16.
\textsuperscript{242} Id.