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FORCE MAJEURE, VIS MAJOR, IMPOSSIBILITY, AND IMPRATICABILITY UNDER OHIO LAW BEFORE AND AFTER COVID-19

Laura Gates

I. INTRODUCTION

It is a tale as old as time—when the economy thrives, businesses grow, and deals are made. Transactional attorneys draw up contracts, affix signatures, and give handshakes and felicitations all around. But just as Isaac Newton warned us that what goes up, must come down, so too does the economy inevitably falter. When this happens, contracts fail—suppliers fail to deliver goods, businesses lay off workers, and litigators circle the carnage like buzzards.¹ In the cases where things fall apart dramatically, judges must interpret these failed contracts to determine what is owed and to whom.

One recent example of this cycle occurred during the COVID-19 pandemic of 2020.² However, this pandemic is far from the first time that this cycle of boom and bust has happened.³ To protect business transactions and mitigate risk in case of disaster, contract drafters have developed several boilerplate clauses, including force majeure clauses.⁴ Furthermore, courts in every jurisdiction, including Ohio, have adopted methods for interpreting these provisions. In addition, the common law doctrines of impossibility, impracticability, and vis major give parties some grace for nonperformance under certain unforeseen circumstances.⁵

While courts have grappled with disasters and broken contracts in the past, the COVID-19 pandemic created cataclysmic and unprecedented effects for large sectors of the American economy.⁶ It remains to be seen exactly how these doctrines and interpretations will stay consistent or change over time as Ohio courts reopen, and the inevitable flood of litigation moves through the court system.

1. Jeremiah A. Ho, *Why Flexibility Matters: Inequality and Contract Pluralism*, 18 U.C. DAVIS BUS. L. J. 35, 40 (2018).

2. Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48 (2020).

3. See *Hanover Petroleum Corp. v. Tenneco*, 521 So. 2d 1234 (La. Ct. App. 1988) (a breach of contract dispute resulting from the recession of the early 1980s and the 1979 energy crisis); *Great Lakes Gas Transmissions Ltd. P'ship v. Essar Steel Minn., LLC*, 871 F.Supp.2d 843 (D. Minn. 2012) (a breach of contract dispute resulting from the Great Recession of 2008).

4. 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2020).

5. 30 WILLISTON ON CONTRACTS § 77:6 (4th ed. 2020).

6. Lauren Bauer et al., *Ten Facts about COVID-19 and the U.S. Economy*, BROOKINGS INSTITUTE (Sept. 2020), https://www.brookings.edu/wp-content/uploads/2020/09/FutureShutdowns_Facts_LO_Final.pdf.

Optimistically, one could argue that the need for such analysis is waning. Throughout the end of 2020 and into 2021, more and more pharmaceutical companies have developed COVID-19 vaccines, which have and will continue to normalize life. As of February 2021, two pharmaceutical companies have developed vaccines (which have received emergency authorization) that could be over 90 percent effective against COVID-19.⁷ However, even with approval and distribution of vaccines, the aggregated effects of COVID-19 will not disappear overnight. Cases about this period of time will likely come to the courts for years to come, and it will be critical for courts to develop sound interpretative principles.

This Comment assesses the past, present, and future of force majeure, impossibility, impracticability, and related doctrines under Ohio law in light of COVID-19. Section II examines the history of these doctrines in Ohio courts, as well as the history of the COVID-19 pandemic and certain law and economics principles. Section III analyzes how Ohio courts likely *would* apply these doctrines and interpretations (as they currently exist) to cases involving breach of contract due to COVID-19, and also how they *should* apply these doctrines and interpretations.

II. BACKGROUND

Understanding how Ohio courts might apply different contract defenses and excuses for nonperformance in light of the COVID-19 pandemic requires both an understanding of the impact of COVID-19 on businesses in Ohio, and of how Ohio courts have applied these defenses and excuses for nonperformance prior to the pandemic. Part A of this Section discusses the impact of COVID-19 on businesses in Ohio. Part B of this Section explores how Ohio courts have applied various contract defenses for nonperformance. Finally, Part C of this Section examines the methods that courts and legal scholars have used to determine how to distribute the costs of contract breach.

A. COVID-19 and the Business Landscape in Ohio

COVID-19 has had a devastating impact on both public health and the

7. Carolyn Y. Johnson & Aaron Steckelberg, *What You Need to Know About the Moderna and Pfizer Coronavirus Vaccines*, WASHINGTON POST (Nov. 17, 2020), <https://www.washingtonpost.com/health/2020/11/17/covid-vaccines-what-you-need-to-know/?arc404=true>.

economy, in Ohio⁸ and around the world.⁹ The first reported case in Ohio was on March 9, 2020,¹⁰ and the first reported death was on March 19, 2020¹¹ (although the true first cases and deaths likely happened earlier in 2020).¹² As of February 22, 2021, there have been 821,016 total cases and 14,351 total deaths from COVID-19 in Ohio.¹³

In an effort to “flatten the curve,”¹⁴ Governor Mike DeWine and former Ohio Department of Health Director Dr. Amy Acton acted swiftly, producing dramatic economic consequences.¹⁵ From March 23, 2020 to April 30, 2020, there was a statewide stay-at-home order that enforced the temporary closure of all nonessential businesses.¹⁶ Beginning on May 1, 2020, and continuing throughout the summer and fall, businesses were gradually allowed to reopen, as long as they complied with restrictions like capacity limitations, social distancing, mask-wearing, and sanitization.¹⁷

Determining to what extent the stay-at-home order caused the recession that followed, and to what extent a recession would have resulted regardless of government action in Ohio and beyond, is outside of the scope of this Comment. However, it is undeniable that the COVID-19 pandemic has resulted in the worst economic downturn that the world has

8. Iryna Demko et al., *From Economic Slowdown to Recession*, URBAN PUBLICATIONS (May 2020), https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2653&context=urban_facpub&ga=2.12481776.53929860.1606673871-688431904.1606673871.

9. *Global Economic Prospects*, WORLD BANK GROUP (June 2020), <https://www.worldbank.org/en/publication/global-economic-prospects>.

10. Emily Bamforth, *Coronavirus Timeline: How the Coronavirus Spread from Cases in China to Ohio in Less than Three Months*, CLEVELAND.COM (Mar. 13, 2020), <https://www.cleveland.com/news/2020/03/coronavirus-timeline-how-the-coronavirus-spread-from-cases-in-china-to-ohio-in-less-than-three-months.html>.

11. Gabe Rosenberg, *Coronavirus in Ohio: State Confirms First Death from COVID-19*, WOSU (Mar. 20, 2020), <https://radio.wosu.org/post/coronavirus-ohio-state-confirms-first-death-covid-19>.

12. Rich Exner, *State Now Identifies 302 Cases Pre-Dating First Confirmations of Coronavirus in Ohio March 9*, CLEVELAND.COM (June 11, 2020), <https://www.cleveland.com/datacentral/2020/06/state-now-identifies-302-cases-pre-dating-first-confirmations-of-coronavirus-in-ohio-march-9.html>.

13. *Coronavirus (COVID-19)*, OHIO DEP'T OF HEALTH (last visited Nov. 29, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home>.

14. “Flattening the curve” is a term in public health, coined by Dr. Howard Markel, referring to an effort to decrease spikes in the number of infected people who need intensive medical care, so as to lessen the burden on healthcare workers.

15. Jennifer Edwards Baker, *Can Ohio's small businesses recover from coronavirus economic shutdown?* FOX 19 (Apr. 8, 2020), <https://www.fox19.com/2020/04/07/can-ohios-small-businesses-recover-coronavirus-economic-shutdown>.

16. *Amended Director's Stay-at-Home Order*, OHIO DEP'T OF HEALTH (Apr. 2, 2020), <https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-At-Home-Order-Amended-04-02-20.pdf>.

17. *Business/Employers – Covid-19 Checklist*, OHIO DEP'T OF HEALTH (July 21, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/checklists/english-checklists/Businesses-Employers-COVID-19-Checklist>.

seen since the Great Recession.¹⁸ Moreover, the effects of this pandemic—both social and in terms of public health—have not been felt evenly across all sectors and socioeconomic groups. Although the demand for goods¹⁹ and housing²⁰ has increased, the overall demand for services—including everything from hotels, to air travel, to retail, to entertainment—has sharply declined.²¹

This is especially apparent in the data on jobs growth, which reflects the imbalance between sectors described above.²² By October 2020, the total nonagricultural labor force in Ohio was down 6.34 percent from the prior year.²³ However, broken down by sector, employers involved in the production of goods experienced only a 4.2 percent annual decrease in employment, while employers involved in the provision of services experienced a 6.77 percent annual decrease.²⁴ Furthermore, these changes in the aggregate were incredibly sharp. The chart below shows the drastic decrease in employment relative to the last business cycle peak in the United States, as compared to prior recessions.²⁵

18. Gita Gopinath, *The Great Lockdown: Worst Economic Downturn Since the Great Depression*, IMF (Apr. 14, 2020), <https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression/>.

19. This is likely because of the increase of leisure consumption inside the home, rather than in the form of services outside the home. See *The Pandemic Economy in Seven Numbers*, NEW YORK TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/19/podcasts/the-daily/coronavirus-pandemic-us-economy-unemployment.html?showTranscript=1>.

20. This is likely because of the sharp increase of at-home schooling and at-home work, as well as ultra-low interest rates. See *id.*

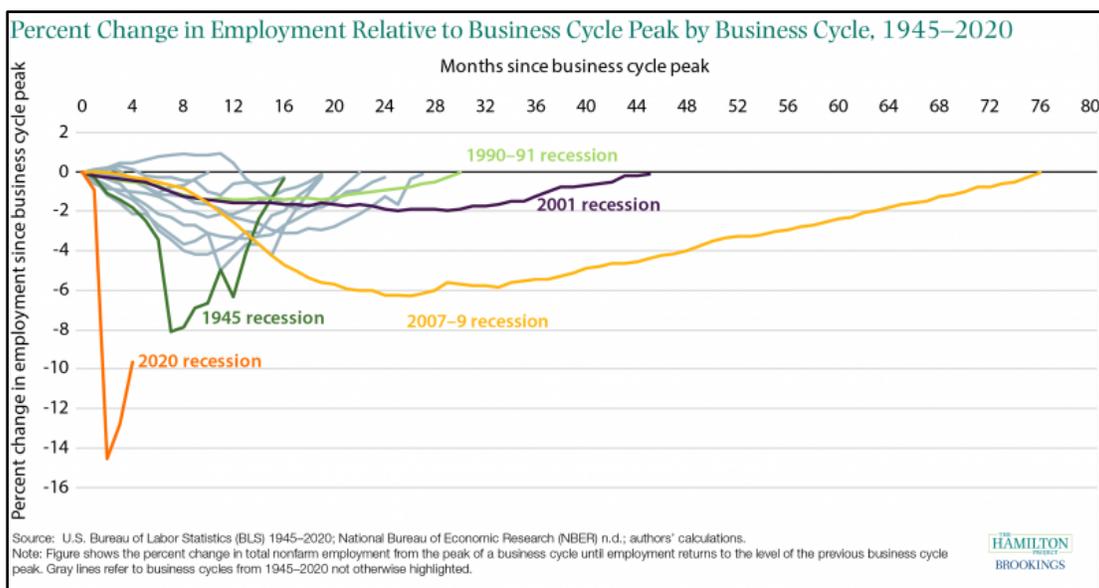
21. *Id.*

22. *Id.*

23. *Ohio Labor Market Information*, OHIO DEP'T OF JOB AND FAM. SERVS (Nov. 2020), <https://ohiolmi.com/Home/page85481/1/size85481/48?page85481=1&size85481=48#>.

24. *Id.*

25. Fred Dews, *Charts of the Week: Impacts of the Coronavirus Recession*, BROOKINGS INSTITUTE (Sept. 11, 2020), <https://www.brookings.edu/blog/brookings-now/2020/09/11/charts-of-the-week-impacts-of-the-coronavirus-recession>.



These negative economic conditions will likely lead many Ohio businesses and individuals to be unable or unwilling to perform their contractual obligations. Furthermore, it is possible that contract breaches, like the economic downturn itself, will not happen equally across all sectors and all types of parties. This Comment discusses the defenses and excuses that may allow these parties to escape contract performance in the next Part of this Section.

B. Contract Defenses Generally

Contracting parties have historically been afforded several defenses for nonperformance of a contract under unusual circumstances. This Part focuses on one such defense that can often be found within the contract itself, a force majeure clause, and three others that have developed at common law, vis major, impossibility, and impracticability. This Part outlines how these doctrines have been applied and interpreted under Ohio law.

1. Force Majeure

The general purpose of a force majeure clause is to excuse nonperformance of contractual obligations in light of an unforeseeable extraordinary event that would make performance impossible or

impracticable.²⁶ Different jurisdictions take different approaches to interpreting these clauses in litigation, answering questions such as: (1) Should a force majeure clause specifically define what constitutes a force majeure event? (2) How strictly should foreseeability be interpreted? (3) Should courts require that the force majeure event made contract performance impossible, or merely impracticable? (4) Can the nonperforming party be negligent and still invoke the force majeure clause as a defense?²⁷ The common law interpretation of force majeure clauses is a relatively new concept for Ohio courts.²⁸ Nevertheless, Ohio courts have answered some of these interpretation questions, which are outlined below.

First, courts in different jurisdictions must decide how specifically a force majeure clause must define a qualifying event. As with other contract provisions, Ohio courts first look to the language of a force majeure clause to determine whether it applies in a given situation.²⁹ Thus, if a contract's force majeure clause includes an enumerated list of specific qualifying events, the clause will be construed narrowly to cover only those events listed, as well as events that are sufficiently similar under the rule of *eiusdem generis*.³⁰ *Eiusdem generis* refers to the principle where, if a law lists classes of people or things, that list is used to clarify the other items within it.³¹ For example, if a force majeure clause listed "war, abnormal weather conditions, and anything beyond the reasonable control of the parties," *eiusdem generis* would dictate that the catchall may include events similar to war and abnormal weather conditions like terrorist attacks or earthquakes but may not include dissimilar events like labor strikes or economic downturns.³²

A lack of similarity between the listed force majeure events and the actual event at issue was a key factor in an Ohio Court of Common Pleas' analysis of the force majeure clause in *Dunaj v. Glassmeyer*. In *Dunaj*, a hotel management company sued the owners of two hotels for reinstatement of the company as manager of the hotels pursuant to an earlier management agreement.³³ The management agreement contained

26. WILLISTON, *supra* note 4.

27. *Force Majeure State Case Law Summary Chart: Overview*, PRACTICAL LAW COMMERCIAL TRANSACTIONS, Westlaw (database updated October 5, 2020).

28. *Haverhill Glen, LLC v. Eric Petroleum Corp.*, 67 N.E.3d 845, 850 (Ohio Ct. App. 2016).

29. *Id.*

30. *United Arab Shipping Co. v. PB Express, Inc.*, No. 96162, 2011 WL 3860639 (Ohio Ct. App. Sept. 1, 2011).

31. Damian McNair, *Force Majeure Clauses*, DLA PIPER (2011), <https://www.dlapiper.com/~media/files/insights/publications/2012/06/iforce-majeurei-clauses/files/forcemajeureclauses/fileattachment/forcemajeureclauses.pdf>.

32. *Id.*

33. *Dunaj v. Glassmeyer*, 580 N.E.2d 98, 99 (Ohio C.P. 1990).

a force majeure clause, which allowed that nonperformance may be excused in the following circumstances:

When prevented by any ‘force majeure’ cause beyond the reasonable control of such party (except financial inability of such party) such as strike, lockout, breakdown, accident, compliance with an order or regulation of any governmental authority, failure of supply or inability, by the exercise of reasonable diligence, to obtain supplies, parts or employees necessary to perform such obligation, or war or other emergency.³⁴

The hotel owners argued that the termination of the plaintiff management company had been warranted, because the hotel management company had not met certain cash flow benchmarks.³⁵ The plaintiff countered that the force majeure clause in their management agreement, which listed specific events like “fire, war, strikes, and acts of God,” excused their inability to meet these goals.³⁶ The qualifying force majeure event, according to the plaintiffs, was shifting economic conditions caused by increased competition from other hotels.³⁷ The court determined that because the force majeure clause had elucidated specific catastrophic events, and the increased economic competition was not sufficiently similar to any of them,³⁸ the plaintiff’s nonperformance was not excused.³⁹

Alternatively, if the force majeure clause does not list specific events and is written broadly, Ohio courts will construe the clause broadly.⁴⁰ In *Haverhill Glen, LLC v. Eric Petroleum Corp.*, lessors of oil and gas rights sued the lessee, seeking a declaratory judgment that the lease had expired due to the lessee’s non-production.⁴¹ The lease contained a force majeure clause reading “[w]hen drilling, reworking, production or other operation are prevented or delayed by inability to obtain necessary access or easements, or by any other cause not reasonably within Lessee’s control, this lease shall not terminate because of such prevention or delay.”⁴² The lessee argued that a qualifying force majeure event—the owner of the surface rights prohibiting the lessee’s access to the property to extract the oil and gas—had caused and thereby excused its nonperformance under the contract.⁴³ An Ohio Court of Appeals determined that the catch-all

34. *Id.* at 100.

35. *Id.*

36. *Id.*

37. *Id.*

38. In fact, the plaintiffs’ issue was arguably closer to a “financial inability” carve out, also in the clause, than to any of the listed qualifying force majeure events. *Id.*

39. *Id.*

40. *Haverhill Glen, LLC v. Eric Petroleum Corp.*, 67 N.E.3d 845, 850 (Ohio Ct. App. 2016).

41. *Id.* at 848.

42. *Id.* at 846-847.

43. *Id.* at 849.

phrase “any other cause not reasonably within Lessee’s control” could be construed to describe the event in question because of how broadly the clause as a whole was written.⁴⁴ Therefore, the lessee’s nonperformance was excused.⁴⁵

Second, some jurisdictions consider how foreseeable an event must be in order for performance to be avoided under a force majeure clause.⁴⁶ A party’s mistaken assumptions about future events or economic outcomes do not excuse non-performance under a force majeure clause in Ohio.⁴⁷ To some extent, parties are expected to foresee economic fluctuations and downturns and factor them into contract formation.⁴⁸

For example, in *Stand Energy Corp. v. Cinergy Services, Inc.*, an electricity broker sued a purchaser, seeking a declaratory judgment that the force majeure clause in their interchange agreement excused the broker’s failure to deliver electrical power.⁴⁹ The force majeure clause specifically excused nonperformance resulting from “any cause or event not reasonably within the control of the Party claiming Force Majeure, and not attributable solely to such Party’s neglect, including but not limited to. . . [an] act of God or the public enemies, breakage or accident to machinery [or] transmission lines. . .”⁵⁰ The failure to deliver electricity transpired after the broker’s suppliers refused to supply the requisite electrical power, and the broker could only find a replacement source at an inflated cost.⁵¹ The court determined that the inability to purchase a commodity at an expected price was not a force majeure event, because mere economic hardship could not be considered such an event.⁵²

Third, courts in different jurisdictions will consider whether the force majeure event must make performance impossible or impracticable in order to excuse nonperformance.⁵³ Ohio courts have determined that a force majeure clause cannot excuse nonperformance merely because performance became difficult, burdensome, or economically disadvantageous.⁵⁴

44. *Id.* at 850.

45. *Id.*

46. *See* *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F.Supp.2d 1099, 1111 (C.D. Cal. 2001).

47. *Dunaj v. Glassmeyer*, 580 N.E.2d 98, 101 (Ohio C.P. 1990).

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

49. *Id.* at 456.

50. *Id.* at 455.

51. *Id.*

52. *Id.* at 457.

53. *See* *Home Devco/Tivoli Isles LLC v. Silver*, 26 So.3d 718, 722 (Fla. Dist. Ct. App. 2010) (“[F]orce majeure clauses broader than the scope of impossibility are enforceable under Florida law”); *but see* *Sunseri v. Garcia & Maggini Co.*, 148 A. 81, 82 (Pa. 1929) (holding that Pennsylvania courts should only apply force majeure clauses to impossible events).

54. *Stand Energy*, 760 N.E.2d at 457.

For instance, in *United Gulf Marine, LLC v. Continental Refining Co.*, a fire occurred at the defendant's oil refinery, which the defendant argued was a force majeure event excusing it from taking truck shipments of product from the plaintiff pursuant to their original agreement.⁵⁵ The parties had a force majeure clause in their agreement stating:

[D]ue to acts of God . . . fires. . . transportation difficulties. . . other industrial disturbances, or for any other cause or causes beyond its reasonable control, it is agreed that on such party's giving notice and full particulars of such force majeure to the other party, the obligations of the party giving notice shall be suspended. . . The term force majeure shall not apply to those events which merely make it more difficult or costly for Seller or Buyer to perform their obligations hereunder.⁵⁶

An Ohio Court of Common Pleas determined that the original contract had not required that the defendant actually be physically able to process the product—the force majeure clause would only excuse performance if it became impossible for the defendant to accept shipments of the product.⁵⁷ The defendant's trucks had not been damaged, so although taking new deliveries might have been impractical for the defendant, it was not legally impracticable or impossible.⁵⁸

Fourth, different jurisdictions have different requirements for how faultless the nonperforming party must be in order to invoke a force majeure clause. In Ohio, the nonperforming party must prove that the force majeure event in question was beyond its control and occurred without its fault or negligence.⁵⁹ In *United Gulf Marine*, the court conceded that the fire damaging the defendant's oil refinery had been beyond the defendant's control, occurring without its fault or negligence, which excused the defendant's nonperformance notwithstanding the force majeure clause.⁶⁰

Ohio does not have as well-developed case law in the area of force majeure clauses as some other states with a higher volume of business litigation, such as New York, or a higher volume of natural disasters, like Louisiana or Texas,⁶¹ which means that the future development of this area can draw inspiration from the laws of other jurisdictions. Other jurisdictions and scholars in contract law have considered other important

55. *United Gulf Marine, LLC v. Continental Refining Co.*, No. CV 2017 0040, 2018 WL 10036528 (Ohio C.P. Feb. 27, 2018).

56. *Id.* at *2.

57. *Id.* at *5.

58. *Id.*

59. *Stand Energy*, 760 N.E.2d at 457 (the case does not elucidate what the actual cause of the fire was, but the fault and negligence of the defendant was not at issue).

60. *United Gulf Marine*, 2018 WL 10036528.

61. As of November 2020, a search on Westlaw for cases involving force majeure clauses yields eleven cases in Ohio, but 49 in New York, forty in Louisiana, and 72 in Texas.

issues related to the interpretation of force majeure clauses, such as the burden of proof,⁶² the nature of causation between the force majeure event and the party's nonperformance,⁶³ notice requirements for the nonperforming party,⁶⁴ requirements for mitigation efforts,⁶⁵ and whether nonperformance is excused temporarily during the force majeure event or permanently.

From the other rules of construction outlined above, it is likely that Ohio courts will primarily utilize the text of the contract itself to interpret force majeure clauses in the future. It is unclear how Ohio courts will interpret force majeure clauses that do not provide explicit answers to litigants' questions.

2. Contract Defenses

In addition to parties contractually protecting themselves from liability for breach of contract due to unforeseen or extraordinary events, courts will sometimes excuse nonperformance in light of such events regardless of whether the contract in question contained a force majeure clause.⁶⁶ These defenses include vis major, impossibility, and impracticability. Each will be discussed in turn below.

The most similar common law defense to the force majeure clause is vis major, also known as the "act of God" defense.⁶⁷ Essentially, this allows a court to excuse nonperformance due to a force majeure-type event, even if the parties did not include a force majeure clause in their contracts.⁶⁸ Accordingly, the vis major defense is very similar to the force

62. See *Maralex Resources, Inc. v. Gilbreath*, 76 P.3d 626 (N.M. 2003) (determining that in New Mexico, the burden of proof is on the breaching party to invoke and prove the propriety of using a force majeure clause); *Idaho Power Co. v. Cogeneration, Inc.*, 9 P.3d 1204 (Idaho 2000) (holding the same in Idaho).

63. See *Oosten v. Hay Haulers Dairy Emp. & Helpers Union*, 291 P.2d 17 (Cal. 1955) (holding that a force majeure event must be the proximate cause of the breaching party's nonperformance in California); *Florida Power Corp. v. City of Tallahassee*, 18 So.2d 671 (Fla. 1944) (determining that the force majeure event must be the sole proximate cause of nonperformance in Florida).

64. See *BAE Sys. Ordinance Sys., Inc. v. El Dorado Chem. Co.*, Civil No. 1:15-cv-01035, 2016 WL 10647120 (W.D. Ark. Sept. 27, 2016) (where written notice of breach due to force majeure was required in Arkansas); *Milford Power Co. v. Alstom Power, Inc.*, 822 A.2d 196 (Conn. 2003) (notice must be timely and specific in Connecticut).

65. See *Hewitt v. Chicago, Burlington & Quincy R.R. Co.*, 426 S.W.2d 27 (Mo. 1968) (holding that, under Missouri law, the breaching party could not successfully invoke a force majeure clause because the damage from the flood was partially due to its neglect); *Commonwealth Edison Co. v. Allied-General Nuclear Services*, 731 F.Supp. 850 (N.D. Ill. 1990) (Illinois requires that the breaching party make a bona fide effort to shed the restraint that is preventing its performance).

66. RESTATEMENT (SECOND) OF CONTRACTS CH. 11, INTRODUCTORY NOTE (AM. LAW. INST. 1981).

67. 18 OHIO JUR. 3D *Contracts* § 208 (2020).

68. *Id.*

majeure provision but with a few added restrictions.⁶⁹ While a force majeure clause can specify any list of qualifying force majeure events to which courts must give effect, Ohio courts will only allow a vis major defense if the event in question is purely natural and occurs without human cause or intervention.⁷⁰ Furthermore, the vis major event must be truly out of the ordinary, rather than typical natural occurrences like fluctuations in weather that are usual for the geographic area (although such natural occurrences could theoretically be incorporated into a contractual force majeure clause).⁷¹ Finally, the vis major event must render performance absolutely impossible, such as when the subject of the contract is completely destroyed.⁷²

Next, there is the defense of impossibility. Under Ohio law, impossibility is a valid defense for nonperformance if, after the contract is entered into, an unforeseeable event arises, rendering performance by one of the parties impossible.⁷³ However, performance is not excused merely because performance is difficult, dangerous, or onerous.⁷⁴ In that sense, the impossibility defense acts similarly to a force majeure clause with its unforeseeability requirement, but it is ascribed to an event by the courts rather than by the terms of the contract.⁷⁵

Ohio courts have not applied impossibility in the pandemic context, but they have recognized when other catastrophic events might make performance impossible (or not impossible, as the case may be). For instance, during World War II, the U.S. District Court for the Northern District of Ohio determined that even if war conditions and government regulations rendered performance difficult or unprofitable, performance could not be considered impossible under the law unless a party truly could not perform.⁷⁶ In other words, the impossibility bar is hard to meet even under the most extreme political and economic hardships. However, there is one notable exception. One Ohio Court of Appeals ruled that a government order may make performance impossible for parties under the law, and a court could not enforce a contract requiring parties to break

69. *Id.*

70. *Fiber Crete Constr. Corp. v. L.W.L. G.P.*, No. 2-86-24, 1987 WL 19038 (Ohio Ct. App. Oct. 13, 1987).

71. *Id.*

72. *D.J. Lavy Constr. Co. v. Jordan*, No. 91CA-12, 1992 WL 79622 (Ohio Ct. App. Apr. 10, 1992).

73. *Truetried Service Co. v. Hager*, 691 N.E.2d 1112, 1118 (Ohio Ct. App. 1997).

74. *State ex rel. Jewett v. Sayre*, 109 N.E. 636, 639 (Ohio 1914).

75. *Haverhill Glen, LLC v. Eric Petroleum Corp.*, 67 N.E.3d 845, 850 (Ohio Ct. App. 2016).

76. *Ohio Citizens Trust Co. v. Air-Way Electric Appliance Corp.*, 56 F.Supp. 1010, 1017 (N.D. Ohio 1944).

the law as a matter of public policy.⁷⁷

A third common law defense for nonperformance that is closely related to impossibility is impracticability. Proving impracticability of performance is somewhat less burdensome for the nonperforming party than proving impossibility, because the party does not have to prove that performance was actually impossible but rather just extremely inconvenient or costly.⁷⁸ Under Ohio contract law, to successfully invoke the defense of impracticability, the nonperforming party must show that a supervening event occurred, the non-occurrence of which was a basic assumption on which the contract was made, and the event rendered performance impracticable.⁷⁹ Ohio courts are split as to whether unforeseeability is a prerequisite for impracticability, as it is for impossibility.⁸⁰ Despite the lower standard for the nonperforming party for impracticability, impracticability still must mean something more than mere impracticality.⁸¹ A party must make reasonable efforts to overcome obstacles to performance, and performance only becomes impracticable when the risk of injury to people or property is disproportionate to the ends that performance would bring.⁸²

C. Law and Economics Principles

Law and economics principles underpin the defenses outlined above in Part B. Law and economics is a somewhat controversial school of jurisprudence that borrows from economic theories and applies them to the law, either descriptively or normatively.⁸³ Implicitly or explicitly, many courts utilize law and economics by subscribing to the efficient breach theory of contract law when assessing whether a party may avoid performance.⁸⁴ Under efficient breach, the non-performing promisor will

77. Ass'n of Cleveland Fire Fighters, Local 93 of the Int'l Ass'n of Fire Fighters v. City of Cleveland, No. 94631, 2010 WL 4684736 (Ohio Ct. App. Nov. 18, 2010).

78. Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207, 210 (2009).

79. Bank One, Marion v. Marion, Ohio, Internal Medicine Inc., No. 9-96-69, 1997 WL 176140 (Ohio Ct. App. Mar. 31, 1997).

80. See *Truetried Service Co. v. Hager*, 691 N.E.2d 1112, 1118 (Ohio Ct. App. 1997) (where the Eighth District held foreseeability to be an element of impracticability), *Bank One*, 1997 WL 176140 (where the Third District held foreseeability to be an element of impracticability). The courts following the Restatement (Second) of Contracts definition of impracticability do not treat foreseeability as an element of impracticability.

81. See *B-Right Trucking Co. v. Warfab Field Machining and Erection Corp.*, No. 2000-T-0072, 2001 WL 1602687 (Ohio Ct. App. Dec. 14, 2001) (“[I]mpracticability’ means more than ‘impracticality.’”).

82. *Id.* at 5.

83. Anita Bernstein, *Whatever Happened to Law and Economics?* 64 MARYLAND L. REV. 303, 304 (2005).

84. Thomas J. Loeb, *Judicial Application of the Efficient Breach Theory: A Critical Examination*,

breach his or her contractual obligations (and therefore have to invoke any of the above defenses) if doing so would make the promisor better off and the promisee no worse off (in other words, if doing so would be Pareto efficient).⁸⁵ While this is certainly an accurate description of some breaches of contract, it relies on certain assumptions—in particular, that both parties are equally sophisticated and rational⁸⁶—that are simply inaccurate, especially during a catastrophic event like the COVID-19 pandemic.

The study of law and economics may offer other insights for courts seeking to understand how to allocate damages when parties breach their contractual obligations. Law and economics is particularly associated with the neoclassical Chicago school of economics and with deregulation,⁸⁷ but it has also been utilized by more pro-regulation legal scholars, like Cass Sunstein, who updated the field with his consideration of behavioral economics and non-rational actors.⁸⁸ In other words, it is a framework that can be utilized by different judges with different judicial philosophies to either preserve or move past the efficient breach theory.

One concept from law and economics that might prove useful is the least-cost avoider theory.⁸⁹ The basic principle of the least-cost avoider, which is most commonly applied in torts cases, is that when there is an accident which serves as a sunk cost, the party best equipped to mitigate the aggregate damage—either before, during, or after the accident—or for whom mitigation is less costly should bear the majority of the costs for mitigation.⁹⁰ In the contracts context, when there is a loss for which the contracting parties did not provide (like a change in market price or a natural disaster), a court can efficiently assign the costs associated with that loss to the party who could have mitigated the loss either *ex ante* or *post ante*.⁹¹ This is because many courts want to create default rules that will ensure that parties take optimal and effective precautions before they wind up in court.⁹²

Another concept in law and economics relates to opportunism, which

30 GEO. J. LEGAL ETHICS 893 (2017).

85. *Id.* at 893-894.

86. *Id.* at 896.

87. James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 L. & HIST. REV. 275 (1997).

88. Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997).

89. William Barnett II, Walter Block, and Gene Callahan, *The Paradox of Coase as a Defender of Free Markets*, NYU J. L. & LIBERTY 1075, 1086 (2005).

90. *Id.*

91. George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941 (1992).

92. *Id.* at 946.

refers to taking advantage of another party's vulnerability.⁹³ The two key vulnerabilities outlined by law and economics scholars are information asymmetry (where one or both parties knows considerably less than required to make an optimal bargain) and sequential performance (where the first moving party who makes non-recoverable investments is at the mercy of the second moving party to ensure the value of those investments).⁹⁴ According to theorists, courts should be concerned with preventing parties from behaving opportunistically—in other words, from acting on information that the other party lacks or from taking advantage of a party that already has sunk costs into non-recoverable investments.⁹⁵ Although the concept of opportunism is less often applied in courts than the concept of least-cost avoiders, opportunism is well-suited to contract law as it currently exists.

III. DISCUSSION

Contract law as it currently exists in Ohio has not been informed by massive disasters. There are very few relevant precedential cases in Ohio⁹⁶ from the 1918 influenza pandemic⁹⁷ and only a few from the wars of the twentieth century.⁹⁸ In other words, much of the case law in Ohio concerns minor emergencies and accidents rather than major catastrophes, differing from cases that New York courts had to grapple with after the September 11th attacks⁹⁹ or Louisiana courts after Hurricane Katrina.¹⁰⁰ Therefore, Ohio's case law may not present clear models for courts to use during the COVID-19 pandemic.

This Section lays out ways that Ohio courts might treat parties seeking to back out of contract performance due to the COVID-19 pandemic. To illustrate, this Section will apply Ohio law to a current case in Delaware to see how the results might turn out in that scenario. The chosen illustration is a high-profile matter from Delaware involving the thwarted acquisition of Victoria's Secret from a struggling L Brands by the buyout

93. *Id.* at 954.

94. *Id.* at 954-955.

95. *Id.*

96. *See* *Montgomery v. Bd. of Educ. Of Liberty Twp., Union Cnty.*, 131 N.E. 497 (Ohio 1921).

97. Other jurisdictions, and other areas of law, also have case law specifically addressing the 1918 flu pandemic. *See* *Citrus Soap Co. v. Peet Bros. Mfg. Co.*, 194 P. 715 (Cal. Dist. Ct. App. 1920); *Napier v. Trace Fork Mining Co.*, 235 S.W. 766 (Ky. Ct. App. 1921); *Sandry v. Brooklyn School Dist. No. 78 of Williams Cnty.*, 182 N.W. 689 (N.D. 1921).

98. *See* *Trimble v. Western & Southern Life Ins. Co.*, 82 N.E.2d 548 (Ohio Ct. App. 1948).

99. *See* *Bush v. Protravel Intern., Inc.*, 192 Misc.2d 743 (N.Y. Civ. Ct. 2002); *Lava Trading, Inc. v. Hartford Fire Ins. Co.*, 365 F.Supp.2d 434 (S.D.N.Y. 2005).

100. *See* *Lila, Inc. v. Underwriters at Lloyd's, London*, 994 So.2d 139 (La. Ct. App. 2008); *View West Condominium Ass'n v. Aspen Specialty Ins. Co.*, No. 11-20423-CIV, 2011 WL 3704782 (S.D. Fla. Aug. 23, 2011).

firm Sycamore Partners.¹⁰¹ Part A of this Section will apply Ohio case law to the Victoria's Secret deal gone wrong. Part B of this Section will then explore the potential shifts that Ohio contract law could take as a normative evolution in response to the COVID-19 pandemic.

A. Application of Ohio Law to Contracts During the COVID-19 Pandemic

This Part discusses how courts ought to apply Ohio contract law to cases arising from the COVID-19 pandemic through the specific illustration of the Victoria's Secret deal. This application will reveal some significant inflexibilities in Ohio contract law, which courts may find unjust in the pandemic context. First, this Part explains how force majeure clauses might be interpreted (most of which would have been written prior to the pandemic). Next, this Part will discuss the application of common law defenses of vis major, impossibility, and impracticability.

1. Force Majeure

In the recent Victoria's Secret deal, L Brands sought to separate its subsidiary Victoria's Secret and place it in a privately-held company that was majority-owned by one of Sycamore Partners' affiliates.¹⁰² The parties entered into a transaction agreement on February 20, 2020, which provided in part that, prior to closing, L Brands would operate Victoria's Secret "in the ordinary course consistent with past practice."¹⁰³ However, during the pandemic, L Brands closed almost all Victoria's Secret stores, furloughed employees, and reduced base compensation. This caused Sycamore Partners to sue to terminate the deal in Delaware Chancery Court due to L Brands' breach of the Transaction Agreement.¹⁰⁴ However, L Brands had been able to carve out certain excuses for nonperformance in the Transaction Agreement's Material Adverse Effect ("MAE") clause, including "the existence, occurrence or continuation of any pandemics . . ."¹⁰⁵

101. James B. Stewart, *The Victoria's Secret Contract that Anticipated a Pandemic*, NEW YORK TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/business/victorias-secret-sycamore-coronavirus.html>.

102. Verified Compl., SP VS Buyer LP v. L Brands, Inc., Del. Ch. 2020 (C.A. No. 2020-0297).

103. *Id.* at 3-4.

104. *Id.* at 3.

105. SP VS Buyer LP, Transaction Agreement (Exhibit 2.1) (Feb. 20, 2020). The MAE clause indicates that a materially adverse event "means any state of facts. . . (i) that would. . . materially impede the performance by Parent of its obligations under this Agreement. . . or (ii) that has a material adverse effect on the financial condition. . . of the Business, excluding, in the case of clause (ii), any state of facts. . . directly or indirectly resulting from. . . pandemics. . ."

It may be helpful to treat the MAE clause carveout like a force majeure clause and decipher how an Ohio court might construe it in favor of or against L Brands if such a case were to be decided under Ohio law. First, regarding specificity, Ohio courts defer to the language of the contract to determine how narrowly a force majeure clause should be construed. A force majeure clause listing a specific set of events will be construed narrowly by Ohio courts, while one with broad categories such as “any cause not reasonably within the parties’ control” is likely to be construed more broadly.¹⁰⁶

If parties in Ohio write contracts after the pandemic and wish for events like pandemics, quarantines, and shutdowns to be considered force majeure events, then they can best ensure that courts will extend the force majeure clause defense to such events by specifying those events within the clause. That is the approach recommended by the Thompson Reuters Practical Law editors who updated their recommended standard force majeure clauses in March 2020 to include “other potential disaster(s) or catastrophe(s), such as epidemics, pandemics, or quarantines.”¹⁰⁷ Parties can choose to make their lists of force majeure events in several different ways, but in either case the Practical Law editors recommend specific pandemic-inclusive language.¹⁰⁸ Clearly, the MAE carveout specifically listing “pandemics” in the Victoria’s Secret deal would pass this requirement with flying colors.¹⁰⁹

Next, regarding foreseeability, Ohio courts seem to expect parties to foresee economic fluctuations and downturns and factor them into contract formation as well as the drafting of force majeure clauses.¹¹⁰ For example, the court in *Stand Energy* held a price increase was not a force majeure event because price changes ought to be foreseeable by the parties at the time of contract formation.¹¹¹

Foreseeability may be a sticking point for parties seeking to avoid performance. Although the economic downturn caused by the COVID-19 pandemic is worse than any since the Great Depression, it is nevertheless a market fluctuation that Ohio courts would probably deem foreseeable—at least to an extent—because the economy is always cycling either into or away from a downturn. Moreover, many public health experts

106. *Stand Energy Corp. v. Cinergy Services, Inc.*, 760 N.E.2d 453, 455 (Ohio Ct. App. 2001).

107. General Contract Clauses: Force Majeure (OH), Practical Law Commercial Transactions (Mar. 31, 2020).

108. *Id.*

109. This is particularly true because the drafters specifically included “any state of facts, circumstance, condition, event, change, development, occurrence, result or effect to the extent directly or indirectly resulting from. . . pandemics. . .” SP VS Buyer LP, *supra* note 106.

110. *In re Millers Cove Energy Co., Inc.*, 62 F.3d 155, 158 (6th Cir. 1995).

111. *Stand Energy*, 760 N.E.2d at 457.

predicted a catastrophic pandemic throughout the 2010s,¹¹² and such experts predicted that the COVID-19 pandemic itself would have dire international effects as early as January 2020,¹¹³ which may lead an Ohio court to deem the pandemic itself to be foreseeable. In other words, the attorneys for L Brands may have foreseen the pandemic and resulting economic hardship and drafted the February 2020 Transaction Agreement accordingly.

One key difference in the way different jurisdictions analyze force majeure clauses is whether the event must render performance actually impossible or merely impracticable. In Ohio, a force majeure clause cannot excuse nonperformance merely because performance became difficult, burdensome, or economically disadvantageous, but the standard does not seem to rise to actual impossibility.¹¹⁴ However, just how difficult contract performance must be in order to satisfy force majeure has not been developed in Ohio case law.

This ambiguity may be a critical sticking point with courts trying to interpret force majeure clauses during COVID-19, and the answer may come down to timing. In March and April of 2020, the Ohio state government shut down all nonessential businesses¹¹⁵ and issued a stay-at-home order for all nonessential workers and activities. During that time, many parties may have found that performance of contractual obligations might have risen to very near the level of impossibility such that a force majeure contract would excuse nonperformance. However, in the month of May and thereafter, the state government gradually allowed these nonessential businesses and activities to resume with strict public health limitations.¹¹⁶ It is not clear whether mandates like capacity limitations, social distancing, mask-wearing, and sanitization, or even the extreme economic downturn, would be considered valid excuses for nonperformance under a force majeure clause in Ohio. In any case, in the

112. Dana Vigue, *Experts Predicted a Coronavirus Pandemic Years Ago. Now It's Playing Out Before Our Eyes*, CNN (Sept. 8, 2020), <https://www.cnn.com/2020/09/08/health/coronavirus-pandemic-training-scenario/index.html>.

113. Erin Schumaker, *Timeline: How Coronavirus Got Started*, ABC NEWS (Sept. 8, 2020), <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>.

114. *United Gulf Marine, LLC v. Continental Refining Co.*, No. CV 2017 0040, 2018 WL 10036528 (Ohio Ct. C.P. Feb. 27, 2018).

115. Essential businesses in Ohio include stores that sell groceries and medicine, food and beverage production and agriculture, charitable and social services, religious entities, media, gas and transportation businesses, financial institutions, hardware and supply store, certain critical trades, mail and shipping, educational institutions, laundry services, home-based care, residential facilities, professional services, manufacture and supply chain for certain critical products and industries, and funeral services. *See Director's Stay At Home Order*, OHIO DEP'T OF HEALTH (Mar. 22, 2020), <https://coronavirus.ohio.gov/static/DirectorsOrderStayAtHome.pdf>.

116. *Governor Announces Order to Reopen Certain Facilities*, OHIO DEP'T OF HEALTH (June 4, 2020), <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/news-releases-news-you-can-use/governor-reopen-certain-facilities>.

Victoria's Secret example, L Brands may have been able to argue that performance in the early months of the pandemic was actually impossible due to government orders causing an extreme contraction in the retail sector,¹¹⁷ which would have potentially helped its case.

Finally, regarding control of the nonperforming party, in order to successfully use a contract's force majeure clause as a defense for nonperformance, the nonperforming party must prove that the force majeure event in question was beyond its control and occurred without its fault or negligence.¹¹⁸ This seems like an area in which the party seeking nonperformance of contractual obligations would prevail. The trifecta of issues surrounding the COVID-19 pandemic—the economic recession, the government shutdowns and mandates, and the deadly virus itself—would probably not be considered the result of the fault or negligence of any party to a contract, unless one of those parties is the government itself. In the Victoria's Secret example, the pandemic and subsequent recession were certainly none of the parties' fault, so this requirement would likely be satisfied in that case.

As shown above, L Brands was very lucky to have good legal representation in the dealmaking process—ensuring that the MAE clause carved out specific foreseeable events—meaning its force majeure provision would likely carry significant weight under Ohio law.¹¹⁹

2. Vis Major

Vis major is more limited than its common law defense analogue force majeure. First, Ohio courts will only allow a vis major defense if the event in question is purely natural, meaning it occurs without human cause or intervention.¹²⁰ Second, the vis major event must be truly out of the ordinary.¹²¹ Third, the vis major event must render performance absolutely impossible.¹²²

The first and second criteria seem like they would be relatively easy to prove to an Ohio court. First, as a virus, COVID-19 is natural on its face

117. NEW YORK TIMES, *supra* note 20.

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

119. The case did not move forward in Delaware, so it is unclear how the Delaware courts would have interpreted the Transaction Agreement. As it was, the case settled, and both parties got away with not paying a termination fee. Jenna Greene, *Clean Break: Kirkland Client Can Walk Away from \$525M Victoria's Secret Deal*, LITIGATION DAILY (May 4, 2020), <https://www.law.com/litigationdaily/2020/05/04/daily-dicta-clean-break-kirkland-client-can-walk-away-from-525m-victorias-secret-deal>.

120. *Fiber Crete Constr. Corp. v. L.W.L. G.P.*, No. 2-86-24, 1987 WL 19038 (Ohio Ct. App. Oct. 13, 1987).

121. *Id.*

122. *D.J. Lavy Constr. Co. v. Jordan*, No. 91CA-12, 1992 WL 79622 (Ohio Ct. App. Apr. 10, 1992).

and is furthermore thought to be the result of zoonotic transfer from an animal rather than laboratory manipulation.¹²³ Second, pandemics on the scale of COVID-19, producing deaths in the hundreds of thousands in a matter of months, are uncommon in the United States in the twentieth and twenty-first centuries—the last pandemic in the United States on that scale was arguably the 1968 flu pandemic.¹²⁴

However, impossibility is an incredibly high bar for parties to meet. It could perhaps be met if the parties could only perform their contractual obligations by breaking state government mandates, as one Ohio Court of Appeals allowed in *Glickman v. Coakley*.¹²⁵ Otherwise, parties may have a very difficult time proving this criterion. For instance, if the Victoria's Secret case was heard in Ohio courts, and L Brands had not included the pandemic carveout in the MAE clause, they would have had to argue that negative economic conditions rose to the level of actual impossibility—a very difficult task, which probably could only have been sustained by invoking the government order shutting down nonessential businesses in March and April.

3. Impossibility and Impracticability

Under Ohio law, impossibility is a valid defense for nonperformance if, after the contract is entered into, an unforeseeable event arises, rendering performance by one of the parties impossible.¹²⁶ However, performance is not excused merely because performance is difficult, dangerous, or onerous.¹²⁷ On the other hand, to successfully invoke the affirmative defense of impracticability, the nonperforming party must show that a supervening event occurred, the non-occurrence of which was a basic assumption on which the contract was made, and rendered performance impracticable (rather than impossible).¹²⁸ Ohio courts are split as to whether unforeseeability is a prerequisite for impracticability, as it is for impossibility.

Parties might be able to argue that performance was actually impossible (rather than merely impracticable) in Ohio during March and April 2020, when the state government ordered a shutdown of all

123. Kristian G. Anderen et al., *The Proximal Origin of SARS-CoV-2*, 26 NATURE MEDICINE 4 (Mar. 17, 2020).

124. Michael S. Rosenwald, *History's Deadliest Pandemics, from Ancient Rome to Modern America*, WASHINGTON POST (Apr. 7, 2020), <https://www.washingtonpost.com/graphics/2020/local/retropolis/coronavirus-deadliest-pandemics>.

125. *Glickman v. Coakley*, 488 N.E.2d 906, 911 (Ohio Ct. App. 1984).

126. *Truetried Service Co. v. Hager*, 691 N.E.2d 1112, 1118 (Ohio Ct. App. 1997).

127. *State ex rel. Jewett v. Sayre*, 109 N.E. 636, 639 (Ohio 1914).

128. *Bank One, Marion v. Marion, Ohio, Internal Medicine Inc.*, No. 9-96-69, 1997 WL 176140 (Ohio Ct. App. Mar. 31, 1997).

nonessential businesses and activities, because many parties would have been completely unable to operate.¹²⁹ However, in May and afterwards, nonessential businesses began resuming their normal activities, but did so in a strongly regulated manner—with masks and social distancing, to name a couple such regulations¹³⁰—and with an increasingly unstable workforce and customer base due to layoffs and illness. At that point, Ohio courts would probably not consider performance actually impossible because businesses could conduct many of their normal activities, just in a very limited way. Therefore, after May 2020, parties would likely be more successful using the defense of impracticability than impossibility.

To assert an impracticability defense, the party seeking an excuse for nonperformance would have to first show that a supervening event occurred. This would be simple enough, as the COVID-19 pandemic has been extremely well-documented. Next, the party would have to prove that the non-occurrence of the pandemic was a basic assumption on which the contract was made. This criterion is a bit trickier, because one has to judge whether either party assumed the risk of the event occurring.¹³¹ Thus, an unforeseeable event would probably suggest that its non-occurrence was a basic assumption upon which the contract was made.¹³² Other factors highlighted by the Restatement are the relative bargaining power of the two parties and the effectiveness of the market in spreading the risks at issue.¹³³

So, in the context of the COVID-19 pandemic, it is likely that neither party would have assumed the risk of Ohio's stay-at-home order and global pandemic, as no such incident has occurred in any living person's lifetime, although one or more parties may have assumed the risk of a recession. If one or more parties are legally sophisticated and economically powerful entities (for example, L Brands and Sycamore Partners in the Victoria's Secret deal) but did not include a force majeure clause to mitigate risk, then some courts may be less likely to hold that impracticability has been satisfied in the case.¹³⁴ Last, the risks at issue have not been spread evenly by the market thus far in 2020, with vastly different impacts on groups of different socioeconomic classes,¹³⁵ which

129. OHIO DEP'T OF HEALTH, *supra* note 17.

130. *Id.*

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

132. *Id.* at CH. 11, INTRODUCTORY NOTE.

133. *Id.*

134. J. Denmon Sigler & Scott Shelton, "Could the Parties Have Anticipated the Unthinkable?" *Force Majeure in the Texas Energy Industry after COVID-19*, TEXAS LAWBOOK (Apr. 2, 2020), <https://texaslawbook.net/could-the-parties-have-anticipated-the-unthinkable-force-majeure-in-the-texas-energy-industry-after-covid-19>.

135. Bauer, *supra* note 6.

could impact a court's determination of whether the pandemic was an event whose non-occurrence was a basic assumption upon which the contract was made, depending on who the parties are.

Finally, the party would have to show that COVID-19 made performance impracticable. Again, how impracticable performance might be for any given business during the pandemic would probably be strongly dependent on the time when performance was supposed to occur, the essential or nonessential nature of the business, and the economic power of the business prior to the COVID-19 pandemic.

B. Normative Shifts in Ohio Contract Law During and After COVID-19

This Comment has thus far described contract provisions and defenses during COVID-19 descriptively rather than normatively. Because this is an emerging area of the law and the economy, where courts, businesses, government entities, and individual people are scrambling to respond and build a new normal, Ohio courts need to establish a description of the law as it is.

However, jurists in Ohio should also take this crisis as an opportunity to consider how the law ought to be. Who benefits and who loses under the law as it is written? Who are the parties who most desperately need a win in 2020? And how can Ohio courts shape common law to help make the economy and society whole? L Brands may have been able to get off relatively easily, but what about a smaller seller with less sophisticated legal counsel?

None of the aforementioned contract principles make it easy for parties to escape performance of their contractual obligations. Each of them has sticking points around foreseeability as well as the impossibility and impracticability standards. But as the Restatement authors wrote, “[c]ontract liability is strict liability.”¹³⁶ In a normal and ideal world, that is probably for the best. It ensures that parties take the utmost care before they enter into a contract and in return gain the flexibility to provide for mutually favorable terms within the scope of an individual transaction or relationship. If a party breaches a contract, it does so because, under efficient breach theory, it would make them better off and the opposing party no worse off.

However, during the COVID-19 pandemic, neither Ohio nor any other jurisdiction in the United States is normal or ideal, and it is difficult to expect parties to act rationally under such circumstances. While the CARES Act and the Paycheck Protection Program saw Congress

136. RESTATEMENT (SECOND) OF CONTRACTS, CH. 11, INTRODUCTORY NOTE (AM. LAW. INST. 1981).

attempting to bolster small businesses back in March, further federal relief was not forthcoming for the remainder of 2020.¹³⁷ Small companies and individual people have unquestionably borne the burden of this, with smaller firms laying off more people than larger ones, only 14 percent of small businesses receiving Paycheck Protection Program loans, and at least 2 percent of small businesses shutting permanently.¹³⁸ This will almost certainly lead to failures of contract performance between manufacturers, suppliers, and retailers on a massive scale. These parties may or may not be able to evade litigation, an extremely time-consuming and expensive endeavor, without financial ruination.

Ohio courts should proceed with some grace for parties on both sides of this matter and for the economic and legal system as a whole. This is where law and economics principles, particularly the least-cost avoider and opportunism, could be instructive.

One way courts could assess breaches of contract would be to adopt the principle of the least cost avoider for contract cases arising from the COVID-19 pandemic. After all, the least cost avoider, or cheapest cost avoider, is a well-established principle in tort liability.¹³⁹ However, it is less commonly applied in contract law, though such applications are not unheard of.¹⁴⁰ The least cost avoider principle holds that whoever has the lowest cost of avoiding harm, whether by prevention, mitigation, or insurance, should generally be assigned liability when that harm occurs.¹⁴¹ This is a particularly appealing framework when both parties are faultless,¹⁴² as the parties struggling over performance or nonperformance during a global pandemic would both likely be.

Redrawn for the contracts context, courts could construe the least cost avoider as the drafter, who can avoid mistakes by exercising greater care in drafting contracts.¹⁴³ Courts could also make judgments specific to the type of contract and parties involved. For instance, in a franchisee-franchisor relationship, the franchisor might be the least cost avoider, as it would be in a better position to identify and spread risks to the economic

137. JORDAIN CARNEY, *CORONAVIRUS RELIEF AT A STANDSTILL WITH NO LEADERSHIP-LEVEL TALKS*, THE HILL (NOV. 18, 2020), [HTTPS://THEHILL.COM/HOMENEWS/SENATE/526509-CORONAVIRUS-RELIEF-AT-A-STANDSTILL-WITH-NO-LEADERSHIP-LEVEL-TALKS](https://thehill.com/homenews/senate/526509-coronavirus-relief-at-a-standstill-with-no-leadership-level-talks).

138. Heather Long, *Small Business Used to Define America's Economy. The Pandemic Could Change That Forever*, WASHINGTON POST (May 12, 2020), <https://www.washingtonpost.com/business/2020/05/12/small-business-used-define-americas-economy-pandemic-could-end-that-forever>.

139. See *Holtz v. J.J.B. Hilliard W.L. Lyons, Inc.*, 185 F.3d 732 (7th Cir. 1999).

140. Cohen, *supra* note 91.

141. *Id.*

142. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Riggs Nat'l Bank of Washington*, 5 F.3d 554 (D.C. Cir. 1993).

143. *Extrusion Painting, Inc. v. Awnings Unlimited, Inc.*, No. 00-1682, 2002 WL 1402192 (6th Cir. June 27, 2002).

health of its products.¹⁴⁴ Generally, in a contractual dispute with two relatively faultless parties, the least cost avoider will be the more economically and legally sophisticated entity. In a dispute between a more sophisticated party and a less sophisticated party arising from the COVID-19 pandemic, the more sophisticated party may be more financially solvent and better able to shoulder a late delivery of goods or late payments on a loan or mortgage—to name a few ways this could play out in court.

Another law and economics concept Ohio courts might choose to apply in the COVID-19 pandemic context is opportunism, where courts would attempt to punish a party that tries to take advantage of another party's information asymmetry or sunk costs. Unlike the least-cost avoider, this concept could be used to the benefit of both highly sophisticated and less sophisticated parties. For instance, in a loan transaction, a borrower may have limited information on what he is entitled to from the Paycheck Protection Program, and a court might attempt to incentivize the lender to act fairly notwithstanding the borrower's lack of knowledge.

In the area of employment law, employers often sink relatively large resources into recruiting and training new employees¹⁴⁵ and count on employees to not take advantage of these sunk resources by taking the training and transferring to another position. Although the COVID-19 pandemic has caused widespread unemployment, there are certain sectors, like healthcare, where workers are scarce.¹⁴⁶ It would be opportunistic behavior—and likely a breach of contract—for a doctor or nurse to receive training at one hospital and then attempt to move to another one that might pay more. Courts could attempt to dissuade this kind of opportunistic behavior as well.

Of course, Ohio courts may not want to apply such principles in every breach of contract matter, or for all eternity, even after the COVID-19 pandemic has ended. However, innovative legal concepts like those proposed in this Section may give parties that are already struggling due to the pandemic some much-needed relief.

IV. CONCLUSION

Courts will need to develop good principles of contract interpretation,

144. *Freedman Truck Ctr., Inc. v. General Motors Corp.*, 784 F. Supp. 167 (D.N.J. 1992).

145. John Hall, *The Cost of Turnover Can Kill Your Business and Make Things Less Fun*, FORBES (May 9, 2019), <https://www.forbes.com/sites/johnhall/2019/05/09/the-cost-of-turnover-can-kill-your-business-and-make-things-less-fun/?sh=8833b4794371>.

146. Alexis C. Madrigal, *Hospitals Can't Go On Like This: Twenty-Two Percent of American Hospitals Don't Have Enough Workers Right Now*, THE ATLANTIC (Nov. 17, 2020), <https://www.theatlantic.com/science/archive/2020/11/third-surge-hospitals-staffing-shortage/617128>.

because the effects of COVID-19 will outlive the virus itself. Even with vaccines approved for distribution in December 2020, COVID-19 will not disappear overnight. After vaccination, individuals would still need to engage in social distancing, likely for much of 2021.¹⁴⁷ The most optimistic scenario seems to place the reemergence of normal non-pandemic life at the end of 2021 or beginning of 2022.¹⁴⁸ Until then, Americans and Ohioans will continue to get sick and die, and the economy will probably continue to suffer from the lockdowns and the public health crisis.

Furthermore, even when COVID-19 is in society's rearview mirror, other deadly pandemics are likely to arise.¹⁴⁹ Even without an epidemic or pandemic in the United States, the economy will fluctuate in its regular boom and bust cycles. All of this is not meant to catastrophize but rather contextualize the importance of understanding how Ohio courts apply contract law. Disasters, large and small, individual and societal, will always occur, and these disasters will cause (whether indirectly or directly) parties to breach the contracts they make in more halcyon times.

This will require parties to understand how best to draft force majeure clauses in their contracts, and how to invoke contract defenses if these clauses fail to protect them. It is also an opportunity for Ohio courts to better develop their contract law jurisprudence, incorporating behavioral economics principles to adequately allocate risks in good times and bad. Developing laws that are both flexible enough, so that parties already struggling do not go further underwater, and sensible enough, so that parties can foresee their results at the outset of contract formation, will ensure that Ohio courts can stabilize the state economy at any given point.

147. Jade Scipioni, *Dr. Fauci Says Masks, Social Distancing Will Still be Needed After a Covid-19 Vaccine—Here's Why*, CNBC (Nov. 16, 2020), <https://www.cnbc.com/2020/11/16/fauci-why-still-need-masks-social-distancing-after-covid-19-vaccine.html>.

148. Madeline Holcombe, Holly Yan, and Amir Vera, *US May Not be Back to Normal Until 2022, Fauci Says*, CNN (Oct. 28, 2020), <https://www.cnn.com/2020/10/28/health/us-coronavirus-wednesday/index.html>.

149. Jonathan Chan and Sony Salzman, *As COVID-19 Continues, Experts Warn of Next Pandemic Likely to Come from Animals*, ABC NEWS (Sept. 3, 2020), <https://abcnews.go.com/Health/covid-19-continues-experts-warn-pandemic-animals/story?id=72755696>.