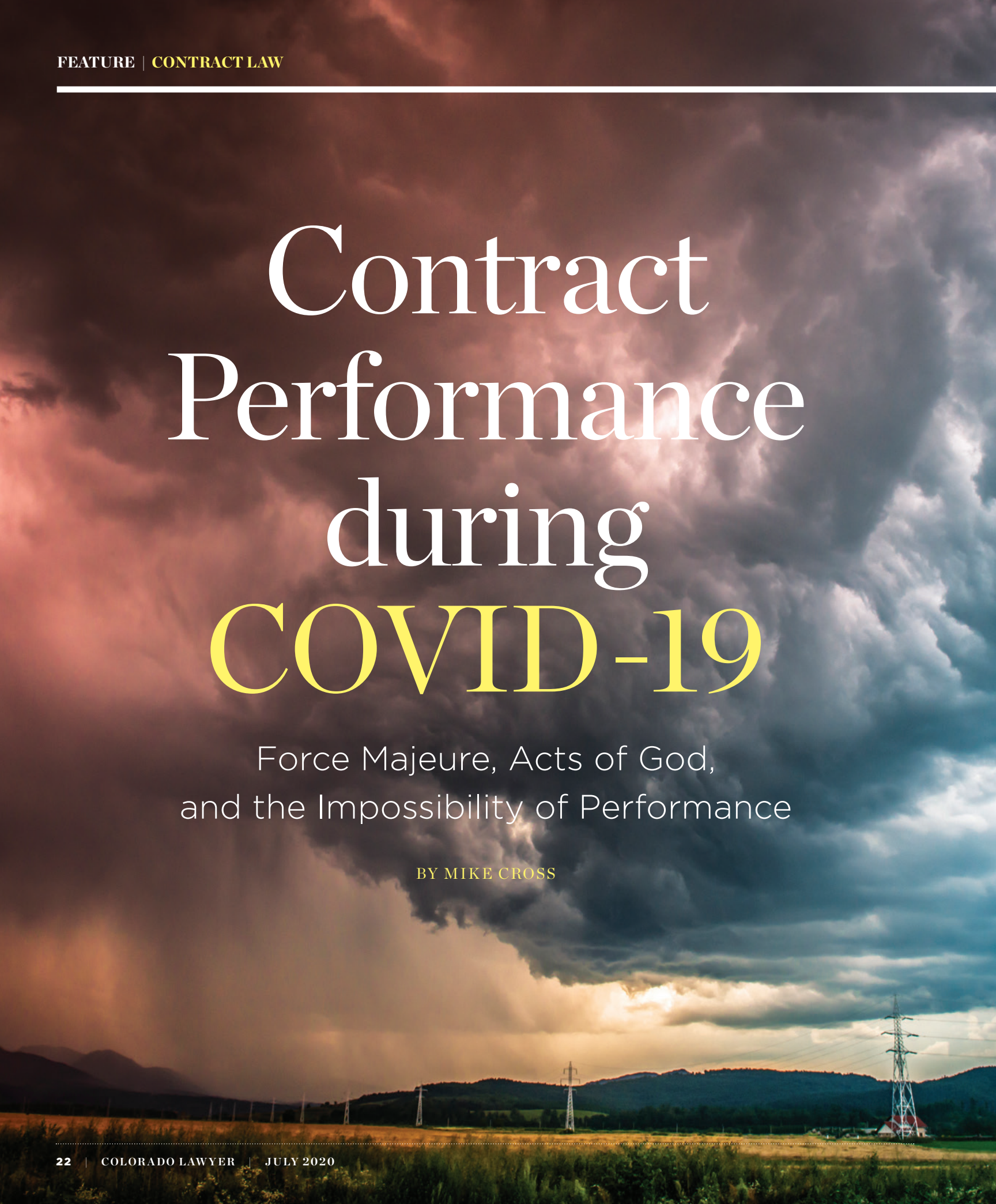
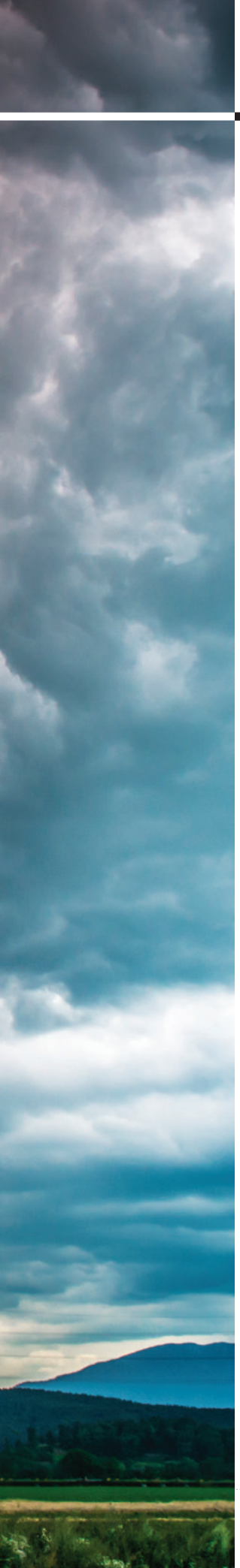


Contract Performance during COVID-19

Force Majeure, Acts of God, and the Impossibility of Performance

BY MIKE CROSS



This article discusses how force majeure provisions and common law defenses may operate to excuse contract performance during the COVID-19 pandemic.

As the COVID-19 pandemic derails and disrupts industries throughout the world, parties find themselves flipping to the back of their lengthy contracts to dust off an often included and more often ignored provision: the force majeure clause. But will they find salvation there? How will courts interpret force majeure clauses in the new world shaped by the COVID-19 pandemic? And how should parties move forward?

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What Constitutes Force Majeure?

The French term “force majeure” translates literally to “superior strength.” *Black’s Law Dictionary* defines the concept as an “event or effect that can neither be anticipated nor controlled” that “prevents someone from doing something that he or she had agreed or officially planned to do.”[1] Many contracts contain force majeure clauses excusing performance under such unanticipated circumstances.

The term force majeure is often conflated with the phrase “act of God.” They have different meanings and scope. An “act of God,” or *vis major*, is an extraordinary and uncontrollable natural disaster or irresistible “superhuman” cause that impedes performance.[2] Force majeure clauses in contracts typically excuse performance under such circumstances. But force majeure clauses often go further by including a comprehensive “parade of horribles,”[3] natural and unnatural, that excuse performance in whole, in part, or only temporarily, depending on the language and the circumstances. Parties to a contract can negotiate and include any number of specific scenarios, including events that are foreseeable and within the parties’ control.[4]

Even where a force majeure clause does not explicitly include the claimed event, it may still provide relief, because the inability to foresee the occurrence of a force majeure event is a fundamental rationale for the clause. Often, our most important failure is one of imagination. For that reason, most force majeure clauses contain a “catchall” provision, such as “any other emergency beyond the parties’ control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement.”[5]

As one can imagine, these provisions generate most of the litigation relating to force majeure clauses. For example, in 2008 Donald Trump filed an action claiming that the “biggest depression we have had in this country since 1929” constituted an “event or circumstance not within the reasonable control of the borrower” in an attempt to escape a $40 million personal guaranty (he also sought $3 billion for damage to his reputation).[6]

Construing the Clause

When construing force majeure clauses, the question, ultimately, is what situations did the parties intend to constitute

an excuse for performance? For guidance, courts often rely on the doctrine of ejusdem generis, which holds that when "general words follow an enumeration of two or more things, they apply only to . . . things of the same general kind or class specifically."[7] Courts interpret these provisions narrowly and are reluctant to give the general words of the catchall provision expansive meaning.[8]

Most courts have held that economic hardship alone does not qualify.[9] For instance, courts have rejected attempts to invoke force majeure clauses in response to the 1986 collapse of the crude oil market,[10] the "worldwide economic meltdown" of the Great Recession,[11] and the "trade war" with China, involving tariffs and allegations of Chinese market manipulation.[12] Unprofitability alone is usually insufficient, especially in sales contracts where price fluctuations are common and a party may be unwilling, but not "unable," to perform.[13] However, this does not preclude the parties from specifically stating in the force majeure clause that changing economic conditions such as market collapse, price fluctuations, or recession excuse performance.[14]

The COVID-19 Effect

To determine whether the COVID-19 pandemic constitutes a force majeure event sufficient to excuse performance, the starting point is the enumerated horribles. While not common, the terms "pandemic" and "epidemic" do appear in many such clauses. For instance, after canceling the remainder of its season, it did not take long for the NBA to locate the term "epidemic" in the force majeure clause of its collective bargaining agreement and start proposing player salary reductions.[15]

Even if those terms are not explicitly included, others might qualify, such as "government regulation," "supply disruption," or "regulatory action." Such terms are often included in force majeure clauses and could excuse performance where the pandemic or the reaction to the pandemic prevents performance. For example, a company's inability to perform may be caused by the State of Colorado's stay-at-home order rather than its workforce contracting COVID-19. In addition, a catchall provision may apply where a pandemic exists "of the same general kind or class" as those events specifically identified.

Even under non-pandemic circumstances, there is plenty of room for argument about whether a force majeure clause applies. Considering the widespread losses caused by the COVID-19 pandemic, a considerable amount of litigation is likely to occur on whether the nonperformance that caused these losses is excusable. The unique complications of this pandemic will exacerbate the analysis. When did the pandemic start? When will it end? If there are waves, does a trough qualify? What happens if the governor has opened the state for business but a party refuses to perform for safety considerations?

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A war begins with a declaration and ends with an armistice. Hurricanes, tornadoes, and wildfires are readily identifiable. But the COVID-19 pandemic is amorphous, and the breadth of its impact might not be apparent for years to come. Nevertheless, legal obligations persist and must be evaluated.

Force Majeure Pitfalls

Most force majeure clauses contain strict notice provisions[16] that a party must follow to the letter. Even in the absence of specific notice requirements, a party should provide immediate notice of, and continuous updates on, a contract impediment. The notice requirement's purpose is to allow the other party to make alternative arrangements and mitigate the impact of the nonperformance. Delayed notice, especially if provided for the first time after the deadline to perform has expired, may result in waiver of performance rights.[17]

Additionally, a party must attempt to overcome an impediment to performance. If alternative avenues of performance exist, those must be explored, even if such options increase a party's costs.[18] A party seeking to be excused must demonstrate that, despite skill, diligence, and good faith, performance remains impossible or unreasonably expensive.[19] Difficulty is not the same as impossibility. For example, while the Ebola virus was ravaging West Africa in 2014, Morocco invoked a force majeure provision to unilaterally withdraw from hosting the African Cup of Nations. The African Confederation of Football (CAF) rejected the move, concluding that while performance was "difficult" due to the need to impose comprehensive sanitation procedures for spectators, performance was possible, as ultimately proven by the replacement host. The CAF fined Morocco and banned the nation from participating in the next two tournaments.[20]

Common Law Relief

Even in the absence of a force majeure clause, relief may be found in common law defenses such

as impossibility, impracticability, and frustration of purpose. Impossibility does not mean literal or strict impossibility but includes "impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."[21] Colorado has adopted the *Restatement (Second) of Contracts*, which requires a party relying on this defense to demonstrate that (1) a supervening event, "either an act of God or an act of a third party," made performance impracticable; (2) the nonoccurrence of the event was a basic assumption of the contract; (3) there was no fault; and (4) the party did not assume the risk of the event's occurrence.[22] Additionally, Colorado's Uniform Commercial Code excuses a seller from timely delivery of goods "if performance as agreed has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."[23] Finally, the doctrine of frustration of purpose may excuse a party in certain situations where the objectives of the contract have been utterly defeated by circumstances arising after the formation of the agreement, such as the cancellation of an event or the destruction of a building by fire due to circumstances beyond the parties' control.[24]

Drafting Tips

Practitioners should consider the following tips when drafting contract provisions:

1. **Include a force majeure clause.** The similar common law doctrines are vague, subject to interpretation, and require factual analysis. A force majeure clause will supersede these defenses.[25] Specifying the exact circumstances that excuse performance will allow parties to make confident decisions during times of uncertainty.
2. **Draft a comprehensive parade of horribles.** Parties can contractually agree to excuse performance under any defined circumstance. This can include foreseeable events if specifically included. Now, more than ever, a practitioner's imagination should be expansive. Most force majeure provisions include standard events such as major natural disasters, wars, and strikes. Counsel should use this opportunity to include more creative scenarios tailored to their clients' needs.
3. **Consider catchall language.** The use of catchall language requires the balance of certainty and risk. The less such language is used, the lower the chance of ambiguity and dispute. However, that comes at a cost. Courts could rely on ejusdem generis, or the doctrine of expressio unius est exclusio alterius—the expression of one thing is the exclusion of another[26]—to limit relief to the enumerated horribles and exclude similar events. A party can tailor the catchall provision to the desired level of specificity. For example, in the Fifth Circuit, where the phrase "including but not limited to" preceded the parade of horribles, the court expansively interpreted the catchall phrase to supersede the doctrine of ejusdem generis.[27]
4. **Remove the phrase "act of God."** This vague phrase not only creates uncertainty, which breeds litigation, but also opens a can of worms. Imagine a jury, six different people with six different religious and political backgrounds, trying to determine whether an "act of God," as opposed to local regulations, Donald Trump, or the Chinese government, prevented a party from performing.

Conclusion

Force majeure clauses and the common law defenses of impossibility, impracticability, and frustration of purpose may provide companies needed relief in this difficult economic environment created by the COVID-19 pandemic. Now is the time to review these clauses and doctrines to determine how they might affect current contracts, and plan for the future accordingly. CL

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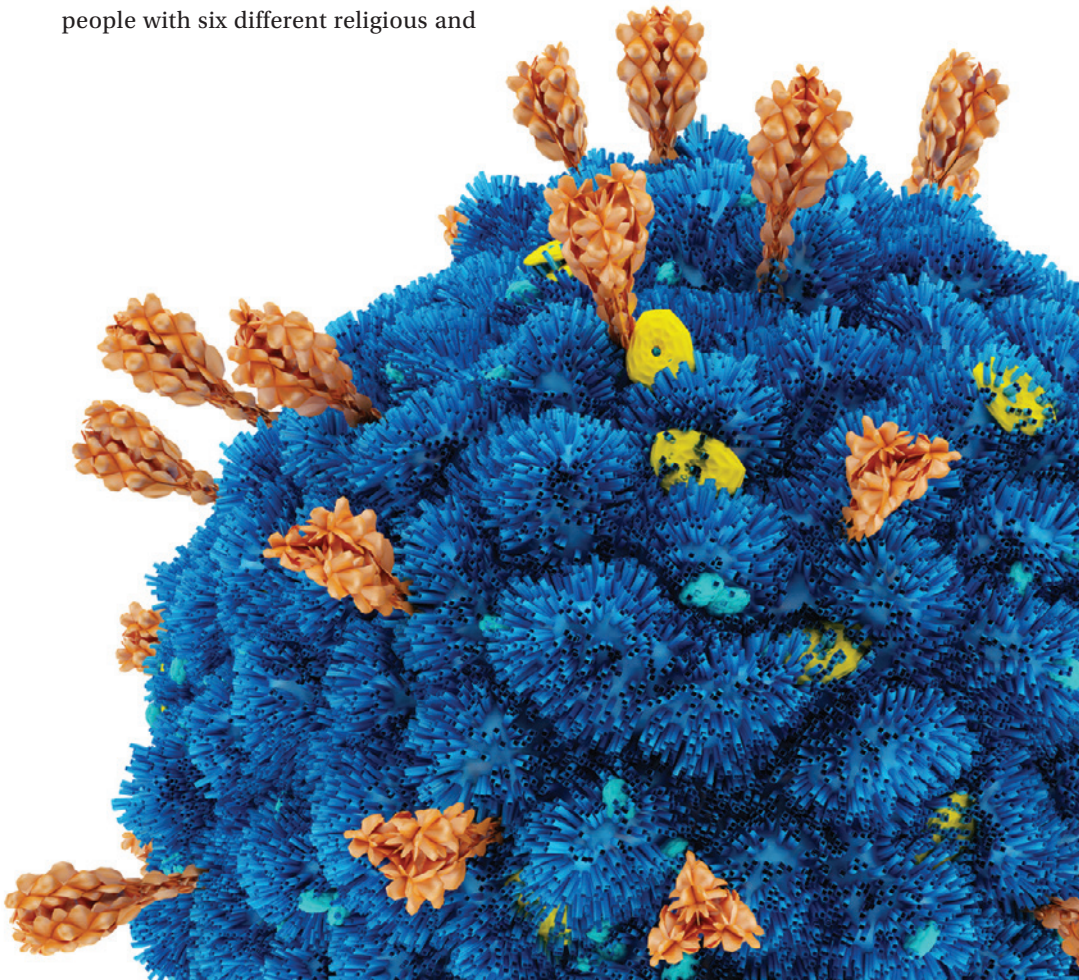

NOTES

1. *Black's Law Dictionary* (Thomson Reuters 11th ed. 2019).

2. *See* Lord, 30 *Williston on Contracts* § 77:31 (Lawyers Coop. Publ'g 4th ed. 1993) (hereinafter *Williston on Contracts*); Pesando, 1 *Am. Jur. 2d* Act of God § 1 (Lawyers Coop. Publ'g 2d ed. 2016) (hereinafter *Am. Jur. 2d*).

3. *See URI Cogeneration Partners, L.P. v. Bd. of Governors*, 915 F.Supp. 1267, 1287 (D.R.I. 1996).

4. *See, e.g.*, *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244 (5th Cir. 1990).

5. *See Williston on Contracts*, *supra* note 2 at § 77:31.

6. Norris, "Trump Sees Act of God in Recession," *N.Y. Times* (Dec. 4, 2008), https://www.nytimes.com/2008/12/05/business/05norris.html.

7. Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* at 199 (West 2012).

8. *See, e.g.*, *Kel Kim Corp. v. Cent. Markets, Inc.*, 519 N.E.2d 295, 296–97 (N.Y.App. 1987).

9. *Williston on Contracts*, *supra* note 2 at § 77:31.

10. *Langham-Hill Petroleum, Inc. v. S. Fuels Co.*, 813 F.2d 1327 (4th Cir. 1987).

11. *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 2010 WL 1945738 at *3–4 (N.Y. Sup.Ct. May 12, 2010).

12. *Kyocera Corp. v. Hemlock Semiconductor, LLC.*, 886 N.W.2d 445 (Mich.App. 2015).

13. *See, e.g.*, *Sabine Corp. v. ONG W., Inc.*, 725 F.Supp. 1157 (W.D.Okla. 1989); *Langham-Hill Petroleum, Inc.*, 813 F.2d 1327.

14. *See, e.g.*, *In re Old Carco LLC*, 452 B.R. 100 (S.D.N.Y. 2011).

15. Pickman, "Report: NBA, NBPA Discussing Possibility of Withholding Player Salaries," *Sports Illustrated* (Mar. 31, 2020), https://www.si.com/nba/2020/04/01/nba-nbpa-financial-players-future.

16. *Am. Jur. 2d, supra* note 2 at § 13.

17. *See, e.g.*, *Res. Inv. Corp. v. Enron Corp.*, 669 F.Supp. 1038, 1043–44 (D.Colo. 1987).

18. *See, e.g.*, *Erickson v. Dart Oil and Gas Corp.*, 474 N.W.2d 150, 155 (Mich.App. 1991); *Woods v. Ratliff*, 407 So. 2d 1375, 1379 (La.App. 1981).

19. *Williston on Contracts*, *supra* note 2 at § 77:31.

20. *See* Arbitration CAS 2015/A/3920, *FRMF v. CAF*, Award of Nov. 17, 2015.

21. Colo. Civ. Jury Instr. 30:23 (CLE in Colo., Inc. 4th ed. 2019) (quoting *City of Littleton v. Emp'rs Fire Ins. Co.*, 453 P.2d 810, 812 (Colo. 1969)).

22. *Restatement (Second) of Contracts* § 261 (Am. Law Inst. 1981) (hereinafter *Restatement*).

23. CRS § 4-2-615(a).

24. *Restatement*, *supra* note 22 at § 265. *See Beals v. Tri-B Assocs.*, 644 P.2d 78, 80–81 (Colo. App. 1982).

25. *See Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, 731 F.Supp. 850, 855–56 (N.D.Ill. 1990).

26. *See Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1207 (Colo. 1994).

27. *See, e.g.*, *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 989 (5th Cir. 1976).