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Danielle K. Hart
Southwestern Law School, dhart@swlaw.edu

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IF PAST IS PROLOGUE, THEN THE FUTURE IS BLEAK: CONTRACTS, COVID–19, AND THE CHANGED CIRCUMSTANCES DOCTRINES

*by: Danielle Kie Hart**

Abstract

At the heart of most of the systemic problems currently confronting individuals and businesses as a result of the COVID–19 pandemic is quite literally a contract. Housing. Insurance. Food. Health care. Child care. Employment. Manufacturing. Construction. Supply chains. You name it. Contracts are implicated everywhere. So make no mistake: How contract law addresses these ostensibly private contracts will have profound social consequences. If the past really is prologue, then the future is indeed bleak. The empirical study conducted for this Article establishes what the conventional wisdom has claimed for the last 70 years. More specifically, the empirical study here shows that the common law's changed circumstances doctrines ("CCDs")—namely, impossibility, impracticability of performance, and frustration of purpose—will generally not excuse a party from performing his obligations under a contract, regardless of the changed circumstance he alleges. Contrary to all the CCD literature that addresses this issue, this Article makes the unconventional argument that the CCDs should be more broadly available, meaning they should be more successful in excusing contract performance when triggered by catastrophic circumstances. And unlike the rest of the field, which focuses on the CCDs themselves, this Article argues that to effectively address the allocation of unforeseen risks in general and catastrophic risks like a pandemic in particular, we must reframe the legal approach to contract formation. From there, given that the solution to the changed circumstances problem preferred by courts and commentators is an explicit risk-allocation term in the parties' contract, the solution proposed in this Article to the risk-allocation problem literally suggests itself. A risk-and-loss-allocation clause should be mandated in most contracts as a part of contract formation. The type of risk-and-loss-allocation clause and how the clause would work would depend on whether the contract is co-drafted or adhesive. Generally, the inclusion of a risk-and-loss-allocation clause would facilitate transactions and encourage contracting by ensuring that contracts remain efficient and predictable. The main difference between the risk-and-loss-allocation clause proposed here and existing contract law, of course, is who ends up bearing all the risk and loss occasioned by the catastrophic changed circumstance. To be clear, if nothing changes and our approach to contract formation remains the same as it is right now, then all of the risk and all of the attendant loss will generally be left to lie where it falls—namely, on the party trying to get out of the contract because of the

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* Professor of Law, Southwestern Law School; LL.M. Harvard Law School; J.D. William S. Richardson School of Law, University of Hawaii; B.A. Whitman College. My sincere thanks go to Nancy Kim, Stephen Sepinuck, Jay Feinman, and Hila Keren for reading and commenting on drafts of this Article. Any errors in the text are mine alone. Southwestern Law School provided generous research support, for which I am grateful. I also need to thank my research assistants Kimberly Morosi, Ting Yu Lo, Willow Karfiol, and Andres De La Cruz for their help. Finally, I would like to thank Meaganne J. Lewellyn, (the Editor-in-Chief), Spencer Lockwood (the Managing Editor), and all the other editors at the *Texas A&M Law Review* for their professionalism and assistance in editing my article. Any errors remaining are my own.

changed circumstances—and this will be the result regardless of the legal theory used to justify (or demonize) the CCDs or any changes made to the doctrines themselves. But if we finally acknowledge the public aspects of contracts and contract law, namely, that they do in fact produce social consequences that extend beyond the individual contract and contracting parties, then contracts and contract law may well be part of the solutions to some of the most pressing problems currently confronting American society now and into the future.

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I. Introduction

In December 2019, word first started trickling out about a new virus in China.[1] By January 20, 2020, the United States reported its first case of the virus that would later be called COVID–19.[2] By the end of the month, the World Health Organization declared a global health emergency.[3] And by the end of March 2020, more than half the U.S. population was under stay-at-home orders issued by state governors.[4] Not long after that, reports started pouring in from across the country: global supply chains were completely upended, leading to disruptions and shortages;[5] thousands of suppliers across different industries were devastated as customers cut production or closed shop;[6] businesses

1. *See* Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. Times (Mar. 17, 2021), https://www.nytimes.com/article/coronavirus-timeline.html [https://perma.cc/R6PV-NVHW].

2. *Id.*

3. *Id.*

4. *See* Rosie Perper, Sarah Al-Arshani & Holly Secon, *More Than Half of the US Population Is Now Under Orders to Stay Home—Here's a List of Coronavirus Lockdowns in US States and Cities*, Bus. Insider (Mar. 31, 2020, 11:57 PM), https://www.businessinsider.com/states-cities-shutting-down-bars-restaurants-concerts-curfew-2020-3 [https://perma.cc/MNX4-GM6L].

5. Jeff Karoub, *Ravi Anupindi: COVID-19 Shocks Food Supply Chain, Spurs Creativity and Search for Resiliency*, U. Mich. News (Apr. 29, 2020), https://news.umich.edu/covid-19-shocks-food-supply-chain-spurs-creativity-and-search-for-resiliency/ [https://perma.cc/W8B8-V4BH].

6. Tom Linton & Bindiya Vakil, *It's Up to Manufacturers to Keep Their Suppliers Afloat*, Harv. Bus. Rev. (Apr. 14, 2020), https://hbr.org/2020/04/its-up-to-manufacturers-to-keep-their-suppliers-afloat [https://perma.cc/XNM5-TBZJ].

were failing to pay their rent,[7] closing their stores,[8] and furloughing their employees;[9] homeowners could not pay their mortgages;[10] renters could not pay rent, let alone all their other bills;[11] airlines, cruise ships, and hotels were refusing to issue refunds;[12] and credit card companies and other lenders[13] were contemplating the likelihood of massive defaults.[14]

As of January 10, 2022, there were 60,240,751 confirmed COVID–19 cases in the United States, and 835,302 Americans lost their lives because of a virus that has yet to be controlled.[15] Notwithstanding these mind-boggling and heart-breaking numbers, news outlets have been reporting for some time now that the official tallies significantly *undercount* the actual number of cases and deaths that COVID–19 has caused in the United States.[16]

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7. Jordan Valinsky, *Cheesecake Factory Tells Its Landlords It Won't Be Able to Pay April Rent*, CNN BUS., https://www.cnn.com/2020/03/26/business/cheesecake-factory-april-rent-coronavirus/index.html (Mar. 26, 2020, 1:13 PM) [https://perma.cc/5F5X-CUCY]; *see also* Konrad Putzier & Esther Fung, *Businesses Can't Pay Rent. That's a Threat to the $3 Trillion Commercial Mortgage Market*, WALL ST. J. (Mar. 24, 2020, 8:00 AM), https://www.wsj.com/articles/businesses-cant-pay-rent-thats-a-threat-to-the-3-trillion-commercial-mortgage-market-11585051201 [https://perma.cc/D4JY-5DDD].

8. Jordan Valinsky, *Bed Bath & Beyond Is Laying Off 2,800 Employees*, CNN BUS., https://www.cnn.com/2020/08/26/investing/bed-bath-beyond-layoffs (Aug. 26, 2020, 9:07 AM) [https://perma.cc/Y9PR-7M2V].

9. Abha Bhattarai & Rachel Siegel, *Macy's Is Furloughing Most of Its 125,000 Employees Amid Prolonged Coronavirus Shutdown*, WASH. POST (Mar. 30, 2020), https://www.washingtonpost.com/business/2020/03/30/macys-furloughs-coronavirus/ [https://perma.cc/6RM5-3LQR].

10. Diana Olick, *Potential Wave of Mortgage Delinquencies Could Bankrupt the Payment System*, CNBC, https://www.cnbc.com/2020/03/23/coronavirus-us-potential-wave-of-mortgage-delinquencies-could-bankrupt-payment-system.html (Mar. 23, 2020, 5:28 PM) [https://perma.cc/D4KU-34P6].

11. Eric Morath & Rachel Feintzeig, *'I Have Bills I Have to Pay.' Low-Wage Workers Face Brunt of Coronavirus Crisis*, WALL ST. J. (Mar. 20, 2020, 11:58 AM), https://www.wsj.com/articles/i-have-bills-i-have-to-pay-low-wage-workers-face-brunt-of-coronavirus-crisis-11584719927 [https://perma.cc/2NFG-LY78].

12. David Lazarus, Column, *No Coronavirus Refund but Credit for a Future Cruise? Are You Kidding?*, L.A. TIMES (Mar. 31, 2020, 5:00 AM), https://www.latimes.com/business/story/2020-03-31/column-coronavirus-cruise-lines [https://perma.cc/5FCN-WBUX].

13. W. E. Messamore, *The Housing Market Crash's First Victims Won't Be Homeowners*, CCN, https://www.ccn.com/the-housing-market-crashs-first-victims-wont-be-homeowners (Sept. 23, 2020, 1:46 PM) [https://perma.cc/QkX2-UZRS].

14. Matt Egan, *Credit Card CEO Warns of Dark Times When the $600 Unemployment Benefit Expires*, CNN BUS., https://www.cnn.com/2020/07/22/investing/credit-card-debt-synchrony-unemployment (July 22, 2020, 1:57 PM) [https://perma.cc/M47D-A656] (Defaults were particularly likely after the forbearance periods granted by the credit card industry and the $600-a-week unemployment benefits ended.).

15. *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (Jan. 1, 2021) [https://perma.cc/8QH7-VCPC].

16. *See, e.g.*, Berkeley Lovelace, Jr., *Official U.S. Coronavirus Death Toll Is 'A Substantial Undercount' of Actual Tally, Yale Study Finds*, CNBC, https://

In addition to the mounting death toll and long-term health consequences to survivors, the havoc the COVID–19 pandemic is wreaking on the American economy is staggering. A few numbers illustrate the extent of the damage: "The U.S. economy contracted at an annualized pace of 32.9% in the second quarter [of 2020], . . . the sharpest since at least the late 1940s."[17] Economists concluded as early as May 2020 that more than 100,000 small businesses had already closed permanently since the pandemic erupted in March.[18] According to the same survey, 2% of small businesses were simply gone.[19] The pandemic has produced the highest unemployment rates in the country since the Great Depression.[20] More than 50 million Americans were still out of work at the end of July 2020, and over a million people filed new unemployment claims every week, except one, since March.[21] As a result of being laid off, over 5.4 million people lost their health insurance.[22] Further, "[a]t least 11 million renters have fallen behind on

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www.cnbc.com/2020/07/01/official-us-coronavirus-death-toll-is-a-substantial-undercount-of-actual-tally-new-yale-study-finds.html (July 2, 2020, 9:11 AM) [https://perma.cc/D7CE-88SJ]; *Excess Deaths Associated with COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/nvss/vsrr/covid19/excess_deaths.htm (Sept. 1, 2021) [https://perma.cc/8EC5-JQ97]; Angela Betsaida B. Laguipo, *Official U.S. Tallies Likely Undercount COVID-19 Deaths*, NEWS MED. (July 3, 2020), https://www.news-medical.net/news/20200703/Official-UStallies-likely-undercount-COVID-19-deaths.aspx [https://perma.cc/X5PJ-LLW7]; Pien Huang, *Fauci Says U.S. Death Toll Is Likely Higher. Other COVID-19 Stats Need Adjusting, Too*, NPR (May 13, 2020, 12:05 PM), https://www.npr.org/sections/goatsandsoda/2020/05/13/854873605/fauci-says-u-s-death-toll-is-likely-higher-other-covid-stats-need-adjusting-too [https://perma.cc/T5UU-J2CN].

17. William Watts, *This 'Dire' Economic Situation 'Deserves To Be Called a Depression—A Pandemic Depression'*, MKT. WATCH, https://www.marketwatch.com/story/coronavirus-collapse-is-nothing-less-than-a-depression-a-pandemic-depression-warn-top-economists-11596728170 (Aug. 6, 2020, 4:07 PM) [https://perma.cc/GJ58-7NY5].

18. Heather Long, *Small Business Used to Define America's Economy. The Pandemic Could Change That Forever*, WASH. POST (May 12, 2020), https://www.washingtonpost.com/business/2020/05/12/small-business-used-define-americas-economy-pandemic-could-end-that-forever/ [https://perma.cc/UG7A-YFHQ].

19. *Id.*

20. Steven Brown, *The COVID-19 Crisis Continues to Have Uneven Economic Impact by Race and Ethnicity*, URB. INST.: URB. WIRE (July 1, 2020), https://www.urban.org/urban-wire/covid-19-crisis-continues-have-uneven-economic-impact-race-and-ethnicity [https://perma.cc/JE4Z-3T9V].

21. There were more than 1,000,000 unemployment claims for nineteen weeks in a row. Paul Wiseman, *More Than 1 Million Americans File for Unemployment, Again*, ASSOCIATED PRESS (Aug. 27, 2020), https://apnews.com/383eb8856eda415ed3a3b17894be035f#:~:text=the%20Labor%20Department%20reported%20Thursday,late%20March%2C%20an%20unprecedented%20streak [https://perma.cc/Y5ZX-A4CS]; Nick Routley, *Charts: The Economic Impact of COVID-19 in the U.S. So Far*, VISUAL CAPITALIST (July 31, 2020), https://www.visualcapitalist.com/economic-impact-of-covid-h1-2020/ [https://perma.cc/565Y-BMBX].

22. Annie Nova, *5.4 Million Americans Have Lost Their Health Insurance. What to Do If You're One of Them*, CNBC, https://www.cnbc.com/2020/07/14/one-of-the-millions-of-newly-uninsured-americans-what-to-do-next.html (July 14, 2020, 1:54 PM) [https://perma.cc/HZM9-TQ58].

rent[,] and some 3.6 million households could face evictions in the coming months."[23]

Notwithstanding the widespread and across-the-board devastation that COVID–19 is inflicting, it is also agonizingly clear that the pandemic's death toll and economic wreckage disproportionately affects African Americans, Latinos, and Indigenous communities.[24] People of color are at increased risk of getting sick and dying from COVID–19.[25] According to the CDC, as of July 16, 2021, the death rate for American Indians and Alaskan Natives is 2.4 times higher than the death rate for whites; for African Americans the death rate is 2.0 times higher, and for Hispanics/Latinx people the death rate is 2.3 times higher.[26] Much of the disparity in these healthcare outcomes is now widely acknowledged as the result of long-standing systemic health and social inequality.[27]

Moreover, according to the Pew Research Center, 61% of Hispanic Americans and 44% of Black Americans reported in April 2020 that either they or someone in their household had lost a job or wages because of the pandemic, compared to 38% of white adults.[28] The Center for Budget and Policy Priorities reported that one in five adult renters were behind on their rent for the week ending July 5, 2021, but the rates for Black (24%) and Latino (18%) renters were significantly higher than for white (11%) renters.[29] Black and Hispanic adults were

23. Clifford Colby & Dale Smith, *The Federal Eviction Moratorium Is Over. What Renters Need to Know*, CNET, https://www.cnet.com/personal-finance/eviction-crisis-renters-still-have-one-protection-left-until-monday-aug-24/ (Aug. 29, 2021, 9:00 AM) [https://perma.cc/BU4N-6AEL].

24. *Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and (Aug. 9, 2021) [https://perma.cc/RVQ9-N9YP] [hereinafter *Tracking the COVID-19 Recession's Effects*]; Tiffany N. Ford, Sarah Reber & Richard V. Reeves, *Race Gaps in COVID-19 Deaths Are Even Bigger Than They Appear*, BROOKINGS (June 16, 2020), https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/ [https://perma.cc/T997-9HYK].

25. *See, e.g.*, *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html (Apr. 19, 2021) [hereinafter *Health Equity Considerations*]; *Too Many Black Americans Are Dying from COVID-19*, SCI. AM. (Aug 1, 2020), https://www.scientificamerican.com/article/too-many-black-americans-are-dying-from-covid-19/ [https://perma.cc/KBT3-V7X2].

26. *Risk for COVID-19 Infection, Hospitalization, and Death By Race/Ethnicity*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html (July 16, 2021) [https://perma.cc/MC9G-Q9Y8].

27. *See, e.g.*, *Health Equity Considerations*, *supra* note 25; *Too Many Black Americans Are Dying from COVID-19*, *supra* note 25.

28. Mark Hugo Lopez, Lee Rainie & Abby Budiman, *Financial and Health Impacts of COVID-19 Vary Widely by Race and Ethnicity*, PEW RSCH. CTR. (May 5, 2020), https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/ [https://perma.cc/A2QU-LKRJ].

29. *Tracking the COVID-19 Recession's Effects*, *supra* note 24.

also more likely than their white counterparts to say that they could not pay some of their bills or could only make partial payments in April.[30] The Urban Institute's July 2020 research indicated that more than twice as many Black (37.4%) and Hispanic adults (39.3%) were food insecure as white adults (17.6%),[31] none of which is surprising given the employment and wage data.

Clearly, the COVID–19 pandemic's effects in the United States are systemic—they affect countless individuals and businesses from every region of the country, every sector of the economy, and every part of American society. Systemic effects unquestionably require a systemic response from the State, with the Coronavirus Aid, Relief, and Economic Security ("CARES") Act[32] being just one example.

But overlooked if not ignored amid this crisis is the role that contracts and contract law play in all this. A contract is quite literally at the heart of most of the systemic problems currently confronting individuals and businesses. Housing. Insurance. Food. Health care. Child care. Employment. Manufacturing. Construction. Supply chains. You name it. Contracts are implicated *everywhere.* And given the headlines, we all know what is coming down the pike as everyone, individuals and businesses alike, tries to sort through the ruin that COVID–19 continues to leave in its wake and assess the impact that the pandemic will ultimately have on their day-to-day existence if not long-term survival.

Two questions are thus posed by the pandemic for contract law—both of which this Article addresses. The first question is descriptive: Does contract law generally provide any relief to people and entities who find themselves parties to contracts that, when the time set for performance arrives, look very different from the contracts they originally entered into? This question specifically triggers an examination of contract law's changed circumstances doctrines ("CCDs")—namely, impossibility, impracticability of performance, and frustration of purpose—to predict how contract law will address the particular "changed circumstance" known as the COVID–19 pandemic. The second question is normative: *Should* contract law make legal relief, like the CCDs, more broadly available to contracting parties in these kinds of catastrophic circumstances?

Conventional wisdom and the CCD literature spanning 70 years assume that the CCDs are very limited remedies at best. Practically speaking, this means that contract law does not provide relief to most people who want to get out of their contracts because of changed cir-

30. *Id.*

31. Brown, *supra* note 20. For 2021 estimates, see *Tracking the COVID-19 Recession's Effects*, *supra* note 24.

32. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified at 15 U.S.C. § 9001).

cumstances.[33] In a nutshell, this is because the CCDs have front-end and back-end problems: literally, contract formation and remedy. On the front end, the CCDs usually fail because they are premised on assumptions about contracting (i.e., about the parties and the contract-formation process) that simply do not hold up in the real world today, if they ever did. More specifically, the literature and cases seemingly agree that the one thing a future adversely affected party can do to ensure that a CCD will work is to include a provision in the contract, like a force majeure clause, to protect itself against future performance-related contingencies.[34] Of course, this solution presupposes at a minimum that future adversely affected parties are either (1) drafting the contracts they are entering into either alone or with their contracting partners *and/or* (2) have the wherewithal—knowledge, time, access to information and advice, money, the list goes on—to not only insist on the inclusion of such a clause in those contracts but also ensure that the clause actually ends up in the written documents. One or both of these presuppositions does not exist in the vast majority of consumer or employment contracts, most if not all online contracts (i.e., like buying music from the Apple store or products from Amazon), or even in a lot of business contracts, particularly those involving small businesses.[35] Consequently, the absence of an explicit risk-allocation clause in most contracts should surprise no one. Yet its absence can be and is used to both indict the party who supposedly could have but nevertheless failed to protect itself and predetermine the outcome of the dispute.

The back-end problem that the CCDs present is that the usual remedy for the CCDs is to excuse the promisor from any further performance obligation.[36] Excuse, in other words, is either granted or denied. The remedy is, therefore, presented as a zero-sum game in which one

33. *See, e.g.*, Arthur Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DEPAUL L. REV. 1, 22 (1953); Michael G. Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Law*, 18 DUQUESNE L. REV. 551, 558–59 (1980); Steven W. Hubbard, Comment, *Relief from Burdensome Long-Term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment*, 47 MO. L. REV. 79, 80 (1982); Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 477 (1985); Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1, 1 (1991); Nicholas R. Weiskopf, *Frustration of Contractual Purpose—Doctrine or Myth?*, 70 ST. JOHN'S L. REV. 239, 242 (1996); Thomas Roberts, *Commercial Impossibility and Frustration of Purpose: A Critical Analysis*, 16 CAN. J.L. & JURIS. 129, 129 (2003); Willem H. Van Boom, Impossibility, Impracticability and Unforeseen Circumstances 9 (Mar. 25, 2020) (unpublished manuscript) (available at https://ssrn.com/abstract=3561025).

34. *See infra* discussion accompanying notes 196–200.

35. *See infra* notes 200–08 and accompanying discussion.

36. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981) (explaining that the "duty to render . . . performance is discharged" if the elements of impracticability are met).

party is usually allocated *all of the risk and accompanying losses*.[37] Not surprisingly, in situations where only one party drafted the contract, the non-drafting party is saddled with all of the risk and loss because the non-drafting party failed to include a provision protecting itself in the contract. The reasoning thus becomes not only circular but self-fulfilling.

While this Article grapples with the CCDs, it diverges from the rest of the CCD literature in several important ways. To begin with, instead of relying on conventional wisdom or anecdotal evidence about whether the CCDs are "successful"[38] when raised in practice, this Article is premised on an empirical study. The study reviewed case law from all federal and state courts in the Seventh and Ninth Circuits. The findings, detailed below, offer a unique insight. They document that parties are not generally successful when they raise the CCDs. That is, courts do not provide any legal relief to the party trying to get out of the contract because of the changed circumstances in 86% of the cases in the Seventh Circuit and in 78% of the cases in the Ninth Circuit.[39] So unfortunately, if the past is indeed a prologue for the future, then the future looks rather bleak. This is because contract law will most likely let the risk *and* loss engendered by the COVID–19 pandemic lie where it falls and leave the contracting parties exactly where it finds them: namely, *in breach* of their supply contracts, commercial or residential rental agreements, credit card contracts, etc.

Make no mistake: How contract law addresses these ostensibly private contracts will have profound social consequences. How many people will be evicted from their apartments or lose their homes to foreclosure? How many of those displaced people will be able to find new places to live or will remain homeless? How many small businesses will be forced to shut down, never to reopen? How many employees will lose their jobs and remain permanently out of the workforce? How many people will lose their health insurance either through lost work or because they simply can no longer afford to pay for their own private insurance? And what will this increase in the number of medically uninsured do to the long-term health of all these affected people and to the already existing health care disparities and exorbitant healthcare costs in general? How many childcare centers will close permanently, and what will happen to the employment pros-

37. *See, e.g.*, Rapsomanikis, *supra* note 33, at 557; Trakman, *supra* note 33, at 482–83; *see also infra* Table 3 and accompanying discussion.

38. The only reason a contracting party would raise one of the CCDs in arbitration or litigation would be to excuse that party from having to perform the contract. With this understanding of the CCDs' purpose, a CCD would only be "successful" when a court finds that the party's performance is excused. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981) ("Where . . . a party's performance is made impracticable . . . his duty to render that performance is discharged . . . .").

39. *See infra* Table 3 and accompanying discussion.

pects for many of those parents, particularly women,[40] who *need* childcare to work?[41]

Obviously, contracts and contract law are not the *only* explanation for the existential crises confronting so many Americans and American businesses. In other words, it is not just because so many people and businesses will end up in breach of their contracts that they find themselves in uncertain and even dire circumstances. But because all these breaches of contracts will produce profound social consequences, contracts and contract law are, in fact, an integral part of the systemic problems currently confronting us all. Consequently, and contrary to all the CCD literature that addresses this issue,[42] this Article makes the unconventional argument that the CCDs *should be* more broadly available, meaning they *should be* more successful in excusing contract performance when triggered by catastrophic circumstances.

This Article therefore proposes a novel intervention. Unlike the rest of the field, which focuses on the CCDs themselves,[43] this Article argues that to effectively address the allocation of unforeseen risks in general, and catastrophic risks like a pandemic in particular, we must reframe the legal approach to contract formation. This is because formation is the core of the entire contract law system;[44] it is literally where power in a contract is not just embedded but also entrenched. So, if contract formation is reframed to more accurately reflect contracting in the real world, and given that the solution to the changed circumstances problem preferred by courts and commentators remains an explicit risk-allocation term in the parties' contract, then the solution proposed in this Article to the risk-allocation problem liter-

40. According to the *Washington Post*, the shuttering of childcare centers may set women's employment back an entire generation. *See* Alicia Sasser Modestino, *Coronavirus Child-Care Crisis Will Set Women Back a Generation*, WASH. POST (July 29, 2020), https://www.washingtonpost.com/us-policy/2020/07/29/childcare-remote-learning-women-employment/ [https://perma.cc/VZC2-YC8A].

41. Reporting shows that 25% of the 950 preschools and in-home sites surveyed by the Center for the Study of Child Care Employment were closed and that others that remained open were going into debt to keep their doors open. Edward Lempinen, *California Child Care System Collapsing Under COVID-19, Berkeley Report Says*, BERKELEY NEWS (July 22, 2020), https://news.berkeley.edu/2020/07/22/california-child-care-system-collapsing-under-covid-19-berkeley-report-says/ [https://perma.cc/ZW33-PEZG].

42. *See infra* discussion accompanying notes 190–95.

43. *See, e.g.*, Hubbard, *supra* note 33, at 104–05 (urging equitable price adjustment as the solution); Trakman, *supra* note 33, at 481–82, 484–85 (arguing that loss sharing would minimize many of the issues currently plaguing CCDs in theory and in application); Kull, *supra* note 33, at 6 (articulating the *windfall principle*, which argues that since the parties have not allocated the risk between them, the losses should be left to lie where they fall).

44. *See generally* Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 275 (2009) [hereinafter Hart, *Formation*] (arguing that the power of contracts comes from their formation, particularly the element of mutual assent); *see also infra* Part IV.

ally suggests itself: A risk-allocation clause should be included in most contracts as part of contract formation. More bluntly, the specific solution will depend on the type of contract involved: (1) For co-drafted contracts, it would require the inclusion of a standard, negotiable, and variable risk-and-loss-allocation clause *and* a good-faith-negotiation provision; and (2) for most adhesion contracts, it would require the inclusion of a standard, *nonnegotiable, and non-variable* risk-*and*-loss allocation clause *and* a good faith negotiation provision. Another important and innovative contribution of this paper, therefore, is that this Article explicitly recognizes two types of contracts—co-drafted and adhesive—and proposes a specific solution based on the type of contract at issue.

In particular, including a risk-and-loss-allocation clause would facilitate transactions and encourage contracting in general by ensuring that contracts remain efficient and predictable. The risk-and-loss-allocation clause would let contracting parties know in advance how risks and losses would be allocated between them if a catastrophic changed circumstance occurs in the future, thereby increasing trust between the parties and enabling the parties to plan their present and future affairs accordingly. This is because the risk-and-loss-allocation clause would require courts and other dispute resolution decision-makers to shift *all* the risk and *all* the loss onto the drafting party in contracts where only one party actually drafted the contract or onto the party designated in a co-drafted contract scenario. Because risk and loss would be explicitly and intentionally allocated in the contract, the CCDs should arguably not even be necessary. The contract itself would predetermine the outcome. That said, should the contracting party that is unhappy with the contract's risk-and-loss-allocations pursue a contract claim in court (or through arbitration), the existence of a risk-and-loss-allocation clause would predetermine the outcome of the CCD cases just as the absence of a risk-and-loss-allocation clause does now. In such cases, the CCDs would and should be more broadly available to excuse performance under a contract.

The main difference between the risk-and-loss-allocation clause proposed here and existing contract law, of course, is who bears all the risk and loss occasioned by the catastrophic changed circumstance. So to be clear, if nothing changes and our approach to contract formation remains the same as it is right now, then *all the risk and all the attendant loss* will generally be left to lie where it falls, namely, on the party trying to get out of the contract because of the changed circumstances. This will be result regardless of the legal theory used to justify (or demonize) the CCDs or any changes made to the doctrines themselves.

One of this Article's most important contributions, therefore, is to expose the *social consequences* created when the effects of ostensibly private contracts between private parties, particularly adhesion con-

tracts (i.e., where only one party drafts the document), are aggregated. Of course, even if the solution suggested in this Article gets adopted, it will come too late to help any of the people and businesses affected by the COVID–19 pandemic. The risk-and-loss-allocation clause and good-faith-negotiation provision being proposed here simply do not exist in *any* of these affected contracts. For this reason, this Article also proposes a principled way for judges or arbitrators deciding CCD cases going forward, particularly cases involving adhesion contracts, to find that the risk and loss created by a catastrophic changed circumstance should fall on the drafting party.

Finally, it is important to acknowledge that any relief provided to a contracting party under the CCDs via any of the solutions proposed in this Article would be meted out contract by contract. Because of this case-by-case approach, contract law is not and never will be a systemic fix for systemic failures in American society. Systemic relief must come from the State. That said, the United States is at a critical moment in its history right now, and as a result, contract law is or will be forced to confront a critical moment in its evolution. If we finally acknowledge *the public* aspects of contracts and contract law—namely, that they do in fact produce *social consequences* that extend beyond the individual contract and contracting parties—then contracts and contract law may well be part of the solutions to some of the most pressing problems confronting American society now and into the future.

The Article proceeds as follows: Part II begins with a primer on the CCDs and then lays out the methodology, findings, and analysis of the empirical study conducted for the Article. The primary conclusion from the study is that the CCDs are not generally successful when raised in practice, even when the contingency causing the contractual disruption was the September 11th terrorist attacks, the Great Recession of 2007–2009, or other similarly catastrophic events. Part III then highlights the distinction between co-drafted contracts and adhesion contracts and examines in more detail why courts and commentators are so reluctant to let people out of their contracts under the CCDs. The focus on contract formation as the source of the problem distinguishes this Article from the rest of the CCD literature and introduces some Legal Realism into both the discussion and the explanation. Finally, Part IV discusses the solutions proposed by this Article in detail, specifically how the risk-and-loss-allocation clause and the good-faith-negotiation provision would work in both a co-drafted contract and an adhesive contract scenario.

II. Empirical Study of the Problem

Before discussing the data, a primer on the CCDs is needed. The CCDs typically include impossibility of performance, impracticability of performance (a.k.a. commercial impracticability), and frustration of

purpose (a.k.a. commercial frustration).[45] All the CCDs are triggered by changed circumstances, that is, when circumstances change so dramatically *after* contract formation such that performance is (1) literally impossible, (2) impracticable because of excessive and unreasonable cost, or (3) almost completely valueless to one party.[46] While CCDs have changed circumstances in common, they differ from each other in specific ways, including how they address different performance-related problems and receive separate analytical treatment.[47]

The doctrine of impossibility requires *objective impossibility*. In other words, the party seeking to get out of the contract must prove that the performance promised in the contract is physically not possible, that is, that *no one* could perform.[48] The *Taylor v. Caldwell* case is the oft-cited example.[49]

In *Taylor*, the parties contracted for Taylor to use Caldwell's music hall for a series of performances that would occur over four days.[50] Unfortunately, an accidental fire destroyed Caldwell's music hall before the first performance was scheduled to take place.[51] The destruction of the music hall made Caldwell's duty to provide *that music hall* objectively impossible.[52] Taylor then sued Caldwell for breach of contract.[53] The Court held that Caldwell's duty to provide the music hall under the parties' contract was excused because it found that the parties contracted on the basis of the continued existence of the music hall.[54]

Contract law theoretically shifted from impossibility to impracticability of performance sometime in the 1900s.[55] Or perhaps it is more accurate to say that contract law acknowledged something it already recognized: Literal impossibility was not required to excuse performance.[56] Instead, the party seeking relief from a contract could now

45. *See* Rapsomanikis, *supra* note 33, at 551.

46. *See id.*

47. Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUDS. 83, 85 (1977).

48. *See id.*; Uri Benoliel, *The Impossibility Doctrine in Commercial Contracts: An Empirical Analysis*, 85 BROOK. L. REV. 393, 395–96 (2020).

49. E. ALLAN FARNSWORTH, CONTRACTS § 9.5 (4th ed. 2004) (discussing Taylor v. Caldwell, (1863) 122 Eng. Rep. 309 (QB), and calling it "the fountainhead of the modern law of impossibility").

50. *Taylor*, 122 Eng. Rep. at 312.

51. *Id.*

52. *Id.*

53. *Id.* at 310.

54. *Id.* at 314–15.

55. *See, e.g.*, Hubbard, *supra* note 33, at 84; Liu Chengwei, Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL § 19.3.1 (2003) (unpublished manuscript) (available at https://www.academia.edu/37883872/Remedies_for_Non_performance_Perspectives_from_CISG_UNIDROIT_Principles_and_PECL).

56. *See, e.g.*, FARNSWORTH, *supra* note 49, § 9.6 ("[C]ourts did not insist on strict impossibility even under the traditional analysis."). *But see* JEFF FERRIELL, UNDERSTANDING CONTRACTS 572 (3rd ed. 2014).

show that the performance had become "impracticable," meaning that it could be done only with extreme and unanticipated difficulty or cost.[57] With impracticability of performance, therefore, the performance is *not* literally impossible, it has just become too difficult or costly to perform.[58] The modern doctrine of impracticability of performance originated in the *Mineral Park Land Co. v. Howard* case.[59]

In *Mineral Park*, a contractor agreed to remove all the gravel from the owner's land that the contractor required for a construction project and purchase it at a fixed price.[60] The contractor ended up taking only some of the gravel needed for the construction project from the owner's land because, as the parties discovered after extraction began, much of the gravel on the owner's land was submerged underwater.[61] The contractor therefore argued that its performance should be excused because removing the gravel that was submerged required a different method of extraction and would cost 10 to 12 times more to remove.[62] The California Supreme Court agreed that the extreme increase in cost justified the contractor's nonperformance. According to the court, "[a] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost."[63]

Finally, the frustration of purpose doctrine generally deals with changed circumstances that make the contract almost completely worthless to one of the parties.[64] So like impracticability of performance, performance of the contract is *not* literally impossible. Rather, performance is still possible. But frustration of purpose differs from impracticability of performance because the adversely affected party must be able to show that its principal purpose in entering into the contract has been frustrated.[65] More importantly, that purpose is frustrated only where the object is "so completely the basis of the contract that, as both parties know, without it the contract would have little meaning."[66] In other words, frustration of purpose requires that *both parties* have some kind of common understanding about the principal purpose of the contract. The *Krell v. Henry*[67] case is the usual example.

57. *See* Hubbard, *supra* note 33, at 84; Liu, *supra* note 55, § 19.3.1.

58. Posner & Rosenfield, *supra* note 47, at 86; Benoliel, *supra* note 48, at 397.

59. FERRIELL, *supra* note 56, at 572 (discussing Min. Park Land Co. v. Howard, 156 P. 458 (Cal. 1916)).

60. *Min. Park*, 156 P. at 458.

61. *Id.* at 458–59.

62. *Id.* at 459.

63. *Id.* at 460.

64. RESTATEMENT (SECOND) OF CONTS. § 265 cmt. a (AM. L. INST. 1981); Hubbard, *supra* note 33, at 83, 93; Anderson, *supra* note 33, at 4; Weiskopf, *supra* note 33, at 239–40.

65. Weiskopf, *supra* note 33, at 240.

66. *Id.* at 248 (quoting RESTATEMENT (SECOND) OF CONTS. § 265 cmt. a).

67. Krell v. Henry [1903], 2 KB 740.

In *Krell*, the defendant rented a room from the plaintiff that overlooked the route of the coronation procession for King Edward VII.[68] The plaintiff was aware that the defendant's primary purpose for renting the room was to view the coronation procession because the plaintiff had advertised his room specifically for this purpose.[69] When the procession did not take place as originally scheduled, the defendant no longer had any need of the room and refused to pay the balance due under the contract.[70] The court held that the coronation procession was "the foundation of the contract" *and* was recognized as such by both parties.[71] As a result, and even though the defendant's promise to pay was obviously still performable, the court held that the cancellation of the coronation procession excused the defendant from his duty to pay.[72]

As the foregoing discussion shows, the CCDs have been around for a long time.[73] Consequently, considerable conventional wisdom has developed about them. Some of that wisdom includes the following: (1) impossibility and impracticability of performance are generally raised by the contracting party with performance obligations, like building the house, delivering the goods, etc., as opposed to the paying party;[74] (2) contract law shifted away from impossibility to impracticability;[75] (3) frustration of purpose is generally raised by the paying party;[76] (4) courts are much more reluctant to excuse performance based on frustration of purpose;[77] and (5) the changed circumstance (i.e., the event) that triggers the CCDs (a) will usually involve "acts of God" or acts by third parties[78] and (b) cannot be in the control of the

68. *Id.* at 740.

69. *Id.* at 750.

70. *Id.* at 740.

71. *Id.* at 754.

72. *Id.*

73. The dates associated with the aforementioned decisions are illustrative. Taylor v. Caldwell, (1863) 122 Eng. Rep. 309 (QB) (impossibility); Min. Park Land Co. v. Howard, 156 P. 458 (Cal. 1916) (impracticability); *Krell*, 2 KB at 740 (frustration of purpose); *see also* Rapsomanikis, *supra* note 33, at 551.

74. *See, e.g.*, FARNSWORTH, *supra* note 49, § 9.7.

75. The Restatement (Second) of Contracts, for example, only discusses changed circumstances in terms of impracticability, not impossibility. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. §§ 261–64 (AM. L. INST. 1981); *see also*, FERRIELL, supra note 56, at 569 ("Contract law originally limited this escape to situations in which the change of circumstances had made performance literally impossible . . . . The law later expanded to provide relief where performance had not become completely impossible, but where . . . the burden of performing had changed in a way that was beyond the risks assumed by the parties when the contract was made[, i.e.,] performance . . . ha[d] become 'commercially impracticable.'"); FARNSWORTH, *supra* note 49, § 9.6 (referring to impracticability as the new synthesis of the law of impossibility).

76. *See*, *e.g.,* FARNSWORTH, *supra* note 49, § 9.7.

77. *See id.*; Weiskopf, *supra* note 33, at 267; Van Boom, *supra* note 33, at 9.

78. For example, all the illustrations used in Restatement (Second) of Conts. §§ 261 and 265 involve acts of God or acts by third parties. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 261 cmt d. ("Events that come within the rule stated in this

party seeking to excuse its performance.[79] *But* if the changed circumstance preventing the party seeking to be excused from performing was caused by the other party, then this should ordinarily be treated as a breach of contract by the other party.[80] This last piece of conventional wisdom therefore suggests that if the other party's actions that caused the changed circumstances was *not* a breach by that party, then the party seeking to be excused should be able to argue one of the CCDs to justify its non-performance. It just remains to be seen whether the conventional wisdom about the CCDs holds true in practice.

A. *The Cases*

Once in a contract, it is *very* difficult to get out.[81] This generally accepted proposition has been substantiated with more and more empirical work,[82] most notably with respect to the doctrine of unconscionability.[83] But not a lot of empirical work exists that examines the CCDs. Notably, only a couple of such studies examine the CCDs under U.S. law.[84] Thus, by focusing on the CCDs, this Subsection adds to the growing body of empirical scholarship, confirming that courts rarely let parties out of a contract once that contract has been formed.

Section [impracticability] are generally due either to "acts of God" or to act of third parties.")

79. With respect to the changed circumstance outside the control of the party seeking to be excused, see, e.g., Restatement (Second) of Conts. § 261 ("Where, after a contract is made, a party's performance is made impracticable without his fault . . . ."); *id.* § 265 ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault . . . .").

80. *See, e.g.*, Restatement (Second) of Conts. § 261 cmt d. ("If the event that prevents the obligor's performance is caused by the obligee, it will ordinarily amount to a breach by the latter . . . without regard to this Section.").

81. *See generally*, Danielle Kie Hart, *In & Out—Contract Doctrines in Action,* 66 Hastings L.J. 1661 (2015) [hereinafter, Hart, *In & Out*]; *see also* Robert M. Lloyd, *Making Contracts Relevant: Thirteen Lessons for the First-Year Contracts Course*, 36 Ariz. St. L.J. 257, 267 (2004); Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 Ala. L. Rev. 63, 110 (1998); Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 Stan. L. Rev. 99, 99 (1990) ("Notwithstanding academic writing that reports or urges expansion of the grounds of excuse, courts actually remain extremely reluctant to release parties from their obligations.").

82. *See, e.g.*, Hart, *In & Out, supra* note 81 (evaluating duress, modification, and impracticability of performance empirically through various cases); Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. Va. L. Rev. 443, 463–65 (2005) (exploring courts' treatment of duress in contract disputes).

83. *See* Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 Vill. L. Rev. 773 (2020) (performing an empirical study of unconscionability and summarizing other existing empirical studies covering the same doctrine).

84. *See* Benoliel, *supra* note 48; Anderson, *supra* note 33. There are, however, empirical studies that examine CCDs in other countries. *See, e.g.*, Smaran Shetty & Pranav Budihal, *Force Majeure, Frustration and Impossibility*: *A Qualitative Empirical Analysis* (Aug. 6, 2020), https://ssrn.com/abstract=3665213 [https://perma.cc/47AM-MU9J] (Indian law).

I first describe the methodology used to collect the cases for the Article. Then, I present the results of the data collected and draw some conclusions based on that data. To conclude the Subsection, I make some observations based on the data, including, but not limited to, some comments about the conventional wisdom discussed in the CCD primer above.

1. Methodology

The case law empirical study conducted here focused on three common law doctrines: impossibility of performance, supervening impracticability of performance, and supervening frustration of purpose. Excluded were existing and temporary impracticability or frustration. This study updates earlier impracticability of performance research I conducted in 2015[85] by adding five and a half years of additional data (2014–2019). The study is entirely new with respect to impossibility and frustration of purpose. All told, the study includes 20 years of data for impossibility and impracticability of performance (2000–2019)[86] and ten years of data for frustration of purpose (2005–2015). This ten-year window for frustration of purpose was specifically selected to capture the jurisprudential outcomes surrounding the Great Recession (2007–2009). A total of 136 cases from the federal and state courts within the Seventh and Ninth Circuits were collected for the study.[87] The research was conducted in the following steps:

I. ***Selecting the Jurisdictions.*** The Seventh and Ninth Circuits were selected, because these circuits were the ones used in my 2015 empirical study.[88] That said, the reasons these circuits were selected for the previous study make sense here as well. More specifically, the Ninth Circuit was selected because, with nine states,[89] it is the largest of all thirteen circuits and is likely to hear a lot of cases. The Ninth Circuit also has a reputation of

85. Hart, *In & Out*, *supra* note 81.

86. Even though impossibility is entirely new in this empirical study, I used the same time period for impossibility that I used for impracticability of performance (2000–2019). This is because impossibility and impracticability of performance are similar enough doctrines that using a different time frame would seemingly skew the data.

87. The cases collected here are from a dataset of cases consisting of court opinions made available on LexisNexis. Consequently, the following are omitted from the available LexisNexis dataset: (1) all cases where the parties voluntarily agreed to cancel the contract (either because no lawsuit was ever brought or the case was settled before a decision) and (2) an unknowable number of cases litigated in state court that were not appealed since very few state trial court decisions result in an opinion.

88. Hart, *In & Out, supra* note 81.

89. The states within the Ninth Circuit are Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. *What Is the Ninth Circuit?*, https://www.ca9.uscourts.gov/judicial-council/what-is-the-ninth-circuit/ [https://perma.cc/CFF9-9U3U].

being more consumer friendly, suggesting that courts there might be more inclined to excuse people from their contractual obligations than courts in other circuits. The Seventh Circuit, in contrast, is much smaller, encompassing only three states,[90] but it is closely associated with the Law and Economics approach and therefore has a reputation for being less consumer friendly, suggesting that courts there might be more likely to require that people fulfill their contractual promises.[91]

II. ***The Searches***. Each search was conducted on LexisNexis for Law School. The searches were broken down by doctrine, applying the timelines, jurisdictional filters, and search terms specified below:

a. Jurisdictional Filters—All Searches

i. Seventh Circuit—Jurisdiction: Seventh Circuit, Illinois, Indiana Wisconsin

ii. Ninth Circuit—Jurisdiction: Ninth Circuit, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington

* All the federal and state courts in the Seventh and Ninth Circuits are included in the jurisdictional filters.

b. Impracticability of Performance: Original Search (from 2015 Study)

i. *Timeline*: January 1, 2000, through March 1, 2014

ii. *Search Terms*

1. Impracticability of Performance: (impract! near/25 perform!) and (perform! near /25 contract).

c. Impracticability of Performance: Updated Search (2020)

i. *Timeline*: March 15, 2014, through December 31, 2019

ii. *Search Terms*

1. impract! near/25 perform!
2. perform! near /25 contract
3. (impract! near/25 perform!) and (perform! near /25 contract)
4. "impracticability of performance"
5. "Restatement (Second) of Contracts §261"

d. Impossibility of Performance

i. *Timeline*: January 1, 2000, through December 31, 2019

ii. *Search Terms*

1. "Impossibility of Performance"

e. Frustration of Purpose

i. *Timeline*: January 1, 2005, through December 31, 2015

90. The states within the Seventh Circuit are Illinois, Indiana, and Wisconsin. *About the Court*, https://www.ca7.uscourts.gov/about-court/about-court.htm [https://perma.cc/XHK8-Z56V].

91. *See* Hart, *In & Out*, *supra* note 81, at 1668.

ii. *Search Terms*
1. "Frustration of purpose"
2. "Restatement (Second) of Contracts §265"

III. ***Screening the Cases.*** The searches conducted for *this* study pulled up 176 cases for the Seventh Circuit and 502 cases for the Ninth Circuit.[92] Each case was initially screened to ensure that it addressed the relevant doctrine being examined and that some part of the case was decided based on that doctrine. Only cases that satisfied these criteria were selected for substantive review.

IV. ***Substantive Review of the Cases.*** Each of the selected cases was then read to ensure, first, that it fell within the jurisdiction of the Seventh and Ninth Circuits and, second, that it did in fact address and decide the contract law doctrine at issue. Cases were omitted, for example, when the court deciding it applied law from a state outside of the two circuits that were the subject of this study (i.e., an Illinois court applying New Jersey law).[93] On occasion, substantive review revealed that the case decided an issue involving more than one doctrine, for example, both impossibility and frustration of purpose. In this situation, the case was selected for both doctrines. It also happened occasionally that a case being reviewed for one doctrine, for example frustration of purpose, actually focused more on another doctrine, like impracticability of performance. In these situations, the case was included as a selected case for the other doctrine even though the case did not appear in the search conducted for that doctrine.

V. ***Totals.*** At the end of the substantive review process, a total of 136 cases were captured—37 cases for the Seventh Circuit and 99 cases for the Ninth Circuit. Table 1 provides a summary of the captured cases in each circuit by substantive category and doctrine.

92. The original empirical study I published in 2015 did not separate the number of cases by doctrine. The study only included the total number of cases found for all doctrines examined in the earlier project, so the numbers stated in this text only reflect the cases discovered in the searches conducted for this empirical study.

93. *See, e.g.*, Days Inn of Am., Inc. v. Patel, 88 F. Supp. 2d 928 (C.D. Ill. 2000) (applying New Jersey law).

TABLE 1: SUMMARY OF CAPTURED CASES BY SUBSTANTIVE CATEGORY[94]

Claim Category	**7th Cir: Performance**	**7th Cir: FoP**	**9th Cir: Performance**	**9th Cir: FoP**	**Total**
Real Property	7	1	31	20	59
Employment	3	2	5	3	13
Goods	4	3	3	2	12
Misc. Commercial	3	1	4	2	10
Settlement Agreements	2	2	4	1	9
Misc. Services	3	0	5	0	8
Family	0	0	4	2	6
Insurance	1	1	2	2	6
Public Util./Energy	1	0	1	2	4
Construction	1	0	3	0	4
Education	0	0	2	0	2
Leases	2	0	0	0	2
Software	0	0	1	0	1

The vast majority of the contracts in the captured cases *appear to be* commercial (as opposed to consumer) contracts between commercial parties.[95] I say, "appear to be," because none of the cases actually included a copy of the contracts involved in the disputes or provide many details about the parties. So determining what kind of contracts were involved in each case is based on who the contracting parties are (i.e., individuals, government entities, or businesses) *and* the subject matter of the contract (i.e., construction, business, etc.). Based on these loose parameters, only 38 non-business transactions exist out of the 136 cases collected for the empirical study.[96] Out of those 38 cases,

94. *See* Appendix 1 for a list of all captured cases by circuit and doctrine (the performance doctrine, which combines impossibility and impracticability, and the doctrine of frustration of purpose ("FoP")) (on file with Author). Settlement agreements included commercial settlements, indemnity agreements, and consent decrees. The "Family" category includes all family-related settlement agreements.

95. A "commercial contract" is defined broadly here as one that involves any kind of business and/or is economic in nature. Hence, a "commercial party" is a party (individual or business entity) that enters the contract for profit or economic reasons, as opposed to a "consumer," which is specifically defined by the U.C.C. as "an individual who enters a transaction primarily for personal, family, or household purposes." U.C.C. § 1-201(b)(11) (AM. L. INST. & UNIF. L. COMM'N 2020) (consumer).

96. The cases involving non-business transactions, grouped by type, are as follows:

RESIDENTIAL REAL PROPERTY TRANSACTIONS (17):

Prospect Enters. v. Ruff, No. 10-1026, 2011 WL 2683004, at *2–3 (C.D. Ill. July 11, 2011) (sale of townhome); Exec. Prop. Mgmt., Inc. v. Watson, No. 1-10-1890, 2011 WL 10069467, at *1 (Ill. App. Ct. Mar. 29, 2011) (residential lease); Ury v. Di Bari, No. 1-

15-0277, 2016 WL 2610167, at *1 (Ill. App. Ct. May 5, 2016) (sale of condo); Samuels v. Merrill, No. B190158, 2007 WL 2084093, at *1 (Cal. Ct. App. July 23, 2007) (sale of condo); Miranda v. Williams, No. F054365, 2008 WL 4636445, at *1 (Cal. Ct. App. Oct. 21, 2008) (purchase and construction of residential property); Archundia v. Chase Home Fin. LLC, No. 09-CV-00960 (AJB), 2009 WL 1796295, at *1 (S.D. Cal. June 23, 2009) (residential property foreclosure); Bean v. BAC Home Loans Servicing, LP, No. 11-CV-553, 2012 WL 10349, at *1 (D. Ariz. Jan. 3, 2012) (residential property foreclosure); Reader v. BAC Home Loan Servicing LP, No. 11-CV-553, 2012 WL 125977, at *1 (D. Ariz. Jan. 17, 2012) (residential property foreclosure); Gutierrez v. PNC Mortg., No. 10CV01770, 2012 WL 1033063, at *1 (S.D. Cal. Mar. 26, 2012) (home loan refinance and modification); Wear v. Sierra Pac. Mortg. Co., No. C13-535, 2013 WL 6008498, at *1 (W.D. Wash. Nov. 12, 2013) (residential home mortgage foreclosure); Deschaine v. IndyMac Mortg. Servs., No. CIV. 2:13-1991, 2013 WL 6054456, at *1–2 (E.D. Cal. Nov. 15, 2013) (residential home mortgage); Lane v. Cooper, No. D062806, 2014 WL 606556, at *1 (Cal. Ct. App. Feb. 18, 2014) (condo CC & Rs); Bob Spain Real Est. Servs., Inc. v. Cox, No. 32006-5, 2015 WL 422371, at *1 (Jan. 27, 2015) (real estate listing agreement); Tanner v. Keating, No. F071491, 2017 WL 2376393, at *1 (Cal. Ct. App. June 1, 2017) (purchase of residence); Balboa Bay Club, Inc. v. Howard, No. G033413, 2005 WL 827064, at *1 (Cal. Ct. App. Apr. 11, 2005) (residential lease); Goldberg v. Prickett, No. B203934, 2009 WL 179572, at *1 (Cal. Ct. App. Jan. 27, 2009) (sale of residential leasehold); Lohman v. Ephraim, No. B207755, 2010 WL 6901, at *1 (Cal. Ct. App. Dec. 30, 2009) (sale of residential property).

Employment-Related Transactions (8):

Dalkilic v. Titan Corp., 516 F. Supp. 2d 1177, 1181 (S.D. Cal. 2007); Caravette v. Z Trim Holdings, Inc., No. 2-11-0087, 2011 WL 10457470, at *1 (Ill. App. Ct. Sept. 29, 2011); Downs v. Rosenthal Collins Grp., LLC, 963 N.E.2d 282, 286, 288 (Ill. App. Ct. 2011); Ryan v. Estate of Sheppard (*In re* Estate of Sheppard), 789 N.W.2d 616, 617 (Wis. Ct. App. 2010); Dauod v. Ameriprise Fin. Servs., No. SACV 10-00302, 2010 WL 11595801, at *1 (C.D. Cal. July 29, 2010); LECG, LLC v. Unni, No. C-13-0639, 2014 WL 2186734, at *1 (N.D. Cal. May 23, 2014); Kische USA LLC v. Simsek, No. C16-0168, 2017 WL 3895545, at *1–2 (W.D. Wash. Sept. 6, 2017); Mitchell v. Leed HR, LLC, No. 2:14-CV-00026, 2015 WL 1611447, at *1–2 (D. Idaho Apr. 10, 2015).

Family-Related Transactions (5):

Archer v. Archer (*In re* Marriage of Archer), No. 1 CA-CV 08-0543, 2009 WL 1682146, at ¶ 2 (Ariz. Ct. App. June 16, 2009) (marriage settlement agreement); *In re* Marriage of Weber, No. 64739-3, 2011 WL 1947728, at *1 (Wash. Ct. App. May 23, 2011) (marital asset agreement); Hibbard v. Hibbard (*In re* Marriage of Hibbard), 151 Cal. Rptr. 3d 553, 554 (Ct. App. Jan. 15, 2013); Bennett v. Foss, No. A137452, 2014 WL 1679559, at *1 (Cal. Ct. App. Apr. 29, 2014) (settlement memo); Klein v. Klein, No. B213125, 2009 WL 3807442, at *1 (Cal. Ct. App. Nov. 16, 2009) (marital settlement agreement).

Miscellaneous Transactions (8):

Tahir v. Imp. Acquisition Motors, LLC, No. 09 C 6471, 2014 WL 985351, at *1 (N.D. Ill. Mar. 13, 2014) (sale of a car); Ploegman v. Burlington N. & Santa Fe Ry., Co., No. 46776, 2002 WL 1161387, at *1 (Wash. Ct. App. June 3, 2002) (personal injury indemnity agreement); Carsh v. Chaparral Pines, LLC, No. 2 CA-CV 2002-0175, 2003 Ariz. App. Unpub. LEXIS 59, at *2–3 (Ct. App. Aug. 4, 2003) (contract involving a golf membership); Kashmiri v. Regents of the Univ. of Cal., 67 Cal. Rptr. 3d 635, 638–39 (Ct. App. Nov. 2, 2007) (contract regarding cost of education); Babcock v. ING Life Ins. & Annuity Co., No. 12-CV-5093, 2013 WL 24372, at *1–2 (E.D. Wash. Jan. 2, 2013) (insurance structured settlement); Achziger v. IDS Prop. Cas. Ins., No. C14-

only 15 of them appear to involve adhesive contracts,[97] i.e., contracts drafted by one party, usually but not always on a standard form, and presented to the other party on a take it or leave it basis.[98] Four commercial contracts could also be characterized as adhesive.[99]

To be clear: I do not claim that the empirical study conducted for this Article captured *all* the CCD cases in the Seventh and Ninth Circuits. For example, this study focused exclusively on the common law CCDs and not the sale of goods under the Uniform Commercial Code (i.e., § 2-615). Nor does this study make any claim to have captured all the CCD cases that applied law from the Seventh or Ninth Circuits. In other words, the study only focused on cases generated from states within each of the circuits selected; the study, therefore, would not have captured a New York court applying California law. That said,

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5445, 2017 WL 5194914, at *1 (W.D. Wash. Nov. 9, 2017) (insurance settlement); Koka v. Koka, No. B277116, 2017 WL 5898391, at *1 (Cal. Ct. App. Nov. 29, 2017) (real property settlement agreement); Hensley for Hensley v. Haney-Turner, LLC, No. Civ. S-01-2212, 2006 WL 8458651, at *1 (E.D. Cal. Sept. 28, 2006) (ADA settlement).

97. The cases involving non-business transactions with adhesive contracts, grouped by type, are as follows:

Residential Real Property Transactions (10):

Prospect Enters., 2011 WL 2683004, at *1–2 (sale of townhome); *Watson*, 2011 WL 10069467 at *1–2 (residential lease); *Archundia*, 2009 WL 1796295, at *1 (residential property foreclosure); *Bean*, 2012 WL 10349, at *1 (residential property foreclosure); *Reader*, 2012 WL 125977, at *1 (residential property foreclosure); *Gutierrez*, 2012 WL 1033063, at *1 (home loan refinance and modification); *Wear*, 2013 WL 6008498, at *1 (residential home mortgage foreclosure); *Deschaine*, 2013 WL 6054456, at *1–2 (residential home mortgage); *Bob Spain Real Est. Servs.*, 2015 WL 422371, at *1 (real estate listing agreement); *Balboa*, 20115 WL 827064, at *1 (residential lease).

Employment-Related Transactions (2):

Dalkilic, 516 F. Supp. 2d at 1180–81 (Turkish interpreters during Iraq War); *Dauod*, 2010 WL 11595801, at *1 (forgivable loans repayable immediate if employee left before 7 years).

Miscellaneous Transactions (3):

Carsh, 2003 Ariz. App. Unpub. LEXIS 59, at *1 (contract involving a golf membership); *Babcock*, 2013 WL 24372, at *1–2 (insurance structured settlement); *Achziger*, 2017 WL 5194914, at *1 (insurance settlement).

98. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1176–77 (1983).

99. *See* Specialty Foods of Ind., Inc. v. City of S. Bend, No. 71C01-1212-MI-00244, 2013 WL 3812025 (Ind. Cir. Ct. Feb. 20, 2013) (commercial lease); Butterfield Plaza Benson, LLC v. Johnson, No. 2 CA-CV 2010-0042, 2010 WL 4705181, at *1 (Ariz. Ct. App. Nov. 19, 2010) (commercial lease); Wells Fargo Bank, N.A. v. Ash Org., No. 09-CV-188, 2010 WL 2681675, at *1 (D. Or. July 2, 2010) (commercial loan foreclosure—land under mobile home park); United States v. Sandwich Isles Commc'ns, Inc., 398 F. Supp. 3d 757, 764–65 (D. Haw. 2019) (telecommunication loan agreements with the federal government).

and with respect to the common law CCDs, the study collected a significant number of CCD cases spanning 20 years. Collectively, therefore, the cases create a clear picture of how the CCDs are being interpreted and applied in practice and a solid basis upon which to draw some conclusions.

2. The Data and Conclusions

This empirical study captured a total of 18 cases that cited a catastrophic changed circumstance as the event excusing performance: 3 in the Seventh Circuit and 15 in the Ninth Circuit. Parties raised the Great Recession in 14 of the cases, the September 11th terrorist attack in one case, and the unprecedented manipulation of California's energy market, the collapse of the wine-grape market, and the Californian fiscal crisis in three cases.[100] As Table 2 shows, even a catastrophic changed circumstance is generally insufficient to excuse the party adversely affected by that event from having to perform a contract. In fact, performance was excused in only one out of the 18 cases (6%), meaning, of course, that performance was *not* excused in 17 of the cases (i.e., 94% of the time).

TABLE 2: CATASTROPHIC CHANGED CIRCUMSTANCES[101]

	7th Cir: Total # of Cases	7th Cir: Performance Excused	7th Cir: Performance Not Excused	9th Cir: Total # of Cases	9th Cir: Performance Excused	9th Cir: Performance Not Excused
Great Recession	3	0	3	11	0	11
9/11	0	0	0	1	0	1
Other	0	0	0	3	1	2
Total	3	0	3 (100%)	15	1 (7 %)	14 (93%)

Next, Table 3 aggregates the data by doctrine (with the two performance CCDs—impossibility and impracticability—combined). Table 3 confirms that the CCDs are not generally successful in excusing performance in either the Seventh or the Ninth Circuits. More specifically, courts in the Seventh Circuit excused performance in only 14% of the cases. Courts in the Ninth Circuit were a little more likely to excuse performance, namely, in 22% of the cases. Overall, combining all the data shows that courts did not excuse performance in 80% of the cases.

100. *See* Appendix 2 (on file with Author).
101. *See* Appendix 2 (on file with Author).

TABLE 3: PERFORMANCE EXCUSED/NOT EXCUSED[102]

	7th Cir: Total # of Cases	7th Cir: Performance Excused	7th Cir: Performance Not Excused	9th Cir: Total # of Cases	9th Cir: Performance Excused	9th Cir: Performance Not Excused
Imprac/ Imposs	27	4	23	65	16	49
FoP	10	1	9	34	6	28
Total	**37**	**5 (14%)**	**32 (86%)**	**99**	**22 (22%)**	**78 (78%)**

In reviewing the cases, the CCD claims typically failed for four main reasons. Each of the four main reasons was cited at least 15 times.[103] A summary of the reasons the CCDs failed is provided in Table 4 below. Table 4 lays out this data by circuit. While it was not uncommon for a CCD to fail for more than one reason (for example, the event was both foreseeable *and* a risk assigned to the adversely affected party), Table 4 tracks the cases based on each of the categories discussed above. In other words, if a CCD failed because it was foreseeable and the risk was assigned, the case would be counted in both the Foreseeable and Risk categories in Table 4. For this reason, there will be cases that appear in more than one category in Appendix 4, which lists the cases in Table 4.

The first reason the CCDs failed has to do with the type of event (i.e., the changed circumstance) identified as triggering the CCD claim. Courts routinely held that a party's own financial ability to perform its duties under a contract and market conditions are not the type of event that justifies nonperformance under the CCDs.[104] And to be clear: Finances and market conditions were not the right kinds of events even if the party alleged that its finances were adversely affected because of an economic crisis[105] like the Great Recession,[106] changed market conditions due to the collapse of the wine grape mar-

102. *See* Appendix 2 for a list of all cases used for this analysis (on file with Author). Table 3 shows the total number of cases excused and not excused for each circuit, separated by the performance doctrines (impracticability ("Imprac") and impossibility ("Imposs")) and the doctrine of frustration of purpose (FoP).

103. *See infra* Table 4.

104. *See, e.g.*, Prospect Enters. v. Ruff, No. 10-1026, 2011 WL 2683004, at *7 (C.D. Ill. July 11, 2011); Bank of Am., N.A. v. Shelbourne Dev. Grp., No. 09 C 4963, 2011 WL 829390, at *5 (N.D. Ill. Mar. 3, 2011); *In re* Marriage of Weber, No. 64739–3–1, 2011 WL 1947728, at *2–3 (Wash. Ct. App. May 23, 2011); Bean v. BAC Home Loans Servicing, L.P., No. 11-CV-553, 2012 WL 10349, at *5 (D. Ariz. Jan. 3, 2012); Reader v. BAC Home Loan Servicing, L.P., No. 11-CV-553, 2012 WL 125977, at *4 (D. Ariz. Jan. 17, 2012).

105. *See, e.g.*, Mañay v. Acad. Exch. of Am., No. C07-5071, 2008 WL 820097, at *5 (W.D. Wash. Mar. 25, 2008); Hellerstein v. Desert Lifestyles, LLC, No. 15-CV-01804, 2015 WL 6962862, at *9 (D. Nev. Nov. 10, 2015).

106. *See, e.g.*, *Shelbourne Dev. Grp.*, 2011 WL 829390, at *4–5 (concerning a commercial property developer alleging the inability to obtain construction loan commitments from banks, because the Great Recession caused the developer to default).

ket,[107] or the housing market crash that precipitated the Great Recession.[108]

Indeed, courts often found that the event cited by the adversely affected party was foreseeable or at least not unanticipated. Such events included things like the Great Recession,[109] class action litigation against an insurance company,[110] the inability to obtain financing for a project,[111] changing market conditions,[112] a third party absconding with money,[113] and changes in state or federal regulation.[114] The foreseeability of the event is the second main reason why the CCD claims failed.[115]

The CCD claims also failed in the cases because the courts found that the adversely affected party either contributed to the event's occurrence or failed to meet the burden of proof that it did not contribute to the happening of the event.[116] So for example, courts held that a CCD failed because the adversely affected party: (1) could not show that it did not contribute to the circumstances giving rise to the class action litigations against it;[117] (2) shut down one of its reactors as part of routine maintenance thereby causing the shortage of materials being complained about;[118] (3) failed to act with due diligence;[119] and (4) built and opened a store in violation of its agreement with the other party.[120]

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107. French Camp Vineyards v. Guenoc Winery, No. CPF-04-504511, 2005 Cal. Super. LEXIS 1673, at *6–8 (Cal. Super. Ct. Apr. 22, 2005) (terminating a grape and wine purchasing agreement between a winery and a vineyard due to the wine grape market collapse).

108. *See, e.g.*, Realty Execs. Int'l Inc. v. RE/EX Cal. Inc., No. 2:09-CV-00562, 2011 WL 13185715, at *5 (D. Ariz. June 1, 2011) (regarding a regional franchise developer that failed to pay franchise fees because of housing market crash); *Bean*, 2012 WL 10349, at *5.

109. *See, e.g.*, Ner Tamid Congregation of N. Town v. Krivoruchko, No. 08 C 1261, 2009 WL 10696538, at *11 (N.D. Ill. July 9, 2009) (holding that risk of the Great Recession may have been uncertain but it was not unforeseeable*)*; Archer v. Archer (*In re* Marriage of Archer), No. 1 CA-CV-08-0543, 2009 WL 1682146, at *2–3 (Ariz. Ct. App. June 16, 2009).

110. Blue Cross Blue Shield v. BCS Ins., 517 F. Supp. 2d 1050, 1058 (N.D. Ill. 2007).

111. YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, 933 N.E.2d 860, 865–66 (Ill. App. Ct. 2010); *Archer*, 2009 WL 1682146, at *2–3.

112. *French Camp Vineyards*, 2005 Cal. Super. LEXIS 1673, at *7.

113. Cashman Equip. Co. v. W. Edna Assocs., 380 P.3d 844, 846–47, 852–53 (Nev. 2016).

114. United States v. Sandwich Isles Commc'ns, Inc., 398 F. Supp. 3d 757, 772 (D. Haw. 2019); Pure Wafer Inc. v. City of Prescott, 845 F.3d 943, 957 (9th Cir. 2017).

115. *See infra* Table 4.

116. *See infra* Table 4.

117. Blue Cross Blue Shield v. BCS Ins., 517 F. Supp. 2d 1050, 1058 (N.D. Ill. 2007).

118. BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co., 949 F. Supp. 2d 862, 876–77 (N.D. Ind. 2013).

119. Nielsen Bros. v. Solid Trading, Ltd., No. 52535-2-I, 2004 WL 2581556, at *4 (Wash. Ct. App. Nov. 15, 2004).

120. Cabela's Retail, Inc. v. Hawks Prairie Inv., LLC, No. 11-cv-5973-RBL, 2013 WL 3089516, at *1, 12 (W.D. Wash. June 18, 2013).

The CCDs also failed when the courts found that the risk of the event occurring was assigned to the adversely affected party because (1) the event represented a type of "normal risk" that is assumed by the adversely affected party;[121] (2) a specific clause in the contract allocated the risk to the adversely affected party;[122] (3) the absence of a specific clause in the contract meant that the risk was allocated to the adversely affected party;[123] or (4) the adversely affected party failed to show that it did not bear the risk.[124]

It was also not uncommon for a single case to cite more than one, sometimes overlapping or conflated, reason why the CCD failed. For example, CCDs failed because: the event was a foreseeable business risk;[125] the event was foreseeable such that the risk was assumed by the adversely affected party;[126] or the event was foreseeable and the adversely affected party contributed to it.[127]

Finally, there were a host of other reasons why the CCDs failed that do not fail squarely within any of the categories of reasons just described. Some of those reasons are still worth mentioning here because they were raised in several cases. These other reasons include, among other things: (1) objective, literal impossibility is required before performance will be excused;[128] (2) the fact that performance

121. Indeck Energy Servs., Inc. v. NRG Energy, Inc., No. 03 C 2265, 2004 WL 2095554, at *11 (N.D. Ill. Sept. 16, 2004); Prospect Enters. V. Ruff, No. 10-1026, 2011 WL 2683004, at *7 (C.D. Ill. July 11, 2011); PeopleSoft U.S.A., Inc. v. Softeck, Inc., 227 F. Supp. 2d 1116, 1118–19 (N.D. Cal. 2002); French Camp Vineyards v. Guenoc Winery, No. CPF-04-504511, 2005 Cal. Super. LEXIS 1673, at *7 (Cal. Super. Ct. Apr. 22, 2005).

122. Prime/Mansur Inv. Partners, LLC v. Phx. Off., LLC, No. 1-10-0928, 2011 WL 10069096, at *7 (Ill. App. Ct. June 30, 2011); Rock & Stone Mfg. Inc. v. Allied Stone Sys., No. 1 CA-CV 07-0514, 2008 WL 4329922, at *2 (Ariz. Ct. App. Sept. 18, 2008) (fixed price contract); Aleut Enters. v. Adak Seafood, LLC, No. 10-cv-0017-RRB, 2010 WL 3522348, at *1–2 (D. Alaska Sept. 2, 2010); Butterfield Plaza Benson, LLC v. Johnson, No. 2 CA–CV 2010–0042, 2010 WL 4705181, at *4–5 (Ariz. Ct. App. Nov. 19, 2010).

123. Ner Tamid Congregation of N. Town v. Krivoruchko, No. 08 C 1261, 2009 WL 10696538, at *11–13 (N.D. Ill. July 9, 2009) (missing a financing contingency); YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, 933 N.E.2d 860, 866 (Ill. App. Ct. 2010) (missing a financing contingency); United States v. Sandwich Isles Commc'ns., Inc., 398 F. Supp. 3d 757, 772 (D. Haw. 2019); Next Gen Cap., LLC v. Consumer Lending Assocs., 316 P.3d 598, 601 (Ariz. Ct. App. 2013).

124. Achziger v. IDS Prop. Cas. Ins., No. C14-5445 BHS, 2017 WL 5194914, at *7 (W.D. Wash. Nov. 9, 2017).

125. *Indeck Energy*, 2004 WL 2095554, at *11; *French Camp Vineyards*, 2005 Cal. Super. LEXIS 1673, at *7.

126. *YPI*, 933 N.E.2d at 865–66; Pure Wafer Inc. v. City of Prescott, 845 F.3d 943, 957 (9th Cir. 2017); Alameda Belt Line v. City of Alameda, No. A118596, 2009 WL 1744543, at *15 (Cal. Ct. App. June 22, 2009); Confederated Tribes of the Warm Springs Rsrv. v. Ambac Assur. Corp., No. 10-130-KI, 2010 WL 4875657, at *6 (D. Or. Nov. 17, 2010).

127. Tahir v. Imp. Acquisition Motors, LLC, No. 09 C 6471, 2014 WL 985351, at *6 (N.D. Ill. Mar. 13, 2014).

128. Innovative Modular Sols. v. Hazel Crest Sch. Dist. 152.5, 965 N.E.2d 414, 421–22 (Ill. 2012); Mostardi Platt Env't., Inc. v. Power Holdings, LLC, No. 2-13-0737,

has become more expensive or difficult is not sufficient to excuse performance;[129] (3) an alternative performance was available;[130] and (4) making a payment is never objectively impossible.[131]

TABLE 4: REASONS THE CCDS FAILED[132]

Category	7th Circuit	9th Circuit	Totals
Event	8	28	36
Foreseeable	14	21	35
Contributed	7	13	20
Risk	4	11	15
Other	12	19	31

The last two tables in this section—Tables 5 and 6—provide a more granular look at the CCDs to get a better idea of how often parties raise each doctrine; whether the doctrines were raised in combination and, if so, how often; and how many times the paying party raised one of the performance doctrines (i.e., impossibility or impracticability) or

2014 WL 2192965, at *17 (Ill. App. Ct. May 27, 2014); Ury v. Di Bari, No. 1-15-0277, 2016 WL 2610167, at *4 (Ill. App. Ct. May 5, 2016).

129. Prospect Enters. v. Ruff, No. 10-1026, 2011 WL 2683004, at *6–7 (C.D. Ill. July 11, 2011); Wolf v. Auxxi & Assocs., No. 2-11-0727, 2012 WL 6968932, at *5 (Ill. App. Ct. Aug. 2, 2012); OWBR LLC v. Clear Channel Commc'ns, Inc., 266 F. Supp. 2d 1214, 1222 (D. Haw. 2003); Cal. Bio-Mass v. City of San Bernadino, No. E037065, 2006 WL 2949565, at *8 (Cal. Ct. App. Oct. 17, 2006); Century Sur. Co. v. 350 W.A., LLC, No. 05-CV-1548-L(LSP), 2007 WL 2819668, at *10 (S.D. Cal. Sept. 25, 2007); Mañay v. Acad. Exch. of Am., No. C07-5071 RBL, 2008 WL 820097, at *5 (W.D. Wash. Mar. 25, 2008); Rock & Stone Mfg. Inc. v. Allied Stone Sys., Inc., No. 1 CA-CV 07-0514, 2008 WL 4329922, at *2 (Ariz. Ct. App. Sept. 18, 2008); Landon v. Nolen, No. 2 CA-CV 2004-0193, 2005 Ariz. App. Unpub. LEXIS 268, at *8 (Ariz. Ct. App. June 20, 2005).

130. *Century*, 2007 WL 2819668, at *10–11; *In re* Marriage of Archer, No. 1 CA-CV 08-0543, 2009 WL 1682146, at *2 (Ariz. Ct. App. June 16, 2009); M & I Bank, FSB v. Coughlin, No. CV 09-02282-PHX-NVW, 2011 WL 5445416, at *7 (D. Ariz. Nov. 10, 2011); Bennett v. Foss, No. A137452, 2014 WL 1679559, at *13 (Cal. Ct. App. Apr. 29, 2014); Kische USA LLC v. Simsek, No. C16-0168JLR, 2017 WL 3895545, at *9 (W.D. Wash. Sept. 6, 2017).

131. *E.g.*, Seamen v. Valley Health Care Med. Grp., Inc., No. SA CV 13-1709-DOC (RNBx), 2015 WL 9093593, at *5 (C.D. Cal. Dec. 16, 2015); *see also* Exec. Prop. Mgmt., Inc. v. Watson, No. 1-10-1890, 2011 WL 10069467, at *6 (Ill. App. Ct. Mar. 29, 2011); Lutheran Homes, Inc. v. Lock Realty Corp. IX, No. 1:14-CV-102, 2015 WL 880644, at *6 (N.D. Ind. Mar. 2, 2015); PeopleSoft U.S.A., Inc. v. Softeck, Inc., 227 F. Supp. 2d 1116, 1119 (N.D. Cal. 2002); Landover Corp. v. Bellevue Master, LLC, No. C04-2407, 2006 WL 47662, at *14 (W.D. Wash. Jan. 6, 2006); Archundia v. Chase Home Fin. LLC., No. 09–CV–00960, 2009 WL 1796295, at *5 (S.D. Cal. June 23, 2009); Dauod v. Ameriprise Fin. Servs., No. SACV 10-00302, 2010 WL 11595801, at *3 (C.D. Cal. July 29, 2010); Gutierrez v. PNC Mortg., No. 10cv01770, 2012 WL 1033063, at *11 (S.D. Cal. Mar. 26, 2012); Wear v. Sierra Pac. Mortg. Co., No. C13–535, 2013 WL 6008498, at *4 (W.D. Wash. Nov. 12, 2013); Deschaine v. IndyMac Mortg. Servs., No. CIV.2:13–1991, 2013 WL 6054456, at *5 (E.D. Cal. Nov. 15, 2013).

132. *See* Appendix 4 for the list of cases used in Table 4 (on file with Author).

the performing party raised frustration of purpose. Table 5 tabulates the data for impossibility and impracticability of performance; Table 6 does the same for frustration of purpose. For example, Table 5 shows that impossibility was raised 14 times in the Seventh Circuit, and the paying party raised it in 6 of those cases.[133]

TABLE 5: IMPOSSIBILITY & IMPRACTICABILITY OF PERFORMANCE

	7th Cir: Total Cases	**7th Cir: Paying Party**	**9th Cir: Total Cases**	**9th Cir: Paying Party**
Impossibility	14	6	18	10
Impracticability	5	2	20	8
Both Is + Im	1	1	11	5
Is/Im + FoP	7	3	16	11
Total	**27**	**12 (44%)**	**65**	**34 (52%)**

TABLE 6: FRUSTRATION OF PURPOSE

	7th Cir: Tot Cases	**7th Cir: Perf. Pty**	**9th Cir: Total Cases**	**9th Cir: Perf Pty**
FoP	9	2	21	4
FoP + Is/Im	1	0	13	4
Totals	**10**	**2 (20%)**	**34**	**8 (24%)**

B. *Some Observations*

Based on the data collected for this Article, several things are worth noting. For instance, notwithstanding the supposed shift from impossibility to impracticability sometime in the 1900s,[134] impossibility is still very much alive and well in both the Seventh and Ninth Circuits.[135] In fact, impossibility is the performance doctrine raised most frequently in the Seventh Circuit.[136]

Second, only under some states' law within each circuit was performance excused based on a CCD. In the Seventh Circuit, those states were Indiana (1)[137] and Wisconsin (3).[138] In the Ninth Circuit,

133. *See* Table 5.
134. *See supra* discussion accompanying notes 55–59.
135. *See* Table 5.
136. *See* Table 5, Appendix 5 (on file with Author).
137. *See* Specialty Foods of Ind., Inc. v. City of S. Bend, No. 71C01-1212-MI-00244, 2013 WL 3812025, at *5 (Ind. Cir. Ct. Feb. 20, 2013) (impracticability).
138. *See* Hugo Bramschreiber Asphalt Co. v. Midwest Amusement Park, LLC, No. 2006AP1205, 2006 WL 2671000, at *1 (Wis. Ct. App. Sept. 19, 2006) (impossibility); Wis. Elec. Power Co. v. Union Pac. R.R., 557 F.3d 504, 507 (7th Cir. 2009) (impossibility); Ryan v. Estate of Sheppard (*In re* Estate of Sheppard), 789 N.W.2d 616, 620 (Wis. Ct. App. 2010) (frustration of purpose).

those states were Arizona (1),[139] California (13),[140] Hawaii (2),[141] Montana (2),[142] Oregon (1),[143] and Washington (3).[144]

Third, force majeure clauses rarely appeared in the captured cases. More specifically, there were only a total of two cases in the Seventh Circuit[145] and four cases in the Ninth Circuit[146] that even mentioned a force majeure clause.

To put the fourth observation into context, recall that even though changed circumstances trigger the CCDs, each of the CCDs actually

139. *See* C.H. Robinson Co. v. Glob. Fresh, Inc., No. CV 08-2002-PHX-SRB, 2010 WL 11515522, at *5 (D. Ariz. Jan. 22, 2010) (frustration of purpose).

140. *See* Credit Rsch., Inc. v. Experian Info. Sols., Inc., No. H024220, 2003 WL 22133193, at *7 (Cal. Ct. App. Sept. 16, 2003) (impracticability); Praxis Dev. Grp., Inc. v. Richman, Lawrence, Greene & Chizever, No. A104874, 2005 WL 1607784, at *8–9 (Cal. Ct. App. July 8, 2005) (impossibility); Miranda v. Williams, No. F054365, 2008 WL 4636445, at *4 (Cal. Ct. App. Oct. 21, 2008) (impossibility); Goldberg v. Prickett, No. B203934, 2009 WL 179572, at *4 (Cal. Ct. App. Jan. 27, 2009) (frustration of purpose); Pharmicare Co. v. Prosurg, Inc., No. CPF-08-509076, 2009 Cal. Super. LEXIS 3780, at *10–11 (Cal. Super. Ct. May 5, 2009) (frustration of purpose); Klein v. Klein, No. B213125, 2009 WL 3807442, at *3 (Cal. Ct. App. Nov. 16, 2009) (frustration of purpose); Elsinore Hang Gliding Ass'n v. Concordia CKS Invs., LLC, No. E046936, 2010 WL 3760247, at *9 (Cal. Ct. App. Sept. 28, 2010) (impossibility); Lane v. Cooper, No. D062806, 2014 WL 606556, at *7 (Cal. Ct. App. Feb. 18, 2014) (impracticability); Sznyter v. Spun.com, Inc., No. D061832, 2014 WL 1654036, at *3–4 (Cal. Ct. App. Apr. 25, 2014) (impossibility and impracticability); Maywood Police Officers Ass'n v. City of Maywood, No. B256417, 2016 WL 399780, at *5–7 (Cal. Ct. App. Feb. 2, 2016) (impossibility, impracticability, and frustration of purpose); Koka v. Koka, No. B277116, 2017 WL 5898391, at *3–4 (Cal. Ct. App. Nov. 29, 2017) (impracticability). One case, *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, was counted twice because the court ruled on two different doctrines. 96 Cal. Rptr. 3d 813, 843 (Ct. App. 2009) (impossibility and commercial frustration).

141. *See* United States v. Pflueger, No. 06-00140 BMK, 2007 WL 1876028, at *4 (D. Haw. June 27, 2007) (impracticability); One Wailea Dev., LLC v. Warren S. Unemori Eng'g, Inc., No. CAAP–13–0000418, 2016 WL 2941062, at *12 (Haw. Ct. App. Apr. 20, 2016) (impracticability).

142. *See* Cape-France Enters. v. Estate of Peed, 29 P.3d 1011, 1016 (Mont. 2001) (impossibility and impracticability); Cline v. Kralich, No. DA 16-2016, 2017 WL 3263081, ¶ 8 (Mont. Aug. 1, 2017) (impracticability).

143. *See* Chang v. Pacificorp, 157 P.3d 243, 257–58 (Or. Ct. App. 2007) (frustration of purpose).

144. *See* Ploegman v. Burlington N. & Santa Fe Ry. Co., No. 46776–0–I, 2002 WL 1161387, at *2–3 (Wash. Ct. App. June 3, 2002) (impossibility and impracticability); Evans v. County of Spokane, No. 19862–6–III, 2002 WL 1797485, at *7 (Wash. Ct. App. Aug. 6, 2002) (impossibility and impracticability); Babcock v. ING Life Ins. & Annuity Co., No. 12–CV–5093, 2013 WL 24372, at *4 (E.D. Wash. Jan. 2, 2013) (impracticability).

145. Wis. Elec. Power Co. v. Union Pac. R.R., 557 F.3d 504, 507 (7th Cir. 2009) (impossibility); Specialty Foods of Ind., Inc. v. City of S. Bend, No. 71C01-1212-MI-00244, 2013 WL 3812025, at *1 (Ind. Cir. Ct. Feb. 20, 2013) (impracticability).

146. OWBR LLC v. Clear Channel Commc'ns, Inc., 266 F. Supp. 2d 1214, 1216 (D. Haw. 2003); French Camp Vineyards v. Guenoc Winery, Inc., No. CPF-04-504511, 2005 Cal. Super. LEXIS 1673, at *6 (Cal. Super. Ct. Apr. 22, 2005) (commercial impracticability); *Pflueger*, 2007 WL 1876028, at *2–3; Aleut Enter., LLC v. Adak Seafood, LLC, No. 3:10-cv-0017-RRB, 2010 WL 3522348, at *2 (D. Alaska Sept. 2, 2010) (commercial impracticability).

addresses a different performance related issue,[147] which, according to the conventional wisdom, means that impossibility and impracticability of performance are generally raised by the contracting party with performance obligations while frustration of purpose is usually raised by the paying party.[148] The data suggest, however, that there may be some substantive confusion by the litigants/attorneys raising the CCDs and the courts deciding these cases regarding which CCD the facts actually trigger and, therefore, the "correct" CCD to raise in litigation. This substantive confusion is evidenced both by the number of cases in which a party raised one or both of the performance CCDs and the frustration of purpose CCD (8 cases in the Seventh Circuit and 29 in the Ninth Circuit, respectively),[149] *and* the number of times that the paying party raised one of the performance CCDs.[150] With respect to the latter observation, the paying party raised the performance CCD(s) in 12 of the 27 cases out of the Seventh Circuit.[151] In other words, the paying party raised a performance CCD 44% of the time.[152] In the Ninth Circuit, the paying party raised a performance CCD in 34 of the 65 cases.[153] This means that the paying party raised a performance CCD 52% of the time.[154] Even if the cases raising both the performance CCDs *and* the frustration of purpose CCD are eliminated, leaving only the "pure" performance CCDs, the percentages remain high—45% in the Seventh Circuit and 47% in the Ninth Circuit.[155]

Fifth, a few words must be said about the successful CCD claims and, more specifically, about the types of changed circumstances on which they were premised. Recall that the changed circumstance (i.e., the event) that triggers the CCDs (a) will generally involve acts of God or acts by third parties and (b) cannot be in the control of the party seeking to excuse its performance. But if the other party caused the event preventing the adversely affected party from performing, then this should ordinarily be treated as a breach of contract by the other party.[156] Some takeaways from the successful claims in the Seventh Circuit (i.e., the cases that excused performance based on a CCD) are as follows: (1) all involved events outside of the control of

147. *See supra* discussion accompanying notes 45–80 (providing a general overview of CCDs).

148. *See supra* discussion accompanying notes 75–80 (discussing CCD conventional wisdom).

149. *See supra* Tables 5 and 6.

150. *See supra* Table 5.

151. *See supra* Table 5.

152. *See supra* Table 5.

153. *See supra* Table 5.

154. *See supra* Table 5.

155. *See supra* Table 5.

156. *See supra* discussion accompanying notes 75–80 (conventional wisdom).

either party;[157] and (2) three of the four cases dealt with traditional types of changed circumstances, namely, a thing necessary for performance failed to come into existence (two cases)[158] or the death or incapacity of a person necessary for performance (one case).[159]

In contrast, the Ninth Circuit cases are much less uniform with respect to the types of changed circumstances on which the 22 successful claims were based.[160] More specifically, 14 of the successful cases addressed changed circumstances outside of the control of either contracting party with 8 of these 13 cases based on traditional types of changed circumstances[161] and 6 on another event.[162] For 7 of the 22

157. Hugo Bramschreiber Asphalt Co. v. Midwest Amusement Park, LLC, No. 2006AP1205, 2006 WL 2671000, at *1 (Wis. Ct. App. Sept. 19, 2006) (holding that a third party supplier that failed to deliver asphalt to the plaintiff rendered plaintiff's performance impracticable); Wis. Elec. Power Co. v. Union Pac. R.R., 557 F.3d 504, 509 (7th Cir. 2009) (ruling that the railroad was not responsible for transporting coal to a power plant once the mine closed under the doctrine of impossibility); Specialty Foods of Ind. v. City of S. Bend, 997 N.E.2d 23, 29 (Ind. Ct. of App. 2013) (excusing performance from a contract due to impracticability when the College Football Hall of Fame relocated from South Bend, Indiana to Atlanta, Geogia); Ryan v. Estate of Sheppard (*In re* Estate of Sheppard), 789 N.W.2d 616, 620 (Wis. Ct. App. 2010) (determining that the death of a paying party amounted to frustration of purpose).

158. *Wis. Elec. Power Co*., 557 F.3d at 509 (ruling that the railroad was not responsible for transporting coal to a power plant once the mine closed under the doctrine of impossibility); *Specialty Foods of Ind*., 997 N.E.2d 23, 29 (Ind. Ct. App. 2013) (excusing performance from a contract due to impracticability when the College Football Hall of Fame relocated from South Bend, Indiana to Atlanta, Georgia); *see also* RESTATEMENT (SECOND) OF CONTS. § 263 (AM. L. INST. 1981).

159. *In re* Estate of Sheppard, 789 N.W.2d at 620 (determining that death of a paying party amounted to frustration of purpose); *see also* RESTATEMENT (SECOND) OF CONTS. § 262.

160. One of the successful claims was counted twice—once for impossibility and once for frustration of purpose—because both doctrines were decided in the case. *See* Habitat Tr. for Wildlife, Inc. v. City of Rancho Cucamonga, 96 Cal. Rptr. 3d 813, 843 (Ct. App. 2009). That said, for purposes of discussing the event that gave rise to the successful claim, the same case was only counted once. As a result, the discussion of the 22 successful claims results in a case count of *21* when the specific events are examined.

161. Praxis Dev. Grp. v. Richman, Lawrence, Greene & Chizever, No. A104874, 2005 WL 1607784, at *7–8 (Cal. Ct. App. July 8, 2005) (determining that the doctrine of impossibility applied when a City did not approve interchange agreement necessary for development project); Miranda v. Williams, No. F054365, 2008 WL 4636445, at *4 (Cal. Ct. App. Oct. 21, 2008) (holding that performance was excused under the doctrine of impossibility when the City refused to move a sewer line or issue a permit to build over it); Goldberg v. Prickett, No. B203934, 2009 WL 179572, at *4 (Cal. Ct. App. Jan. 27, 2009) (finding that when a 1031 exchange fell through on a property, the contract's purpose was frustrated); Pharmicare Co. v. Prosurg, Inc., No. CPF-08-509076, 2009 Cal. Super. LEXIS 3780, at *10–11 (Cal. Super. Ct. May 6, 2009) (ruling that a contract's purpose was frustrated when contracted products failed to satisfy testing standards set by Korean equivalent of FDA and therefore could not be sold in Korea); Klein v. Klein, No. B213125, 2009 WL 3807442, at *3 (Cal. Ct. App. Nov. 16, 2009) (finding that the doctrine of frustration of purpose applied when the child for whom child support was owed died); *Habitat Tr*., 96 Cal. Rptr. 3d at 843 (asserting that the doctrines of impossibility and frustration of purpose excused performance after the City determined that Plaintiff was not a qualified conservation entity and did

cases, the changed circumstances were within the control of one of the contracting parties, with 5 of these events in the control of the non-adversely affected party[163] and 2 in the control of the party seeking to excuse its own performance.[164] With respect to the five cases with

not qualify to hold the mitigation land); Elsinore Hang Gliding Ass'n v. Concordia CKS Invs., LLC, No. E044307, 2010 WL 3760247, at *9 (Cal. Ct. App. Sept. 28, 2010) (affirming the trial court's finding that performance was impossible when the Riverside County Flood Control District failed to approve a hang-gliding easement); Babcock v. ING Life Ins. & Annuity Co., No. 12-CV-5093-TOR, 2013 WL 24372, at *6 (E.D. Wash. Jan. 2, 2013) (granting summary judgment to defendant insurance company after defendant failed to make further payments from structured settlement pending further proceedings in Ohio, which rendered performance impossible); *see also* RESTATEMENT (SECOND) OF CONTS. § 264.

162. Cape-Frances Enters. v. Estate of Peed, 29 P.3d 1011, 1015–16 (Mont. 2001) (finding that a discovery of underground pollution caused performance to be impossible and impracticable); Credit Rsch., Inc. v. Experian Info. Sols., Inc., No. H024220, 2003 WL 22133193, at *5 (Cal. Ct. App. Sept. 16, 2003) (determining that when a third party cut off database access, it rendered performance impracticable); Chang v. Pacificorp, 157 P.3d 243, 247–48 (Or. Ct. App. 2007) (ruling that the unprecedented manipulation of California's energy market by third parties constituted as frustration of purpose); Lane v. Cooper, No. D062806, 2014 WL 606556, at *7–8 (Cal. Ct. App. Feb. 18, 2014) (asserting that performance was impracticable when an architectural jury referenced in CCRs no longer existed); One Wailea Dev., LLC v. Warren S. Unemori Eng'g, Inc., No. CAAP-13-0000418, 2016 WL 2941062, at *12, 29–32 (Haw. Ct. App. Apr. 20, 2016) (holding that the doctrine of impracticability excused defendant's performance when plaintiff's breach of contract with a third party caused the third party to cancel the land sales contract for the property for which defendant's services were required); Koka v. Koka, No. B277116, 2017 WL 5898391, at *3–4 (Cal. Ct. App. Nov. 29, 2017) (finding that the doctrine of impracticability applied to contractual performance when mediator specified in the parties' agreement retired).

163. Ploegman v. Burlington N. & Santa Fe Ry., Co., No. 46776-0-I, 2002 WL 1161387, at *2–3 (Wash. Ct. App. June 3, 2002) (excusing plaintiff's performance by the impossibility and impracticability doctrines when defendant railroad leased property to a third party without reserving right for plaintiff to enter and cut vegetation); Evans v. Cnty. of Spokane, No. 19862-6-III, 2002 WL 1797485, at *6–7 (Wash. Ct. App. Aug. 6, 2002) (finding that defendant county's performance was excused due to impossibility and impracticability when plaintiffs improperly installed a sewer/septic system, which led to ongoing violations of health regulations); C.H. Robinson Co. v. Glob. Fresh, Inc., No. CV 08-2002, 2010 WL 11515522, at *5 (D. Ariz. Jan. 22, 2010) (discharging defendant's performance because the contract's purpose was frustrated when plaintiff issued voluntary recall of melons after FDA issud warnings regarding melons); Maywood Police Officers Ass'n v. City of Maywood, No. B256417, 2016 WL 399780, at *5–7 (Cal. Ct. App. Feb. 2, 2016) (ruling that the doctrines of impossibility, impracticability, and frustration of purpose release the defendant from performing after plaintiff police department's frequency and severity of liability claims caused the defendant city to lose its insurance coverage); Cline v. Kralich, No. DA 16-0216, 2017 WL 3263081, at *2 (Mont. Aug. 1, 2017) (finding that by failing to provide defendant with notice required by the parties' agreement, plaintiff caused defendant's performance to be impracticable and therefore excused).

164. United States v. Pflueger, No. 06-00140, 2007 WL 1876028, at *3–4 (D. Haw. June 27, 2007) (excusing defendant's performance due to impracticability when defendant was unable to obtain a surety bond required to remediate under consent decree after dam partially owned by defendant broke, causing damage and death); Sznyter v. Spun.com, Inc., No. D061832, 2014 WL 1654036, at *3–4 (Cal. Ct. App. Apr. 25, 2014) (affirming that the defendant's performance was excused due to impracticability after defendant became insolvent and merged with another company, which triggered Del-

events in the control of the non-adversely affected party, three involve what looks like a breach by the non-adversely affected party.[165] This data, therefore, also suggests that there is substantive confusion about the CCDs in practice, particularly in the Ninth Circuit.

Finally, the particular problems presented by the frustration of purpose doctrine need to be noted, particularly because a lot of people and businesses affected by the Covid-19 pandemic will be the paying parties. Recall that conventional contract wisdom tells us that frustration of purpose is generally raised by the paying party *and* that courts are much more reluctant to excuse performance based on this doctrine.[166]

While none of the CCDs are generally successful when raised in litigation, frustration of purpose is still less successful in practice than impossibility and impracticability of performance.[167] More specifically, impossibility and impracticability failed 85% of the time and frustration of purpose failed 90% of the time in the Seventh Circuit.[168] In the Ninth Circuit, impossibility and impracticability failed 75% of the time and frustration of purpose failed 82% of the time.[169] That frustration of purpose is generally less successful than either of the two performance doctrines is particularly significant given that data for frustration of purpose was only collected over a ten-year period (2005–2015) while data for impossibility and impracticability of performance spanned a twenty-year period (2000–2019).[170]

The cases highlight why frustration of purpose will generally be more difficult to establish than impossibility or impracticability of performance. To begin with, the CCD cases make clear that making payments required under a contract is *never* objectively impossible.[171] So impossibility is never going to excuse performance by a paying party. As for impracticability and frustration of purpose, the CCD cases

aware law resulting in cancelation of all existing stock shares for nominal consideration).

165. Ploegman v. Burlington N. & Santa Fe Ry., Co., No. 46776-0-I, 2002 WL 1161387, at *2–3 (Wash. Ct. App. June 3, 2002) (defendant railroad leased property to a third party without reserving right for plaintiff to enter and cut vegetation); Maywood Police Officers Ass'n v. City of Maywood, No. B256417, 2016 WL 399780, at *5–7 (Cal. Ct. App. Feb. 2, 2016) (defendant city terminated its memo of understanding with plaintiff police department because the frequency and severity of liability claims against the police department caused the defendant city to lose its insurance coverage); Cline v. Kralich, No. DA 16-0216, 2017 WL 3263081, at *2 (Mont. Aug. 1, 2017) (finding that plaintiff breached the contract with defendant by failing to provide defendant with notice required by the parties' agreement and that the breach caused defendant's performance (providing plaintiff with 30 days to cure) to be impracticable).

166. *See supra* discussion accompanying notes 76–79.

167. *See supra* Table 3.

168. *See supra* Table 3.

169. *See supra* Table 3.

170. *See supra* Subsection II.A.1 (detailing the Article's methodology).

171. *See supra* discussion accompanying note 131.

make clear that (1) a party's financial ability to perform its own duties under a contract is never an excuse for nonperformance and (2) an increase in the expense or difficulty of performance is not sufficient to excuse performance—even if the event causing the expense or difficulty is a housing and/or market collapse or an economic disaster.[172] This, of course, means that impracticability of performance and frustration of purpose will rarely excuse the paying party's performance either.

Another reason frustration of purpose is more difficult to establish in practice is because of the doctrine's "common understanding" requirement. Recall that frustration of purpose generally requires the adversely affected party to show that its principal purpose for the contract has been frustrated *and* that the parties share some kind of common understanding of that purpose.[173] *Proving* that both parties to the contract shared a common understanding generally is very difficult, if not outright impossible, to do.[174]

Consider two examples: (1) Parties enter a residential housing agreement (either lease or mortgage); the common understanding of the parties is probably (and simply) the ability of the paying party to possess the premises as a place to live in exchange for money. (2) Parties enter a lease agreement involving commercial property; the common understanding of the parties is probably (and simply) the ability of the tenant to possess the premises for commercial purposes (i.e., for a restaurant, a clothing or hardware store, a software developer's office, etc.) in exchange for money. Suddenly, the COVID–19 pandemic strikes and shuts down the economy. People lose jobs; businesses lose customers.[175]

There are *three* intertwined problems now confronting the paying parties (i.e., the residential renters/mortgagors and commercial lessees). First, the *common understanding* of the parties remains completely intact, even when faced with the economic devastation caused by the COVID–19 pandemic.[176] The paying party *still has the right to possess the residential or commercial premises* for its housing or its

172. *See supra* discussion accompanying notes 156–57.

173. *See supra* discussion accompanying notes 64–72 (discussing frustration of purpose).

174. *See, e.g.*, Alameda Belt Line v. City of Alameda, No. A118596, 2009 WL 1744543, at *14–16 (Cal. Ct. App. June 22, 2009); Liberty Dialysis–Haw., LLC v. Fresenius Med. Care Holdings, Inc., No. 07-00286, 2009 WL 1789332, at *11 (D. Haw. June 19, 2009); Confederated Tribes of the Warm Springs Rsrv. v. Ambac Assur. Corp., No. 10-130, 2010 WL 4875657, at *6 (D. Or. Nov. 17, 2010). For an earlier case outside the parameters of this empirical study, see *7200 Scottsdale Road General Partners v. Kuhn Farm Machinery, Inc.*, 909 P.2d 408, 418 (Ariz. Ct. App. 1995).

175. *See supra* discussion accompanying note 17–23.

176. *See* Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail*, CAN. J.L. & JURIS. (forthcoming 2021) (manuscript at 30) (available at https://ssrn.com/abstract=3605411 [https://perma.cc/2G3A-9NTB]).

business.[177] But the paying party either (1) can no longer pay for that right of possession or (2) sees paying as more expensive or difficult.[178] Second, *the paying party's ability to pay* (i.e., to perform its own duty under a contract) is never going to be the common understanding of the parties going into any contract.[179] And third, inability to pay for whatever reason (i.e., it's become more expensive or difficult) is simply not an excuse for nonperformance—even when the cause of the paying party's financial difficulties is a catastrophic event.[180] All this means, of course, that paying parties cannot excuse themselves from performance under the frustration of purpose doctrine.

In sum, the primary conclusion from the data collected for this empirical study is that contract law via the CCDs will, with a few exceptions, let the loss lie where it falls and leave the contracting parties exactly where it finds them, namely, *in breach* of their contracts. And this is true even when the changed circumstance triggering the invocation of one of the CCDs is catastrophic, like the housing market crash that precipitated the Great Recession. Paying parties in particular will have a harder time excusing their performance using any of the CCDs.

III. Searching in All the Wrong Places

That the CCDs are not generally successful when raised in practice is consistent with CCD literature spanning 70 years.[181] That said, the literature reflects a lack of consensus on what the CCDs actually do when they are being employed and even on the theoretical justifications for them. Some contracts scholars, including Melvin Eisenberg, argue that the CCDs serve a gap-filling function, much like implied terms.[182] Other scholars, including Richard Posner, Andrew Rosenfield, and George Triantis, argue that the CCDs are risk-allocation de-

177. Putzier & Fung, *supra* note 7.

178. *See id.*

179. Dagan & Somech, *supra* note 180 (manuscript at 28–29).

180. *See supra* Table 2.

181. *See, e.g.*, Anderson, *supra* note 33, at 1, 21–22; Rapsomanikis, supra note 33, at 558; Hubbard, *supra* note 33, at 80; Trakman, *supra* note 33, at 477; Kull, *supra* note 33, at 1; Weiskopf, *supra* note 33, at 242; Roberts, *supra* note 33, at 129; Van Boom, *supra* note 33, at 4–5.

182. Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. Legal Analysis 207, 209 (2009) [hereinafter Eisenberg, *Impossibility*] ("The methodological proposition is that the tacit assumptions of contracting parties, like other implied contractual terms, are normally best determined by considering what similarly situated parties would likely have assumed."); Farnsworth, *supra* note 49, at 623 ("When a court excuses a party on the ground of impossibility, it is supplying a term to deal with an omitted case, to fill a gap."); *cf.* Kull, *supra* note 33, at 7 ("[T]he contemporary formulation of the problem sees the frustrated contract as 'incomplete,' in that it did not define expressly the obligations of the parties upon the occurrence of the frustrating event, and thus assigns to the court the task of supplying a 'gap-filling' term.").

vices.[183] Still other scholars, including Leon Trakman, argue that the CCDs should address loss allocation.[184] The theoretical justifications served by the CCDs range from fairness (Perillo, Liu, and Jenkins)[185] and efficiency (Posner and Rosenfield)[186] to autonomy (Dagan and Somech)[187] and freedom of contract (Roberts, Triantis, and Van Boom).[188] This confusion surrounding the CCDs has been noted for decades.[189]

In addition to the differing approaches to the CCDs both practically and theoretically, the literature also takes one of two positions with respect to how broadly the CCDs should be construed in practice. More specifically, some contracts scholars argue that the CCDs should be construed as *a very limited exception* to the general rule that contracts should be strictly enforced while other scholars argue that the CCDs should not be recognized at all. Leon Trakman aptly summed up the limited exception position and the reasoning supporting it as follows:

> [M]any courts tend to view excuse for nonperformance as a very narrow concept that should not be readily used to terminate contractual obligations. These courts reason that because there are few disruptions of performance that parties could not foresee in modern times of political and economic uncertainty, parties engaged in commercial transaction should be bound to fulfill their unqualified promises without excuse. Moreover, a promisor who assumes an obligation without obtaining a contingent release clause should not be permitted to escape liability for breach at the expense of the promisee.[190]

183. *See generally* Posner & Rosenfield, *supra* note 47; George G. Triantis, *Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability*, 42 U. TORONTO L.J. 450, 451 (1992).

184. Trakman, *supra* note 33, at 480 ("Past experience in both common- and civil-law jurisdictions demonstrates that the allocation of losses arising from nonperformance is a logical and equitable alternative to the imposition of the full loss upon one contracting party.").

185. Significantly, the "fairness" rationale is articulated mostly by authors doing comparative law work about the CCDs. *See* Joseph M. Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts*, 5 TUL. J. INT'L & COMPAR. L. 5, 12 (1997); Chengwei, *supra* note 55, § 19.3.2; Sarah Howard Jenkins, *Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles—A Comparative Assessment*, 72 TUL. L. REV. 2015, 2017–19 (1998).

186. *See generally* Posner & Rosenfield, *supra* note 47.

187. *See, e.g.*, Dagan & Somech, *supra* note 180 (manuscript at 3–5, 16).

188. *See, e.g.*, Roberts, *supra* note 33, at 136; Triantis, *supra* note 187, at 480; Van Boom, *supra* note 33, at 1.

189. *See, e.g.*, Posner & Rosenfield, *supra* note 47, at 84–88; Rapsomanikis, *supra* note 33, at 558.

190. Trakman, *supra* note 33, at 479 (emphasis removed) (footnote omitted); *see also* Chengwei, *supra* note 55, at 243; RESTATEMENT (SECOND) OF CONTS., ch. 11, intro. note (AM. L. INST. 1981); Roberts, *supra* note 33, at 143 ("Exceptions to this principle [i.e., sanctity of contract] should only be made where too strict adherence to the principle would be detrimental to another important interest."); *cf.* Dagan & Somech, *supra* note 180 (manuscript at 6, 35) (arguing that though the CCDs are not a

Other scholars, like George Triantis, Andrew Kull, and Thomas Roberts, argued, however, the CCDs should not be recognized at all because (1) the parties have already explicitly or implicitly allocated *all* the potential risks in their contract;[191] (2) the CCDs are self-defeating and would "work[ ] against the very advantages which contracts are intended to secure[,]" namely, risk distribution;[192] (3) the courts have no standards by which to choose where the losses or gains from a contract *should* fall between the parties to a contract;[193] (4) judicial intervention has little social and economic utility and could operate to disincentivize the parties from allocating the risks between themselves;[194] and (5) exploitation is not necessarily relevant for the law.[195]

Despite all these differences, contracts scholars and courts all seem to agree that one way to ensure CCDs will work in practice is for the future adversely affected party to include a provision in the contract to protect itself against changed circumstances that might occur later. An example Eisenberg used is instructive:

> [If] A knows or should know the risk of unexpected subsoil conditions, and B does not[, then], if A wishes either to be excused if such conditions materialize or to put the risk of such conditions on B, A should bring the risk to B's attention *and explicitly contract around it.*[196]

Dagan and Somech agree. They argue, for example, that contract law must follow relational justice, meaning that the law should maintain the ability of both parties to achieve the goal they set for themselves when they co-authored the shared script, that is, when they co-drafted their contract.[197] The Restatement (Second) of Contracts probably makes the point the most succinctly:

> The obligor is . . . liable in damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he had anticipated. . . . *The obligor who does not wish to undertake so extensive an obligation may contract for a lesser one by using a variety of common clauses.*[198]

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marginal part of contract law, the CCDs will generally not be successful when raised, therefore supporting the position that the CCDs are actually limited exceptions to the general rule of strict liability in contract).

191. Triantis, *supra* note 187, at 480.

192. Roberts, *supra* note 33, at 144–45.

193. Kull, *supra* note 33, at 40.

194. *Id.* at 52; Weiskopf, *supra* note 33, at 270–71.

195. Roberts, *supra* note 33, at 136–37 ("[W]here one party exploits the pressing need of the other party by inducing agreement on terms highly unsatisfactory for the latter, this exploitation is not necessarily of any relevance for the law, even though such action may be morally reprehensible.").

196. Eisenberg, *Impossibility*, *supra* note 186, at 221 (emphasis added).

197. Dagan & Somech, *supra* note 180 (manuscript at 19, 22, 48-49, 64).

198. RESTATEMENT (SECOND) OF CONTS. ch. 11, intro. note (AM. L. INST. 1981) (emphasis added); *see also* Anderson, *supra* note 33, at 22; Rapsomanikis, *supra* note

The courts are in accord. In *United States v. Sandwich Isles Communications, Inc.*,[199] for example, the district court said that impracticability of performance is premised on the idea that "'the parties will have bargained with respect to any risks that are both within their contemplation and central to the substance of the contract'. . . . And 'if the risk was foreseeable *there should have been provision for it in the contract*, and the absence of such a provision gives rise to the inference that the risk was assumed.'"[200]

At a minimum, the "insert a clause in the contract" solution assumes that future adversely affected parties are either (1) drafting the contracts they are entering into with their contracting partners (or have meaningful input into the drafting process), and/or (2) have the wherewithal—meaning the knowledge, time, access to information and advice, money, the list goes on—to not only insist on the inclusion of such a clause in those contracts but to also see to it that the clause actually ends up in the written documents.

These assumptions may describe how some contracts are formed, but they do not describe the way most contracts are formed. Adhesion contracts—contracts drafted by one party usually but not always on a standard form and presented to the other party on a take it or leave basis[201]—are ubiquitous in consumer[202] and employment contracts,[203] online contracts (e.g., buying anything off a website),[204] and even a lot of business contracts, particularly those involving small businesses. One need look no further than the pervasive use of mandatory arbitration provisions in contracts between corporations and consum-

33, at 601–02; Chengwei, *supra* note 55, at § 19.2; Van Boom, *supra* note 33, at 13; Eisenberg, *Impossibility*, *supra* note 186, at 221; Kull, *supra* note 33, at 50–51; Roberts, *supra* note 33, at 145; Jenkins, *supra* note 189, at 2017.

199. United States v. Sandwich Isles Commc'ns, Inc., 398 F. Supp. 3d 757 (D. Haw. 2019).

200. *Id.* at 772 (emphasis in original) (citations omitted) (quoting United States v. Winstar Corp., 518 U.S. 839, 905 (1996)). A specific clause in the contract allocates risk to the adversely affected party. And the absence of a specific clause in the contract allocates the risk to the adversely affected party.

201. Rakoff, *supra* note 98, at 1176–77.

202. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346–47 (2011) ("[T]he times in which consumer contracts were anything other than adhesive are long past."); CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 1.1 (2015) ("Whenever a consumer obtains a consumer financial product such as a credit card, a checking account, or a payday loan, he or she typically receives the company's standard form, written legal contract.").

203. Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 428 (2016) ("[Workers are] often presented with a set of non-negotiable terms . . . and asked to accept on the implicit or explicit threat of termination."); *see also* Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 638 (2007).

204. *See generally*, NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 53–54 (2013) (explaining that wrap contracts—a type of online contract—are similar to adhesion contracts).

ers,[205] employees,[206] and small businesses[207] to see the truth of this conclusion.[208]

Given that adhesive contracts are so ubiquitous, it is striking that adhesive contracts do not appear to be the *typical* type of contracts captured in the case law study for this Article, though they are present in the data.[209] What is equally striking is that most contracts in the captured cases instead *appear* to be commercial contracts between commercial parties.[210] Clearly, the data captured at least two very different types of contracts.

These data points present an obvious question: What accounts for or explains the abundance of commercial contracts and the dearth of adhesive contracts in the captured cases?

One reason the data suggests why so many more commercial contracts ended up in court is because so few of the contracts captured in the study included force majeure clauses. More specifically, a force majeure clause was mentioned in only 2 (5%) out of the 37 cases from the Seventh Circuit[211] and in only 4 (4%) of the 99 cases out of the Ninth Circuit.[212] "Force majeure" literally means "an event or effect that cannot be reasonably anticipated or controlled."[213] The primary purpose of a force majeure clause, therefore, is to allocate between the contracting parties the risk that future events will prevent contract performance.[214] Hence, when it comes to the CCDs, the most directly applicable contract clause is a force majeure provision.[215]

So a more specific question presented with respect to these commercial contracts is why did so few of them include a force majeure clause. The lack of force majeure clauses might suggest that the commercial cases captured in the study conducted for this Article are not

205. *See, e.g.*, *AT&T Mobility*, 563 U.S. 333.

206. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

207. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

208. *Cf.* Jeffrey C. Bright, *Unilateral Attorney's Fees Clauses: A Proposal to Shift to the Golden Rule*, 61 DRAKE L. REV. 85, 88 n.8 (2012) ("In my personal experience practicing law, it is standard for one-sided attorney's fees clauses to be included in mortgages, residential and commercial leases, and occasionally in sales of goods and services to small businesses.").

209. *See supra* discussion accompanying notes 95–99; *see also supra* Table 1; Appendix 1 (on file with Author).

210. *See supra* discussion accompanying notes 95–99; *see also supra* Table 1.

211. *See supra* discussion accompanying note 145.

212. *See supra* discussion accompanying note 146.

213. *Force majeure*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/force%2majeure [https://perma.cc/DZ39-F5VL].

214. Benoliel, *supra* note 48, at 402.

215. Indeed, one contract scholar went so far as to argue that "the wide-spread use of force majeure clauses [in contracts] that provide for events with catastrophic consequences" was the reason that courts did not need to fill in any gaps in the parties' contract and, therefore why the CCDs were not needed at all. Triantis, *supra* note 187, at 451–52.

the typical type of cases in which a party would normally raise a CCD.[216] Implicit in this argument are the assumptions that a more standard CCD case would have included a force majeure clause *and* that the force majeure clause would have been successful if it had been invoked.[217] It is not clear how robust this argument and its assumptions are given that (1) this empirical study captured 136 cases, 98 of which appear to be commercial contracts between commercial parties,[218] suggesting that the cases captured are a representative sample of the types of commercial cases that are litigated and in which a CCD is raised;[219] (2) a recent empirical study conducted by Uri Benoliel concluded that sophisticated parties[220] are actually *not* including force majeure clauses in their commercial contracts (66% of the 1,926 contracts collected for his study);[221] and (3) even if included in the contract, force majeure clauses may not necessarily resolve the dispute between the parties either before or after litigation is filed.

Anecdotally, in the empirical study conducted here, performance was only excused in three of the six cases that discuss a force majeure clause,[222] and even then, the force majeure clause was the reason performance was excused in only *one* of those cases.[223] Performance was *not* excused in the other three cases, notwithstanding the presence of a force majeure clause in each of those cases, either because the clause was interpreted very narrowly such that it did not apply to the circumstances being alleged or the event was foreseeable.[224] Indeed, force

216. Thanks go to Stephen Sepinuck for raising this point.

217. If a force majeure clause were included in these contracts, the argument is that these cases would be less likely to be litigated. This is because the contract itself via the force majeure clause would resolve the dispute.

218. *See supra* discussion accompanying notes 95–99.

219. *See supra* discussion accompanying notes 95–99.

220. *See* Benoliel, *supra* note 48, at 409–10 (explaining that at least one of the parties in each of the studied contracts was a sophisticated party, which is defined as "a sophisticated company that is legally required to report to the SEC. These are normally companies with more than $10 million in assets.").

221. *Id.* at 412.

222. Wis. Elec. Power Co. v. Union Pac. R.R., 557 F.3d 504 (7th Cir. 2009) (impossibility); Specialty Foods of Ind., Inc. v. City of S. Bend, 997 N.E.2d 23 (Ind. Ct. App. 2013) (impracticability); United States v. Pflueger, No. 06–00140 BMK, 2007 WL 1876028 (D. Haw. June 27, 2007) (impracticability).

223. *Specialty Foods*, 997 N.E.2d at 29 (holding that the Football Hall of Fame moving to another state was a force majeure event within the "any other reason" language of the contract's force majeure clause, excusing performance); *Wis. Elec.*, 557 F.3d at 507 (asserting that the force majeure clause did not specify the circumstances that would make performance impossible or excuse the performing party from performing the contract); *Pflueger*, 2007 WL 1876028, at *3–4 (ruling that force majeure clause did not excuse performance because a procedural aspect of the clause was not complied with).

224. OWBR LLC v. Clear Channel Commc'ns, Inc., 266 F. Supp. 2d 1214, 1224 (D. Haw. 2003) (interpreting the force majeure clause to not excuse performance based on poor economic conditions); French Camp Vineyards v. Guenoc Winery, No. CPF-04-504511, 2005 Cal. Super. LEXIS 1673, at *7 (Cal. Super. Ct. Apr. 22, 2005) (finding that the force majeure clause did not excuse performance because the cyclical nature

majeure clauses are always subject to interpretation[225] with the consensus being that courts generally construe these clauses narrowly.[226] According to one court, force majeure clauses are now "little more than a descriptive phrase without much inherent substance."[227]

The absence of force majeure clauses from the commercial contracts captured in this case law study, therefore, could actually suggest that the commercial parties to *these* commercial contracts are explicitly opting for default rules,[228] which, in the absence of a risk-allocation clause, would include the CCDs.[229] Another way to state this particular theory would be to say that *these* commercial parties are overtly rejecting the "insert a clause in the contract" solution favored by pundits and courts. This could very well explain why so many of the commercial contracts captured here ended up in litigation. Assuming, therefore, that these are in fact co-drafted contracts between sophisticated commercial parties who are intentionally opting for the CCDs as default rules by choosing not to include a risk-allocation clause in their contracts,[230] then it is entirely plausible that the courts are apply-

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of the wine grape market in California was foreseeable); Aleut Enter., LLC v. Adak Seafood, LLC, No. 3:10-cv-0017, 2010 WL 3522348, at *1–2 (D. Alaska Sept. 2, 2010) (determining that the force majeure clause did not excuse performance because the adversely affected party's inability to obtain fuel was foreseeable).

225. *See, e.g., Wis. Elec.*, 557 F.3d at 507 ("[A] force majeure clause must always be interpreted in accordance with its language and context, like any other provision in a written contract . . . ."); *Specialty Foods*, 997 N.E.2d at 26 ("The objective of a court when it interprets a contract, including a force majeure provision, is to determine the intent of the parties at the time the contract was made by examining the language used in the contract.").

226. *See, e.g.,* Gordon Firemark, *A New Look at the Old Standard: "Force Majeure" Clauses*, L. OFFS. GORDON P. FIREMARK (Mar. 19, 2020), https://firemark.com/2020/03/19/a-new-look-at-the-old-standard-force-majeure-clauses/ [https://perma.cc/PT5A-A5VB]; Janice M. Ryan, *Understanding Force Majeure Clauses*, VENABLE LLP (Feb. 2011), https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses [https://perma.cc/N838-BLLN]; Lawrence P. Rochefort & Rachel E. McRoskey, *The Coronavirus and Force Majeure Clauses in Contracts*, AKERMAN (Apr. 6, 2020), https://www.akerman.com/en/perspectives/the-coronavirus-and-force-majeure-clauses-in-contracts.html [https://perma.cc/LQ32-KBMZ]; P. Danielle Cortez & Jason B. Sims, *Boilerplate Contract Language Coming to the Forefront: Force Majeure Clauses and COVID-19*, NAT'L L. REV. (Mar. 19, 2020), https://www.natlawreview.com/article/boilerplate-contract-language-coming-to-forefront-force-majeure-clauses-and-covid-19 [https://perma.cc/M5CY-C98X].

227. *Specialty Foods*, 997 N.E.2d at 27 (quoting Sun Operating Ltd. P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App. 1998)).

228. *See* Benoliel, *supra* note 48, at 412 (concluding that "most parties prefer not to contract around the default allocation of risks provided under the impossibility doctrine" after finding that most of the commercial contracts collected for his study did not include force majeure provisions).

229. *See, e.g.*, *Wis. Elec.*, 557 F.3d at 506 ("Parties can . . . contract around [impossibility], because it is just a gap filler . . . .").

230. But the entire argument in the text only holds true if the assumptions made also hold true; however, it is not entirely clear from the data that all of the assumptions hold true. The information about the parties in the cases is quite thin, and there is rarely any information about how or if the contract was negotiated or how it was drafted. *See supra* discussion accompanying notes 163–203.

ing the CCDs correctly in these cases. In other words, that the CCDs do not excuse performance most of the time and instead impose all the risk and attendant loss on one of the contracting commercial parties may be the correct result, again depending on whether the assumptions made about these contracts and the contracting parties hold true.

The same reasons, however, do not explain the absence of adhesion contracts in the empirical study conducted here. That said, and to cut right to the chase, the dearth of adhesive contracts is not surprising given the host of barriers that make it extremely difficult to litigate a contract claim in court. To begin with, Eric Zacks has shown that contracts are specifically drafted to take advantage of non-drafting parties' cognitive biases and to discourage non-drafting parties from challenging even unconscionable or illegal contracts.[231] Contracts are drafted, in other words, to encourage non-drafting parties to *not* file a claim. And if the claim is small, the non-drafting party would most likely not want to file a lawsuit[232] because a lawsuit would cost significantly more than the claim at stake.[233] But even if a non-drafting party *wants* to pursue a contract claim in court, that party will probably have to find an attorney willing to represent it. Private attorneys, however, are most likely not going to be willing (or able) to litigate small, individual claims (either for a plaintiff or a defendant) because it would simply not be worth the attorney's time to do so.[234] While aggregating these claims would make pursuing contract claims more attractive, aggregating claims is not viable in many cases and is rarely an easy op-

231. Eric Zacks, *Shame, Regret, and Contract Design*, 97 MARQ. L. REV. 695, 741–46 (2014).

232. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting) (noting that claims against employers were "small, scarcely of a size warranting the expense of seeking redress alone" for individual employees alleging underpayment in violation of the Fair Labor Standards Act); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1524 (2008) ("[P]laintiffs with small stakes might . . . have insufficient reason to hire a lawyer to vindicate their claims.").

233. LAWS. FOR CIV. JUST., CIV. JUST. REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES, USCOURTS.GOV 2 (May 2010), https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf [https://perma.cc/5H6L-7D6K] ("[H]igh transaction costs of litigation, and in particular the costs of discovery, threaten to exceed the amount at issue in all but the largest cases.").

234. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.") (emphasis omitted); *cf.* Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1217 (S.D. Fla. 2006) ("[F]ew firms, no matter how large or well financed, will have any incentive to represent the small stake holders in class actions against corporate America, no matter how worthy the cause or wrongful the defendant's conduct.").

tion given that (1) federal statutes[235] and recent United States Supreme Court decisions[236] make class actions harder to litigate and (2) class action waivers are routinely found in boilerplate sections of adhesion contracts.[237]

Finally, even if a non-drafting party in an adhesive contract is willing to bring a contract claim *and* is able to find an attorney willing to file that claim in court, the non-drafting party will be confronted with another clause in the boilerplate of the contract, namely, a mandatory arbitration provision.[238] The only purpose of a mandatory arbitration clause is to require disputes between the parties to be resolved in an arbitration proceeding.[239] Given that courts routinely enforce mandatory arbitration clauses,[240] the vast majority of all contracts with such a clause will most likely not be litigated.[241] Hence, and for all of the reasons discussed, it is not surprising that the empirical study conducted here did not capture many adhesion contracts.

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235. *E.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (to be codified in scattered sections of 28 U.S.C.) (reducing the number of multistate class actions, the number of national class actions, and the number of state court actions); *see also* Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1606 (2006).

236. *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (interpreting Rule 23 of the Federal Rules of Civil Procedure that consequentially increased the difficulty in filing class action claims).

237. *See, e.g.*, *AT&T Mobility*, 563 U.S. at 333 (consumer wireless service contracts); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (business credit card agreements); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1612 (2018) (employment contracts); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019) (employment contracts).

238. *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (April 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/JPK3-ME2M] (finding that more than 60 million American workers are subject to mandatory arbitration); CONSUMER FIN. PROT. BUREAU, *supra* note 206, § 1.4.1 ("Tens of millions of consumers use financial products or services that are subject to pre-dispute arbitration clauses.").

239. CONSUMER FIN. PROT. BUREAU, *supra* note 206, § 1.1 ("[I]f one side sues the other in court, the party that has been sued in court can invoke the arbitration clause to require that the dispute proceed, if at all, in arbitration instead.").

240. *See supra* notes 205–07 (listing United States Supreme Court arbitration cases).

241. To get a sense of the sheer number of contracts subject to a mandatory arbitration clause, see, e.g., CONSUMER FIN. PROT. BUREAU, *supra* note 206, § 2.3 (finding that 53% of outstanding credit card loans, 44% of insured deposits at financial institutions, 92% of prepaid credit card agreements, and 83.7% of payday lenders all included mandatory arbitration provisions in their contracts); Colvin, *supra* note 242. A 2012 report by Public Citizen documented the problems litigants were facing in court in light of the U.S. Supreme Court's *Concepcion* decision and identified 76 cases in which courts cited *Concepcion* to hold that class action waivers in mandatory arbitration provisions were enforceable; the litigants were therefore required to assert their claims individually in front of an arbitrator. Christine Hines, Negah Mouzoon & Taylor Lincoln, Cong. Watch, *Justice Denied: One Year Later: The Harms to Consumers from the Supreme Court's* Concepcion *Decision Are Plainly Evident*, PUB. CITIZEN 4 (Apr. 2012), http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf [https://perma.cc/VX2L-HTJ8].

But could the "insert a clause in the contract" solution favored by contracts scholars and courts nevertheless be a workable solution in the context of adhesion contracts? The short answer is no. Recall that the "insert a clause in the contract" solution assumes either that both parties are drafting the contract together or the future adversely affected party can actually ensure that such a clause makes its way into the parties' written contract. Neither of these presuppositions are correct in the context of adhesive contracts. The crazy thing is that everyone who writes about or deals with contracts and contract law on any kind of a regular basis already knows this and has known it for a long time.

For starters, adhesion contracts by definition are not drafted by both parties.[242] Instead, adhesion contracts are generally drafted by only one of the contracting parties and presented to the non-drafter on a take-it-or-leave-it basis.[243]

Further, the future adversely affected party has the ability to insist on the inclusion of a clause in the contract protecting against future contingencies *only if* that party already has salient information about the relevant clause *or* that party can obtain such information at a tolerable cost (in terms of time, money, and effort).[244] But most parties either do not want to expend the resources they would need to acquire and process the information or recognize from the outset that obtaining the necessary information would be prohibitively expensive.[245] Moreover, basic microeconomics tells us that information asymmetries exist and are fairly common, obtaining information imposes costs, and, at the end of the day, contracting parties just do not have equal access to information.[246]

But even if all the salient information about the relevant contract clause or the contract in general was readily available, the "insert a clause into the contract" solution also assumes a level of rational decision-making on the part of future adversely affected parties that simply does not exist. Behavioral psychology and behavioral law and economics have told us for years now that contracting parties are *not* rational actors when they decide to enter a contract.[247] On the contrary, there is

242. *See* Rakoff, *supra* note 98, at 1177.

243. *Id.* at 1176–77.

244. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 214 (1995) [hereinafter Eisenberg, *Limits*].

245. *Id.*

246. *See* Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 50 (2011) [hereinafter Hart, *Reality*].

247. *See generally* Eisenberg, *Limits*, *supra* note 248, at 214–25. A thin version of the rational actor is one in which the actor processes information about all available options and then ranks those options in the order of subjective expected utility, where expected utility is usually defined in terms of the actor's own self-interest. *See* Hart, *Reality, supra* note 246, at 48–49.

> a mass of experimental evidence[,] [which] shows the existence of systematic cognitive problems affecting decision-making, such as bounded rationality, which limits the future scenarios that actors can be realistically expected to envision; overoptimism; and defects in capability, including systematic underweighting of future benefits and costs compared to present benefits and costs and systematic underestimation of low-probability risks.[248]

Compounding the problem with adhesive contracts is the widely known fact that adhesive contracts already favor the drafting party and sometimes unreasonably so. For example, Florencia Marotta-Wurgler's research finds that standard terms in software license agreements were biased in favor of sellers (the party that drafted the forms).[249] Regarding online contracts, Nancy Kim argues that drafters already make aggressive use of one-sided terms, such as mandatory arbitration clauses with class action waivers ("sword" terms)[250] and perpetual licenses to user-generated content ("crook" terms),[251] that enabled the drafters of these contracts to obtain benefits that were ancillary or unrelated to the main purpose of the contracts.[252]

Finally, even if all the salient information and requisite decision-making capacity were present, the future adversely affected party would still have to be able to not only insist on the clause's inclusion in the contract but also ensure that the clause actually ends up in the written document. This brings us full circle. Since most contracts are adhesive, there is little likelihood that the future adversely affected party could actually change anything about the contract to which it is entering. This would obviously include *the inability* to insist on the inclusion of a provision in the contract to protect itself against changed circumstances that might occur later.

If everyone already knows all this, then I need to ask: *Why* do courts and commentators all seem to agree that if an adversely affected party wants to excuse its future performance, then it needs to include a provision in the contract to protect against future contingencies *even though* courts and commentators know that including such a provision is pretty much impossible (pun intended) for the vast majority of contracting parties? What is really going on in the debate about whether the CCDs should or should not excuse a party's performance? The answer has to do with what a contract symbolizes in American society *and* the role it plays as a result.

248. Eisenberg, *Impossibility*, *supra* note 186, at 247; *see also* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206, 1208–16 (2003).

249. Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447, 459–63 (2008).

250. KIM, *supra* note 208, at 48–50.

251. *Id.* at 50–52.

252. *Id.* at 4, 48–52, 58, 65–69, 70, 81.

Contracts in the United States are synonymous with freedom and individual responsibility, and they have embodied these values since *at least* emancipation of the slaves in 1863.[253] According to historian Amy Dru Stanley:

> In principle, contract reconciled human autonomy and obligation, imposing social order through personal volition rather than external force. To contract was to incur a duty purely by choice and establish its terms without the constraints of status or legal prescription.[254]

The *role* of a contract, therefore, was to impose social discipline (i.e., to take complete responsibility for oneself) not just on the newly freed slaves but also on everyone already in the country and those who would later flock to our shores.[255] Contracts became the legal space within which individual autonomy was given full expression and the commitment to private ordering was enshrined. This ethos of individual autonomy and responsibility and private ordering remains the foundation of contract law today. As Dagan and Somech explain:

> A genuinely liberal contract law conceptualizes contract as a plan co-authored by the parties in the service of their respective goals. Law's justification for enforcing the parties' agreement is grounded in its commitment to enhance their self-determination, and both its animating principles and its operative doctrines are guided by this autonomy-enhancing *telos*.[256]

Thus, to ensure that contracts fulfill their role in American society, *pacta sunt servanda* (contracts *must be* kept) becomes one of the important, if not the most important, cornerstones of contract law. Otherwise, if parties could just get out of their contracts, what would be the value of a promise, particularly in a market economy[257] where everything and anything of value is transferred via a contract?[258] Predictability and stability, the synergistic by-products of *pacta sunt servanda,* are then called upon to serve twin functions: first, to manage the expectations of the parties and enable them to structure their affairs and facilitate planning for the future *and*, second, to continue to inculcate the norms of autonomy and personal responsibility.

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253. AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 35–37 (1998); *see also* Priya Kandaswamy, *The Obligations of Freedom and the Limits of Legal Equality*, 41 SW. L. REV. 265, 266 (2012) ("[R]ecognition as citizens [of the emancipated slaves] worked to constrain and curtail . . . more expansive possibilities of freedom by locking freedom for black people into an idiom defined by obligation, indebtedness, and responsibility.").

254. STANLEY, *supra* note 257, at 2.

255. *Id.* at 36–37; Kandaswamy, *supra* note 257, at 267–68; P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 654–55 (1979).

256. Dagan & Somech, *supra* note 180 (manuscript at 16).

257. Van Boom, *supra* note 33, at 1.

258. Eisenberg, *Limits*, supra note 248, at 212.

In this light, judicial allocation of the risks from changed circumstances through the CCDs is seen as interference with the parties' freedom of contract, i.e., their autonomy to decide for themselves and without any interference from the State whether to enter a contract and on what terms. If one of the parties did not take the steps necessary to protect their interests in the contract, then the fault is theirs, and all the risks associated with that party's performance *should* be allocated to that party, *and* any losses accruing as a result of a realized risk should fall on that party who failed to adequately protect itself.[259] Andrew Kull called this the "windfall principle."[260]

Under this approach, therefore, contracts should be drafted without the expectation of judicial intervention.[261] This is because the *only role* of the courts as agents of the State is to interpret and then enforce the agreement of the parties as made.[262] In other words, this approach to contract law in general and the CCDs in particular draws a bright line between what the State can do—enforce contracts as written—and what it should not do—step in to excuse performance. Under this view, to assign a different role to the State would not just impinge on the parties' autonomy it would also impermissibly interject the State into the private ordering that contracts are supposed to guarantee.[263]

This stark distinction between what is the proper role of the State (public) and what is not (private) is the bedrock upon which the entire contract law system was constructed in this country.[264] For that reason, it is also the crux of the CCD problem or question—depending on your perspective.[265] But more importantly, *because* a contract is usually understood as a private transaction between two (or more) private parties,[266] the fact that contracts actually produce *profound social (i.e., public) consequences* can and *is* ignored.

IV. Proposal: Intervening When It Matters

The contract law system's allegiance to the public/private distinction demands that we pretend that the *public* aspect(s) of contracts and contract law simply do not exist. But this is a legal fallacy because

259. Triantis, *supra* note 187, at 480.
260. Kull, *supra* note 33, at 6.
261. Jenkins, *supra* note 189, at 2020.
262. *See* Hart, *Reality*, *supra* note 246, at 29.
263. *See generally* Hart, *Formation*, *supra* note 44, at 184–89.
264. *Id.*
265. *See, e.g.*, Rapsomanikis, *supra* note 33, at 551 ("This problem [of changed circumstances] can be better viewed as a conflict between the principle of private autonomy, well expressed in the medieval maxim *reservanda sunt pacta*, and the modern need of attributing a social function to private contracts . . . such as good faith, reasonableness and practicality."); *id.* at 560 ("[C]ommon law views the contract as an instrument of liberalism and private autonomy, whereas civil law has ascribed a social function to private agreements, which are thereby affected by extra-contractual considerations.").
266. Hart, *Formation*, *supra* note 44, at 184–89.

reality shows us something else entirely. Notwithstanding the artificial distinction between the public and the private that contract law clings to, contracts and how contract law deals with contracts produce profound social consequences. This is a fact. One need only look at a newspaper (on paper or online), watch the news, or surf the Internet to see the truth of the matter.[267] Consequently, and specifically because contracts and contract law produce social, that is, public consequences, the State must step in. This is because the State is and always has been free to act in public matters.

What if we were to reimagine contracts based on reality and what we know about contracts and contracting in the real world instead of on legal fictions like the notion that most contracts are drafted by both parties? And what must we do or change to get there?

This Part attempts to sketch out some brief answers—not necessarily *the* answers or completely worked out answers—to these questions. Much more work needs to be done. But this is a starting point . . . .

The first thing that needs to happen is to actually acknowledge that contracts and contract law produce social (i.e., public) consequences. In essence, this step is a call to shift the frame from within which contract law is currently understood and analyzed. This may seem like a trivial step to take but it is not. This is because "frames" are what enable people to make sense of the world around them. Indeed, the purpose of a "frame" and the process of "framing" is to create common meaning and shared understandings of the world and how it works, which then legitimizes those meanings and the responses to them.[268] In short, by explicitly trying to influence what people think and how they think about them, frames help shape reality.[269] So, the first step requires that we recognize that contracts and contract law *at a minimum* implicate public law because of the social consequences they produce. This first step will then legitimize both the State's presence within the field *and* the State's actions in response to the social consequences that contracts and contract law produce.

The second step requires that we premise our understanding of how contracts are created on the ways in which contracts are actually formed in today's world. And the ways in which a contract is actually formed are critical because contract formation itself is the core of the contract law system; this is where power in a contract is embedded and becomes entrenched. This is so because (1) contract formation is where the norms of autonomy, personal responsibility, and freedom are given full effect—two private parties voluntarily come together in their own self-interest to decide whether to enter into a contract and,

267. *See supra* Part I; *see infra* Part V.
268. Danielle Kie Hart, *In a Word*, 41 Sw. L. Rev. 215, 217 (2012).
269. *See generally id.* at 217–20.

if so, on what terms; (2) contract law starts with the formation of a contract—the rest of contract law (i.e., interpretation, defenses, remedies) are only triggered if a contract exists in the first instance; and, most importantly, (3) at the moment of contract formation: a presumption of contract validity is created; and because this presumption of contract validity is extremely difficult to rebut, the practical result is that most contracts will be enforceable.[270] Indeed, the empirical study conducted for this Article validates this conclusion.

Thus, whatever happens or does not happen during contract formation, i.e., whether a term or clause is included in the contract or not, will in effect determine the outcome of contract disputes later. According to Eisenberg, Triantis said as much when he wrote, "[I]f a promisor agrees to render a certain performance, all risks affecting the promisor's ability to render that performance *that are not specified in the contract* are contractually allocated to her."[271]

Turning now to how contracts are formed in the real world, we know, for example, that most contracts are adhesive, meaning that only one party is drafting them.[272] There is also no debate anymore about whether people read the fine print in their contracts—they do not. Tess Wilkinson-Ryan puts it this way, "one of the truisms of empirical contracts research is that 'nobody reads.'"[273] We also know that even if people did read their contracts, they probably would not understand what they read. This is because common-form contract language is generally understandable by people with college degrees,[274] which excludes a large number of contracting parties given that "over 40 million adults are functionally illiterate [while] 'another 50 million have marginal literacy skills.'"[275] The extent of illiteracy is worse when it comes to understanding numbers.[276] But even assuming people read their contracts *and* understand what they are reading, there is little likelihood that they can change anything about the contracts they are entering into because most people entering into con-

270. Hart, *Formation*, *supra* note 44, at 199.

271. Eisenberg, *Impossibility*, supra note 186, at 247 (emphasis added).

272. *See supra* discussion accompanying notes 202–10.

273. Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1751–53 (2014); *see generally* Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1 (2009).

274. Omri Ben-Shahar & Carl. E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 712 (2011).

275. *Id.* at 711 (quoting Ad Hoc Comm. on Health Literacy for the Council on Sci. Affs., Am. Med. Ass'n, *Health Literacy: Report of the Council on Scientific Affairs*, 281 JAMA 552, 552 (1999)).

276. *Id.* at 712 ("Rates of innumeracy are even worse than rates of illiteracy."); *see also* Lauren E. Willis, *The Financial Education Fallacy*, 101 AM. ECON. REV. 429 (2011).

tracts are not rational actors,[277] and again, most of the contracts they enter into are adhesive.[278]

If we acknowledged that contracts and contract law produce social consequences, and if contract formation was premised on the ways in which contracts are actually formed, then any number of different solutions could be considered. Two solutions are proposed here. The first solution is roughly a rule of "interpretation" that would apply to the types of adhesion contracts described in more detail below[279] and permit a judge or arbitrator to impose the risk and loss caused by a catastrophic changed circumstance on the drafting party. If there is no risk-allocation clause in the adhesion contract at issue, then the court should interpret its absence against the drafting party and hold that the drafting party should bear both the risk and loss because this is exactly the contracting party that contract law presumes can and should take care of itself. The drafting party, therefore, should be forced to absorb all the costs associated with its failure to protect itself. That said, even if the adhesion contract at issue includes a risk-allocation clause, the judge or arbitrator could and should still interpret the contract as imposing the risk and loss on the drafting party. Given what we know about how contracts are formed in the real world, a judge or arbitrator could, if she so chose, reasonably and legitimately conclude that the risk-allocation clause in the adhesion contract should not be given effect.

The second solution is one that focuses specifically on the CCDs and is one already suggested by commentators and the courts, namely, including clauses in the contract.[280] The specific clauses suggested here are a risk-and-loss-allocation clause ("RLAC") and a good-faith-negotiation provision ("GFP"). Because it is not likely that the common law would adopt either of the proposed clauses,[281] the RLAC and GFP proposed here must be created under a federal statute. More specifically, the proposed federal statute would require the following: (1) the inclusion of a standard, negotiable, and variable RLAC together with a GFP in co-drafted contracts; and (2) the inclusion of a standard, *nonnegotiable, and non-variable* RLAC (that includes the risk of non-payment) together with a GFP in most adhesive contracts. Because the world of contracting appears split into at least two types of contracts—co-drafted and adhesive—the RLAC in particular

277. *See supra* discussion accompanying notes 247–48.

278. *See supra* discussion accompanying notes 202–10.

279. *See infra* discussion Part IV.

280. *See supra* discussion accompanying notes 201–09.

281. The common law is unlikely to adopt either of the proposed clauses given: (1) its assumptions about contract formation, see *supra* discussion accompanying notes 225–34; (2) the fact that the implied obligation of good faith only applies to the performance and enforcement of contracts under American law, see, e.g., RESTATEMENT (SECOND) OF CONTS. § 205 (AM. L. INST. 1981); and (3) the jurisprudence established around the CCDs, see *supra* discussion accompanying pp. 9–11.

would look and work differently depending on the type of contract at issue. However, the RLAC in each of these contracting scenarios would be triggered by catastrophic changed circumstances, like the Great Recession or the COVID–19 pandemic.[282]

To state the obvious, a contract is "co-drafted" if each party to that contract actually helped negotiate and draft it. But "co-drafting" cannot simply be presumed even in a commercial contract between commercial parties. This is because "co-drafting" presupposes that *each* contracting party possesses a certain amount of bargaining power, specifically, enough bargaining power to enable each party to know, understand, *and* protect their interests during contract formation. So a co-drafted contract would include, at a minimum, the following three criteria.

First, both parties to the contract must either be represented by or have *actual access to third-party advisers* during the negotiation and drafting phase(s) of contract formation. This is because *every* contracting party has theoretical access to third-party advisers in that *every* contracting party can theoretically hire a third-party adviser. An attorney for anyone who wants one is a worthy aspiration. But it is not at all clear (i.e., through any kind of evidence), that most people or even a lot of businesses have the money to *actually* hire a third-party adviser to help negotiate and draft their contracts. So "*actual access to third-party adviser(s)*" means that the contracting parties have actually hired a third-party adviser(s)[283] or have the financial ability to hire a third-party adviser(s) but have explicitly chosen not to do so. If the latter option is taken, certified financial statements documenting that the party who opted not to use a third-party adviser had the finances available are sufficient to satisfy this criterion.

The second and most important criterion is that each contracting party must have *meaningful input* into the terms that are included in and excluded from the contract. While "meaningful input" and "actual access to third-party advisers" seem similar and perhaps redundant, they are not. "Meaningful input" recognizes that even if a contracting party is represented by a third-party adviser, the contract at issue could still be presented on a take it or leave it basis, depending on the disparity in bargaining power between the contracting parties. Imagine, for example, a small parts supplier "negotiating" with Ford Motor

282. One could definitely argue that more circumstances short of catastrophic should excuse performance under a risk-allocation clause or the CCDs. But what constitutes "normal risk"—risk that is reasonable for a contracting party to assume or be made to assume—is beyond the scope of this Article. *Cf.* Indeck Energy Servs., Inc. v. NRG Energy, Inc., No. 03-C-2265, 2004 WL 2095554, at *11 (N.D. Ill. Sept. 16, 2004). That said, there are certain kinds of risk, namely, risk created by unforeseen catastrophic circumstances, that make it simply unreasonable to think—let alone conclude—that a party somehow agreed to assume such risk when it entered the contract.

283. Hiring would include using personnel from within a contracting party's own company (i.e., from the legal, financing, or accounting departments).

Company the terms of a supply contract or a restaurant owner "negotiating" with Wells Fargo for a commercial loan. The parts supplier and restaurant owner could very well be represented by an attorney or adviser in the negotiations. But it is certainly well within the realm of possibility to also imagine that the parts supplier and restaurant owner would have to accept whatever terms Ford or Wells Fargo insisted on if the parts supplier or the restaurant owner really wanted the contract. To establish "meaningful input," therefore, both parties would have to submit declarations or affidavits attesting that they did in fact have meaningful input into the drafting of the contract.[284]

The last criterion for a co-drafted contract is that the contract produced cannot be a standard form.[285] In other words, the contract produced cannot be one that could be re-used in other transactions with different parties with little to no modifications. Instead, the contract produced must be specific and tailored to the transaction and parties at issue.

At the end of the day, any contract between any contracting parties *could be* a co-drafted contract provided that all three criteria are met. In a co-drafted contract scenario, the contracting parties would be subject to the mandatory, but variable, RLAC as well as the GFP. In this situation, the RLAC would be automatically included in the parties' contract unless they explicitly contract around it. The role of the GFP would be to ensure that the negotiations about whether to keep or remove the RLAC would be conducted in good faith. In other words, the parties could decide for themselves whether to keep or eliminate the RLAC and for what consideration. If the RLAC is left in the contract, then the RLAC would determine the risk and loss allocation between the parties if catastrophic changed circumstances affect future performance. But if the parties decide to eliminate the RLAC from their contract, then this means that the parties have explicitly adopted the CCDs as the default rules to sort out their future risk and loss allocations. Here, courts, commentators, and the contracting public could safely assume that *this* co-drafted contract is the product of voluntary agreement between parties who knew what they were doing. Thus, if the CCDs were later invoked in litigation, a court could and should enforce the contract as written and allocate all the risk and

284. If one party is Ford Motor and the other is the small parts supplier, one can plausibly argue that the parts supplier would attest to having meaningful input into the drafting of the contract (even if it did not) to preserve its relationship or potential relationship with Ford. While this practical consideration is true, whether the small parts supplier will attest to meaningful input will really depend on the circumstances. The existence of catastrophic circumstances, like the COVID–19 pandemic, could potentially cause the small parts supplier to go out of business because it cannot satisfy its supply contract with Ford. That parts supplier might very well opt not to claim meaningful input if meaningful input did not in fact occur.

285. This criterion should be obvious given that a standard form is one of the hallmarks of an adhesion contract.

loss onto the party that decided it did not need the protection of the RLAC. In short, allocating risk and loss in this fashion (i.e., pursuant to existing CCD case law) and under these circumstances (i.e., where the parties to a co-drafted contract eliminated the RLAC from their contract) would be the correct result.

Adhesion contracts are a different story. All adhesion contracts are problematic because they call into question the voluntariness of each of the transactions in which they are used.[286] For this reason, it is very tempting to argue that *all* adhesion contracts should include the RLAC and GFP proposed here. But such a blanket approach is too broad. Instead, the type of adhesion contracts that would include the proposed contract provisions are *mass contracts.*

Mass contracts are adhesive contracts that when aggregated can potentially affect a significant part of an industry or sector of the economy.[287] Consequently, the RLAC and GFP would be included in contracts (1) drafted by (or primarily by) one party, where (2) the drafting party is a repeat player, specifically, a party that enters into at least 15 similar transactions a year, and (3) the contract is presented to the non-drafting party on a take it or leave it basis (usually but not necessarily on a standard form). Mass contracts therefore combine the traditional indicia of an adhesion contract (one drafter + take it or leave it basis) *and* an emphasis on a particular class of contract drafters (larger, repeat players).

So contracts with Ford Motor Company, for example, where Ford is the paying party (i.e., supply contracts with parts suppliers) and the performing party (i.e., manufacturing cars for sale to dealerships) could qualify as mass contracts. The same would be true for contracts with banks and financial institutions, large employers, and literally any individual or business, provided that all three mass contract criteria are satisfied.

This is how the proposed contract provisions would work in a mass contract scenario. The RLAC in a mass contract would be mandatory and non-variable, and it would explicitly and intentionally shift *all* the risks and *all* the losses occasioned by the catastrophic changed circumstance to the drafting party. Consider the following example: A homeowner has a mortgage with Wells Fargo. The housing market crashes sending the economy into a tailspin, causing the homeowner to lose her job. Consequently, the homeowner can no longer make her mortgage payments, and she defaults on her mortgage. The non-variable RLAC in the mortgage contract should excuse the homeowner's duty to pay the mortgage balance and instead shift the risk that the housing

286. Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 346-48 (2011).

287. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 628, 631-32 (1943) (defining "mass standardized contracts" as "used in every bargain dealing with the same product or service").

market crashed and the loss in the form of the unpaid mortgage balance onto Wells Fargo.

The problem, of course, is that the homeowner could still lose her home because she can't keep the house without paying for it. This is where the GFP would kick in to require the parties to negotiate in good faith to modify their contract. The incentives for each party to agree on a modification would be that the homeowner would get to keep her house and Wells Fargo would not have to absorb *all* the unpaid mortgage balance *and* decreased market value of the house; instead, these losses would be shared. It is important to note here that absent the RLAC, there would be no incentive for Wells Fargo to modify the mortgage let alone negotiate in good faith for one; this is because under existing contract law (i.e., no RLAC), all the risk and loss engendered by the housing market crash would be shifted to the homeowner.[288] Granted, if the parties cannot reach an agreement to modify the mortgage contract, the homeowner would still lose her house. *But* she would not be liable for the unpaid mortgage balance as she would be under current contract law. Instead, the loss would be imposed on Wells Fargo.[289]

Since the RLAC would be non-variable, the mortgage contract itself should resolve the dispute between the homeowner and Wells Fargo without the need for litigation. But if for some reason Wells Fargo decided to sue the homeowner for defaulting on the mortgage, then the RLAC in the parties' contract would predetermine the outcome of the case. The court (or more likely the arbitrator) deciding the case would be required to give effect to the RLAC, which would mean excusing the non-drafting party's performance per the CCD and imposing the risk and loss on Wells Fargo, the drafter of the mass contract. The CCDs would thus operate in this proposed mass contracting scenario exactly as they would under existing contract law, namely, as doctrines that help the court determine and give effect to the intentions of the parties as expressed in their contract. The main difference, of course, is that under the proposed approach, all the risk and loss would be imposed on the drafting party.

To be clear: Just as the shifting of risk and loss to non-drafting parties under existing contract law is deliberate, this shifting of the risk and loss to the drafters of mass contracts is also an intentional policy choice. There are two main reasons for this shift. First, the drafters of

288. *See supra* discussion accompanying notes 129, 131, 166–80 (discussing the difficulty paying parties have in excusing their performance under the CCDs). So under existing contract law, the homeowner not only would lose her house to the bank but also would be pursued by the bank for her unpaid mortgage debt until it was paid off.

289. Because the bank would get the house, the bank's losses could be mitigated by the value of the house the market dictates. If the market rebounds, the bank's loss from the unpaid mortgage balance would obviously be reduced. If the market does not rebound and the value of the house remains low, the bank's losses would be compounded.

mass contracts are the contracting parties that are likely better able to absorb the risk and loss internally (because of their size) or through insurance and/or to spread the risk by pooling it and pricing it uniformly into all similar contracts across their business(es).[290] Second, and assuming catastrophic changed circumstances have occurred, the aggregated effects from these mass contracts will adversely affect the economy (i.e., they will produce profound social consequences).[291] Because the economy will be adversely affected by these aggregated mass contracts, there is a much greater likelihood that the State would step in to shore up the economy via Federal Reserve policy,[292] a bailout for the affected industry,[293] a government insurance program,[294] or some other measure(s). Some of, if not all, these measures will usually redound to the benefit of the drafters of mass contracts.

290. Just as existing contract law assumes that all contracting parties could, if they really wanted to, insist on the inclusion of clauses in the contract to protect themselves from future performance contingencies, see *supra* discussion accompanying notes 201–09, the contracting model suggested here assumes that the drafters of adhesion contracts can—and do—take care of themselves in the market.

291. *See supra* discussion accompanying notes 17–23 (discussing the COVID–19 pandemic's effects on the U.S. economy).

292. The Federal Reserve acted quickly and took several quick actions to shore up the U.S. economy during the COVID–19 pandemic including, but not limited to: making $2.3 trillion in lending to support different sectors of the economy (state and local governments, households, businesses); slashing interest rates to almost zero; and making a slew of asset purchases. Jeffrey Cheng et al., *What's the Fed Doing in Response to the COVID–19 Crisis? What More Could It Do?*, BROOKINGS (Mar. 30, 2021), https://www.brookings.edu/research/fed-response-to-covid19/ [https://perma.cc/BTB4-GMXP].

293. The federal government bailed out banks and the automotive industry during the Great Recession by spending $426 billion "to stabilize the financial system and prevent even more job losses" and $80 billion to bail out Chrysler and General Motors. Mitchell Hartman, *What Did America Buy with the Auto Bailout, and Was It Worth It?*, MARKETPLACE (Nov. 13, 2018), https://www.marketplace.org/2018/11/13/what-did-america-buy-auto-bailout-and-was-it-worth-it/ [https://perma.cc/GCJ6-VCJA]. The federal government spent $426 billion "to stabilize the financial system and prevent even more job losses" with $80 million to bail out Chrysler and General Motors. *Id.*

294. Because most homeowners' insurance does not cover flood damage, the Federal Emergency Management Administration ("FEMA") manages the National Flood Insurance Program ("NFIP"). *Flood Insurance/National Flood Insurance Program (NFIP)*, NAT'L ASS'N INS. COMM'RS, https://content.naic.org/cipr_topics/topic_flood_insurancenational_flood_insurance_program_nfip.htm#:~:text=background%3A%20The%20NFIP%20was%20created,Flood%20Insurance%20Act%20of%201968.&text=this%20insurance%20is%20intended%20to,their%20contents%20caused%20by%20flood (Oct. 1, 2020) [https://perma.cc/UQQ9-V84G]. Specifically, NFIP was a direct response by Congress "to the lack of availability of private insurance and continued increases in federal disaster assistance due to floods." *Id.* According to FEMA, "[t]he NFIP provides flood insurance to property owners, renters and businesses, ... The NFIP works with communities required to adopt and enforce floodplain management regulations that help mitigate flooding effects." *Flood Insurance*, FEMA, https://www.fema.gov/flood-insurance (May 26, 2021) [https://perma.cc/L5TF-M5EE].

In short, focusing on mass contracts and forcing the drafters of these contracts to absorb *all* the risks and *all* the losses associated with catastrophic changed circumstances is a specific attempt to trigger when necessary the State's systemic responses to the adverse social consequences those catastrophic circumstances create.[295] And if this result became reality, the State would effectively protect both contracting parties. That is, as a specific result of its systemic actions, the State would end up protecting the drafters of mass contracts; and as a specific result of the State action in the form of the proposed federal statute, the RLACs and GFPs would protect the non-drafting parties.

Significantly, and from the more granular perspective of contract and contract law, contracts—both mass and co-drafted—*would* remain predictable, stable, and efficient. This is because contracting parties would know in advance exactly how the risks and losses engendered by future catastrophic changed circumstances would be allocated between them under the contract and, if initiated, in litigation. This knowledge should increase trust between contracting parties in general, which would not only encourage further contracting but would also permit contracting parties to structure their present and future transactions accordingly. In terms of contract law itself, the presence of the RLAC and GFP in these contracts would paradoxically either make the CCDs unnecessary, because the contract would resolve the dispute before litigation, or more successful if litigation is filed, because the RLAC would predetermine the outcome of the cases in which a CCD is raised.

Of course, the devil is always in the details. Where would the federal statute needed to make the RLAC and GFP a reality even come from? How would it be worded? Could the RLAC in particular be drafted to eliminate foreseeability issues that come up in CCD litigation?[296] How much would and could non-drafting parties charge for the non-variable RLAC and GFP in mass contracts? Would that fee be capped and, regardless, would there be a subsidy for qualified non-drafting parties to pay that fee? Should restitution be available and, if so, when?

None of these questions are simple or easily answered, nor do they exhaust the field. Clearly *a lot* of work would need to get done to

295. Systemic responses would be triggered when necessary because unless the losses from the aggregated mass contracts end up adversely affecting the economy, the drafters of the mass contracts would have to absorb all of those losses themselves—unless, of course, the drafters can negotiate loss-sharing modifications with the non-drafting parties.

296. In *Aleut Enterprise, LLC v. Adak Seafood, LLC*, for example, there was a force majeure clause in the contract. No. 3:10–cv–0017–RRB, 2010 WL 3522348, at *2 (D. Alaska Sept. 2, 2010). According to the court, the force majeure clause made the event at issue in the case foreseeable because it specifically mentioned the event. The court held on that basis that the adversely affected party's performance was not excused. *Id.*

create the RLAC and GFP proposed in this Article. With that in mind, a healthy dose of legal realism is required here. The reality is that the RLAC, GFP, and other solutions like it won't ever be adopted unless and until the public aspects of contracts and contract law are acknowledged. That first step—shifting the frame—is the hardest one. That said, given the extent of the inequality and injustice that the COVID–19 pandemic has exposed across American society, there may be a chance to take this first step.

V. CONCLUSION

As of January 10, 2022, there were 60,240,751 confirmed COVID–19 cases and 835,302 COVID–19-related deaths in the United States.[297] Heartbreaking evictions are taking place all over the country.[298] Experts predicted for months that without more stimulus money from Congress, "millions of Americans could be evicted, in the dead of winter, in the middle of a raging pandemic."[299] An August report by the Federal Reserve Bank of New York found that "the number of active Black small-business owners fell 41% from February through April (nearly twice the rate of non-Black-owned businesses), as many struggled to access programs like the Paycheck Protection Program."[300] Yet another news story reports that more Americans fell into poverty after the federal stimulus programs ended, "particularly Black Americans, children[,] and those with a high school education or less."[301]

297. Sergio Hernandez et al., *Tracking COVID-19 Cases in the US*, CNN, https://www.cnn.com/interactive/2020/health/coronavirus-us-maps-and-cases/ (Aug. 21, 2021, 5:45 PM) [https://perma.cc/W7PJ-7ERJ].

298. *See, e.g.*, Randy Mac, *Man Left Homeless in Pandemic After Eviction from Apartment He Lived in for 20 Years*, NBC, https://www.nbclosangeles.com/news/coronavirus/coronavirus-pandemic-homeless-eviction-los-angeles/2415612/ (Aug. 20, 2020, 6:38 AM) [https://perma.cc/73U9-32GR] (Los Angeles); Matt Levin et al., *Exclusive: More than 1,600 Californians Have Been Evicted During Pandemic*, CAL MATTERS, https://calmatters.org/housing/2020/08/californians-evicted-coronavirus-pandemic/ (Sept. 16, 2020) [https://perma.cc/JFL7-WLUH] (examining COVID–19 evictions in California); Teresa Wiltz, *As COVID-19 Tanks the Economy, Eviction Moratoriums Expire*, PEW CHARITABLE TRS. (Aug. 6, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/08/06/as-covid-19-tanks-the-economy-eviction-moratoriums-expire [https://perma.cc/P5KV-3ECQ] (discussing the response to eviction moratoriums expiring throughout the United States).

299. Chris Arnold, *COVID-19 Relief Bill Could Stave Off Historic Wave of Evictions*, NPR (Dec. 24, 2020, 6:15 AM), https://www.npr.org/2020/12/24/949668850/covid-19-relief-bill-could-stave-off-historic-wave-of-evictions [https://perma.cc/7X38-8KRK].

300. Anne Sraders & Lance Lambert, *Nearly 100,000 Establishments that Temporarily Shut Down Due to the Pandemic Are Now Out of Business*, FORTUNE (Sept. 28, 2020, 9:25 AM), https://fortune.com/2020/09/28/covid-buisnesses-shut-down-closed/ [https://perma.cc/F9U3-4UCT].

301. Tami Luhby, *More Americans Fall into Poverty After Federal Stimulus Programs End*, CNN, https://www.cnn.com/2020/10/15/politics/poverty-congress-

Clearly, we are no longer talking about what's "coming down the pike" because all the misery created by the COVID–19 pandemic is already here. And contracts are in the thick of it. Unfortunately, contracts and contract law will never alone solve any of the systemic issues plaguing our country. *Systemic relief must come from the State.* That said, we ignore contracts and contract law at our peril because they both play an integral role in the creation and perpetuation of inequality in American society. The economic devastation caused by the COVID–19 pandemic exposes this. Thus, the real question, the only question that probably matters *at this moment*, is whether this exposure will finally force us to acknowledge the *public* aspects of contracts and contract law. If so, then contracts and contract law can serve as an important part of the solution to some of the most pressing problems confronting us today. If not, then so many of these COVID–19 spawned losses will simply be left to lie where they fall.

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coronavirus-stimulus/index.html (Oct. 15, 2020, 4:41 PM) [https://perma.cc/5JSU-2M8T].