

# THE TIMES THEY ARE A CHANGIN'

Litigation Issues Arising out of Climate  
Change and Green Energy Transition



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# PRESENTATION OVERVIEW

1. “Transformational” litigation against and by governments
2. Federal regulation. *But see West Virginia v. EPA*
3. Litigation over land use and permitting
4. Litigation over “climate effects”
5. Risk mitigation tools — insurance and contractual provisions

# PROLIFERATION OF LITIGATION

“The legal profession’s concern over climate change isn’t new (the first climate lawsuit was filed in 1986), but what is new is the unprecedented scale and diversity of claims related to climate change across the United States and internationally.”

- [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2021-2022/january-february-2022/climate-litigation-rising/](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2021-2022/january-february-2022/climate-litigation-rising/)

## “TRANSFORMATIONAL” LITIGATION

▶ Plaintiffs assert claims for failure to protect natural resources and violation of human rights/civil rights/constitutional rights.

They seek to bring about broad social change and government action

- *Milieudefensie v. Royal Dutch Shell plc* (May 26, 2021), [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526\\_8918\\_judgment-1.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-1.pdf)
- *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (on interlocutory appeal after certification, reversing denial of motion to dismiss 2015 lawsuit by 21 Oregon “youth”)

## “TRANSFORMATIONAL” LITIGATION

### *Milieudefensie v. Royal Dutch Shell plc*



- Judgment of The Hague (Netherlands) District Court: the Shell group shall limit “the aggregate annual volume of all CO2 emissions into the atmosphere . . . due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels.”
- The ruling is based on an “unwritten standard of care” under Dutch law and international human rights principles. Shell has appealed to a higher court.





President Trump & Fossil Fuel Industry...

#YouthvGov

See you in court.



# “TRANSFORMATIONAL” LITIGATION

## *Juliana v. United States* (District of Oregon)

- Plaintiffs ask this Court to order “Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO2 emissions, as well as take such other action necessary to ensure that atmospheric CO2 is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth’s energy balance, and implement that national plan so as to stabilize the climate system.”
- The district court found in the Fifth Amendment’s protection against the deprivation of “life, liberty, or property, without due process of law” a previously unrecognized **fundamental right to a “climate system capable of sustaining human life,”** and the court determined that Plaintiffs had adequately alleged infringement of that right.
- After four mandamus petitions and two applications to the U.S. Supreme Court, the district court certified the issue for interlocutory appeal. The Ninth Circuit reversed, ruling that the Plaintiffs’ claims were not “redressable.”



# STATE AND LOCAL GOVERNMENT LAWSUITS

## CONSUMER PROTECTION

- State Attorneys General versus Oil & Gas Majors and Trade Groups
- Consumer fraud statutes (e.g., Texas, Deceptive Trade Practices Act), false advertising, common-law fraud and misrepresentation.
- E.g., *Minnesota v. American Petroleum Institute*, 2021 WL 1215656, at \*1 (D. Minn. Mar. 31, 2021): “The State alleges that Defendants developed a widespread campaign to deceive the public about the dangers of fossil fuels and to undermine the scientific consensus linking fossil fuel emissions to climate change.”

# RELATED: CORPORATE ESG DISCLOSURES

## CLAIMS OF CORPORATE MISREPRESENTATIONS

- Lawsuits over disclosure of risks posed by climate change and companies' efforts to address climate change ("Green Washing")

## SEC PROPOSED DISCLOSURE RULE

- "climate-related risks that are reasonably likely to have a material impact on [a company's] business, results of operations, or financial condition";
- "climate-related financial statement metrics in a note to their audited financial statements"; and
- supply chain member compliance?
- <https://www.sec.gov/news/press-release/2022-82>

# STATE AND LOCAL GOVERNMENT LAWSUITS

## ▶ THE DEFENDANTS FIGHT BACK

- ExxonMobil sought pre-suit discovery against municipal and NGO plaintiffs over alleged coordinated lawsuits to engage in intentional tortious conduct and abuse of process to chill or affect speech in violation of the U.S. and Texas Constitutions.
- The district court denied the defendants' special appearance, but the court of appeals reversed, finding a lack of minimum contacts to support personal jurisdiction.
- *City of San Francisco v. Exxon Mobil Corp.*, 2020 WL 3969558 (Tex. App.—Ft. Worth, June 18, 2020), pet. denied (Feb. 18, 2022).

# GOVERNMENT: TORT-BASED CLAIMS

- “Big Tobacco” claims against industry participants for fraud, negligence, products liability, nuisance and trespass.
- State Attorneys Generals and municipalities
- Allegations that oil & gas majors’ production and promotion of fossil fuels caused or contributed to global warming.
- Recovery of costs of providing existing and new services and development of new infrastructure.







## GOVERNMENTS: TORT-BASED CLAIMS

### *County of San Mateo v. Chevron Corp.* *People (San Francisco and Oakland) v. BP PLC*

- Claims against industry participants for **nuisance, negligence, products liability, and trespass**.
- Alleging that major oil and gas companies' production and promotion of fossil fuels caused or contributed to global warming inducing a rise in sea level.
- Seek “**billions of dollars** to build sea walls and other infrastructure to protect human safety and public and private property” (*People v. BP*).
- **Remanded** to state court: *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022); *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), cert. denied, 141 S. Ct. 2776 (2021).

# GOVERNMENTS: TORT-BASED CLAIMS

## State-law cases with solid federal defense of preemption Where to litigate — state (plaintiffs) or federal court (defendants)?

- As illustrated by *County of San Mateo* and *City of Oakland*, federal courts of appeals have unanimously answered, “**state** court.”
- Just yesterday, the Third Circuit joined the Tenth, Fourth, Ninth and First Circuit in giving this same answer in cases brought by the State of Delaware and the City of Hoboken, New Jersey: *City of Hoboken v. Chevron Corp.*, No. 21-2728 (3d Cir. Aug. 17, 2022).
- Opinion by Circuit Judge Stephanos Bibas, a Trump appointee supported by the Federalist Society.

# FEDERAL REGULATION

## EXECUTIVE ACTION

“It is the policy of my Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach” to climate pollution (Jan. 27, 2021).

Executive Order [14008] on Tackling the Climate Crisis at Home and Abroad,  
<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>

“Federal agencies must evaluate all relevant environmental impacts — including those associated with climate change — during environmental reviews.”

<https://www.whitehouse.gov/ceq/news-updates/2022/04/19/ceq-restores-three-key-community-safeguards-during-federal-environmental-reviews>



# FEDERAL REGULATION — NOT SO MUCH

## *West Virginia v. EPA*, 142 S. Ct. 2587 (2022)

- The Supreme Court upheld EPA’s authority to set limits on the amount of pollution reduction that power plants need to achieve under Clean Air Act.
- The Court overturned EPA’s rulemaking authority “to compel the transfer of power generating capacity from existing [coal] sources to wind and solar” under the Clean Power Plan (CPP). *Id.* at 2604.
- Major Questions Doctrine: “Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.” *Id.* at 2609.



# LAND USE AND PERMITTING

## NGO CLAIMS OF INSUFFICIENT ENVIRONMENTAL REVIEW — FAILURE TO QUANTIFY “DOWNSTREAM EMISSIONS”

- *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020) (challenge to environmental review of permit for offshore drilling and production facility in Prudhoe Bay, Alaska)
- *Friends of the Earth v. Haaland*, 2022 WL 254526 (D.D.C. Jan. 27, 2022) (same for lease sale of 80 million acres in the Gulf of Mexico)
- *Environmental Defense Center vs. BOEM*, 36 F.4th 850 (9th Cir. 2022) (same for fracking permit off California coast).
- *San Antonio Bay Estuarine Waterkeeper v. Connor*, No. 1:22-CV-01470 (D.D.C. May 25, 2022) (same for U.S. Army Corps permit to dredge the Matagorda Bay shipping channel).

Table 2.1 Mapping Minerals with Relevant Low-Carbon Technologies

	Wind	Solar photovoltaic	Concentrated solar power	Hydro	Geothermal	Energy storage	Nuclear	Coal	Gas	Carbon capture and storage
Aluminum	■	■				■	■	■	■	
Chromium	■			■	■	■	■	■	■	■
Cobalt						■		■	■	■
Copper	■	■	■	■	■	■	■	■	■	■
Graphite						■				
Indium		■					■			
Iron	■					■				
Lead	■	■		■		■	■			
Lithium						■				
Manganese	■			■	■	■		■	■	■
Molybdenum	■	■		■	■		■	■	■	■
Neodymium	■									
Nickel	■	■		■	■	■	■	■	■	■
Silver		■	■				■			
Titanium				■	■		■	■	■	
Vanadium						■	■	■		
Zinc	■	■		■		■	■			
<b>Total</b>	<b>10</b>	<b>8</b>	<b>2</b>	<b>8</b>	<b>6</b>	<b>11</b>	<b>11</b>	<b>9</b>	<b>8</b>	<b>6</b>

## LAND USE AND PERMITTING — IRONIES

### Claims of insufficient environmental review will be used against technologies designed to decarbonize the economy.

- The low-carbon economy requires metals: electric cars require lithium-ion batteries containing lithium, copper, and other minerals; solar panels require copper and massive amounts of aluminum; wind turbines likewise require copper and aluminum, plus nickel. Copper, lithium, and other metals must be dug from the ground — **mined**.
- Mining is especially susceptible to environmental challenge: for example, a district court vacated the approval of an Arizona copper mine slated to produce five billion pounds of copper under NEPA, the ESA, and the Mining Law of 1872, without even needing to reach the Clean Water Act; the Ninth Circuit affirmed in *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 33 F.4th 1202 (9th Cir. 2022).
- NEPA was enacted in 1970, but it was last amended in relevant part in 1975. The ESA was enacted in 1973, but its major provisions have not been amended since 1988. The Clean Water Act was enacted in 1972, but its key jurisdictional definition of “navigable waters” has never been amended.

## CLIMATE EFFECTS LITIGATION

**“Advances in the science of extreme weather event attribution have the potential to change the legal landscape in novel ways. Identifying the human influence in events once known as ‘acts of God’ is likely to inform litigation relating to claims and liability for damages. Attribution science is also leading to better predictions of the expected severity of certain types of weather-related natural disasters.”**

Marjanac, S., Patton, L. & Thornton, J., *Acts of God, human influence and litigation*.  
Nature Geosci 10, 616–619 (2017)

# TEXAS CLIMATE EFFECTS LITIGATION

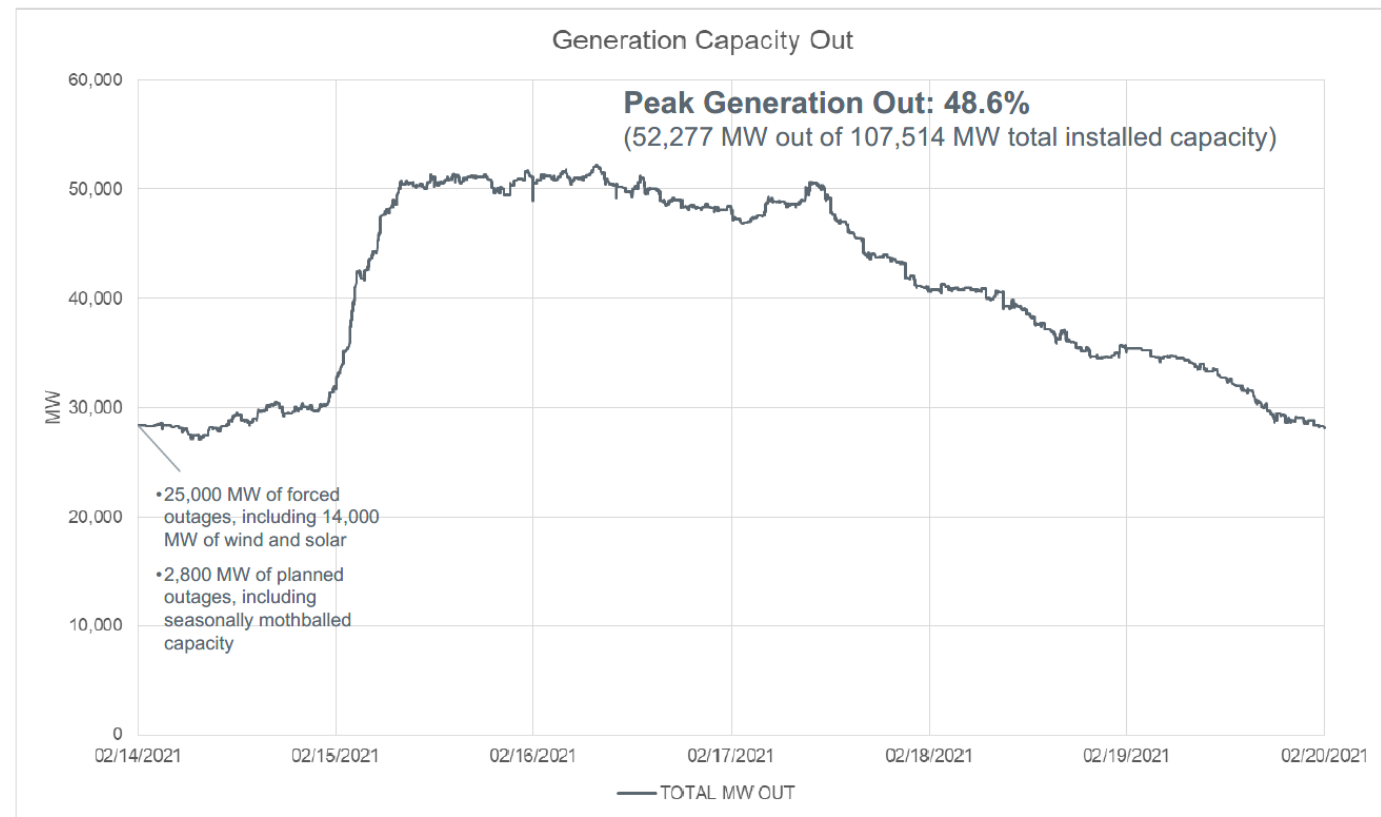


<https://www.houstonchronicle.com/business/energy/article/Did-PUC-go-too-far-in-raising-power-prices-to-the-17130255.php>



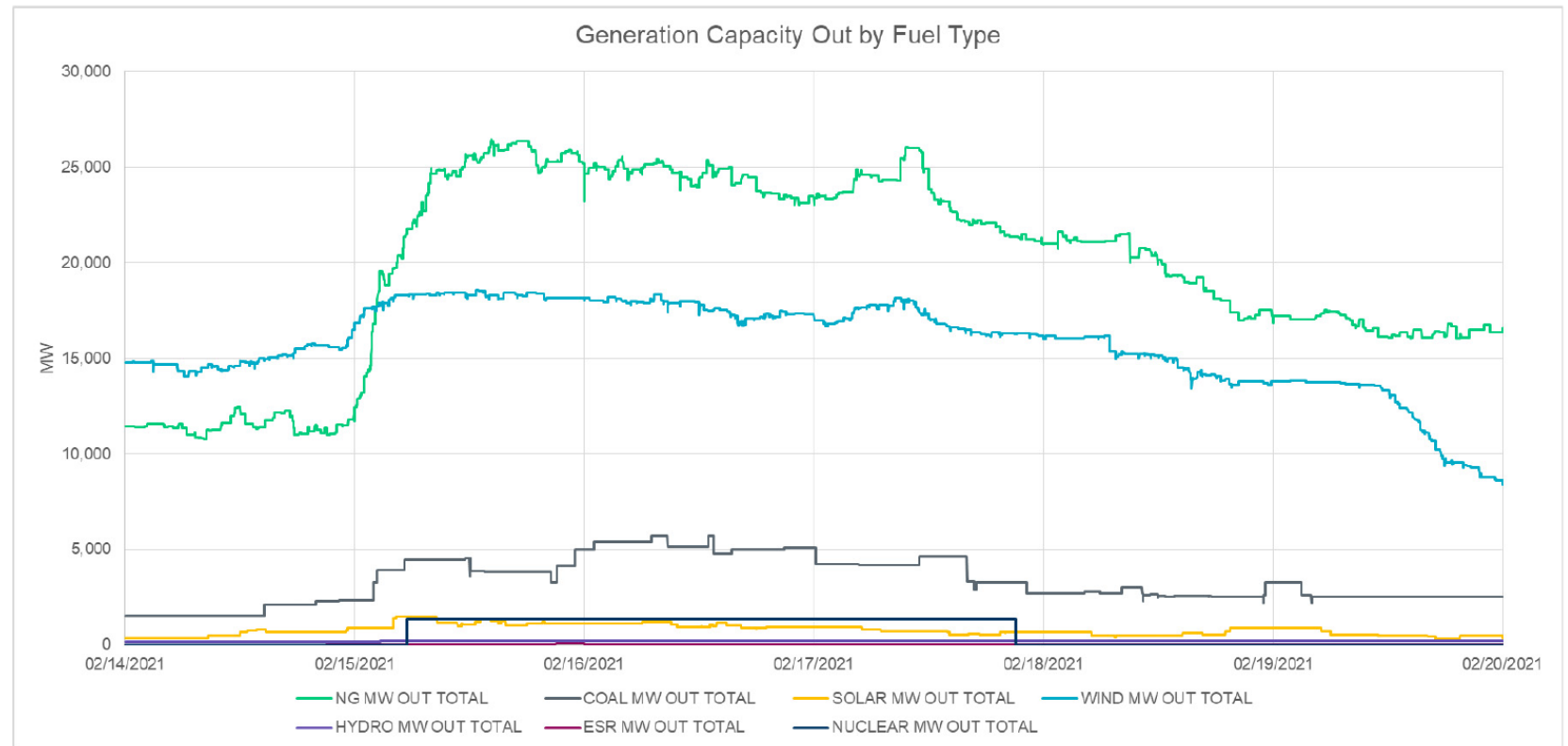
# TEXAS CLIMATE EFFECTS LITIGATION

## Generation Capacity Out February 14 – 19, 2021



# TEXAS CLIMATE EFFECTS LITIGATION

## Generation Capacity Out by Fuel Type



# TEXAS CLIMATE EFFECTS LITIGATION

## IN RE WINTER STORM URI, MDL CASE NO. 5.00140

- Plaintiffs: 450+ Insurance companies and 650+ consumers
- Defendants: ERCOT, Power Generators, TDUs, TREs, Natural Gas
- Claims: failure to weatherize equipment/operations, participation in load shedding programs, failure to secure alternative sources of electrical power/fuel under
- Causes of action: Negligence, nuisance, tortious interference, conspiracy, unjust enrichment
- Threshold Issues: duty, causation, jurisdiction

# TEXAS CLIMATE EFFECTS LITIGATION

## ▶ WINTER STORM URI OTHER LITIGATION

- Other Litigation
  - Natural Gas and Electricity Cost
    - Among Market Participants/ERCOT
    - Among Gas-Electricity Suppliers/Consumers

# TEXAS CLIMATE EFFECTS LITIGATION

## WINTER STORM URI LITIGATION IMPLICATIONS

- Resiliency/Sustainability of Energy Sources
- Liability of Public/Private Infrastructure Operators & Managers

### Tariffs and Jurisdictional Issues

- Duties to the Downstream Consumers for Contractually Supplied Goods
- Standards of Care for CO2 Generating Operations
- Supply Chain & Impracticability of Performance



# RISK MITIGATION

**INSURANCE COVERAGE**

**CONTRACT PROVISIONS**

# INSURANCE COVERAGE DISPUTES

- **LAWSUITS BY GOVERNMENTAL AND NON-GOVERNMENTAL ENTITIES CLAIMING THE DEFENDANT CONTRIBUTED TO CLIMATE CHANGE AND ITS EFFECTS**
- **MINEFIELD OF COVERAGE ISSUES UNDER CGL POLICIES**

# INSURANCE COVERAGE DISPUTES

- **KEY COVERAGE ISSUE UNDER CGL POLICY:**

**Is it a claim for damages because of personal injury or property damage?**

*E.g., Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 865 N.E.2d 571 (Ind. 2007) (claim seeking to compel defendant to install equipment to reduce emissions was not a claim for damages because of personal injury or property damage)

# INSURANCE COVERAGE DISPUTES

- **KEY COVERAGE ISSUE:**

**Was the damage caused by an “occurrence”?**

*E.g., AES Corp. v. Steadfast Ins. Co., 725 S.E.2d 532 (Va. 2012)*  
(claim alleging the defendant knew it was contributing to climate change did not allege an “occurrence” and, therefore, insurer had no duty to defend)

# INSURANCE COVERAGE DISPUTES

- **KEY COVERAGE ISSUE:**

**Is the claim excluded by a pollution exclusion?**

- Issue whether naturally occurring substances like CO<sub>2</sub> constitute a “pollutant.”
- many policies now explicitly include anything that could contribute to global warming as a “pollutant.”



# DEFENSES TO BREACH OF CONTRACT

**FORCE MAJEURE**

**COMMON-LAW DEFENSES**

# FORCE MAJEURE PROVISIONS

- Most commercial contracts have a “force majeure” provision.
- Force majeure is a contract provision, not a legal doctrine.
- Force majeure provisions typically excuse non-performance/hinderance or extend the time to perform when performance was prevented by a defined force majeure event.
- Force majeure provisions usually do not excuse the failure to pay money (e.g., rent, note payments etc.).
- Natural disasters (flood, fire, hurricane, drought) usually qualify as force majeure events. May include supply chain interruptions.
- Foreseeable events – especially market and price fluctuations – are not force majeure events unless clearly specified. Change in regulations?

# COMMON LAW DEFENSES

**IMPRACTICABILITY**

**FRUSTRATION OF PURPOSE**

# IMPRACTICABILITY

- Most states (including Texas) recognize and accept the common-law impracticability doctrine as a defense to breach of contract.
- Includes impossibility and illegality of performance.
- Based on the Restatement (Second) of Contracts or equivalent common law.

# IMPRACTICABILITY

## Restatement (Second) of Contracts § 261:

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



# IMPRACTICABILITY

## Restatement (Second) of Contracts § 261:

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- Impracticable when it cannot be performed without extreme and unreasonable difficulty, expense, injury, or loss to a party.
- Not applicable if the contract otherwise assigns the risk (e.g., a force majeure provision applies)

## FRUSTRATION OF PURPOSE

- Most states recognize and accept the common-law frustration of purpose doctrine as a defense to breach of contract.
- No clear recognition as a distinct common-law defense in Texas.
- Based on the Restatement (Second) of Contracts or equivalent common law.

# FRUSTRATION OF PURPOSE

## Restatement (Second) of Contracts § 265:

“Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”

# FRUSTRATION OF PURPOSE

## Restatement (Second) of Contracts § 265:

“Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”

- The frustrated purpose must be central to the contract.
- Substantial frustration requires more than impracticality or financial difficulty.
- Not applicable if the contract otherwise assigns the risk.

# FRUSTRATION OF PURPOSE

## CLASSIC EXAMPLES

- Krell v. Henry [1903], 2 K.B. 740 (the “coronation case”)
- Indus. Dev. & Land Co. v. Goldschmidt, 206 P. 134 (Cal. Ct. App. 1922)
- Lloyd v. Murphy, 153 P.2d 47 (Cal. 1944)



# FRUSTRATION OF PURPOSE

## FRUSTRATION OF PURPOSE WAS SUCCESSFULLY ASSERTED IN A FEW CASES BASED ON COVID SHUT-DOWN ORDERS

### Examples:

- Bay City Realty, LLC v. Mattress Firm, Inc., 2021 WL 1295261 (E.D. Mich. Apr. 7, 2021)
- UMNV 205-207 Newbury, LLC v. Caffe Nero Americas Inc., 2021 WL 956069 (Mass. Super. Ct. Feb. 8, 2021)

# FRUSTRATION OF PURPOSE

## **MOST COURTS FOUND COMMON-LAW FRUSTRATION OF PURPOSE PREEMPTED BY A FORCE MAJEURE CLAUSE**

### Examples:

- In re CEC Ent., Inc., 2020 WL 7356380 (Bankr. S.D. Tex. Dec. 14, 2020)
- The Gap Inc. v. Ponte Gadea New York LLC, 2021 WL 861121 (S.D.N.Y. Mar. 8, 2021)

# TEMPORARY FRUSTRATION

## Restatement (Second) of Contracts § 269:

“Impracticability of performance or frustration of purpose that is only temporary suspends the obligor’s duty to perform while the impracticability or frustration exist but does not discharge his duty or prevent it from arising unless his performance after the cessation of impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.”

## TEMPORARY FRUSTRATION

- **VERY LITTLE CASE LAW ADDRESSING**
- **SUCCESSFULLY ASSERTED IN ONLY A HANDFUL OF CASES**
- **UNCLEAR IN TEXAS**

# DEFENSES TO BREACH OF CONTRACT

**TAKE-AWAY: COURTS WILL ALWAYS TRY TO FIND THE ANSWER IN THE TERMS OF THE CONTRACT INSTEAD OF IN COMMON-LAW DOCTRINES**

**IF YOU WANT PROTECTIONS, PUT THEM IN THE CONTRACT**





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