ST. THOMAS JOURNAL OF COMPLEX LITIGATION

Volume 8 Fall 2021

EXCUSE UNDER THE UCC IN LIGHT OF THE COVID-19 PANDEMIC IN FLORIDA

Byron Acosta

EXCUSE UNDER THE UCC IN LIGHT OF THE COVID-19 PANDEMIC IN FLORIDA

Byron Acosta*

Under the Uniform Commercial Code ("UCC") § 2-301, the seller's obligation is to transfer and deliver, while the buyer's is to accept and pay in accordance with the contract.[1] Delay in delivery or non-delivery in whole or in part by a seller constitutes a breach of the contract.[2] However, UCC § 2-615 allows parties to a sale of goods contract to claim excuse from performance in certain circumstances.[3] This section of the code is a fallback provision for parties that have not included a *force majeure* (emphasis added) clause in their agreement.[4] The UCC takes a liberal approach in allowing contracts to be formed through various ways, such as by agreement,[5] offer and acceptance,[6] offer and varying acceptance,[7] or conduct.[8] Therefore, the parties to a contract may, in certain instances, not have a *force majeure* clause covering "acts of God" such as the COVID-19 pandemic. If the parties do not have a *force majeure* clause in cases of a breach, the breaching party is liable if it cannot successfully assert UCC § 2-615 as an affirmative defense due to the pandemic.[9] Consequently, whether the COVID-19 pandemic constitutes a foreseeable event for purposes of UCC § 2-615 is a legal controversy in commercial litigation.

This note will discuss the following: (1) background and history of pandemics; (2) frequency of pandemics and other viruses; (3) vulnerability of global supply chains due to off-shoring of manufacturing plants; (4) a legal discussion of excuse from performance under the UCC for contracts not covered by a *force majeure* clause; (5) suggested solutions for legal practitioners dealing with breach of contracts as a result of the COVID-19 pandemic; and (6) will conclude by suggesting that the frequency of epidemics and pandemics over the last century has resulted in disease outbreak no longer being considered an "unforeseen circumstance" that can be used as an

* Byron Acosta, MBA, Juris Doctor Candidate May 2022, St. Thomas University College of Law, ST. THOMAS JOURNAL OF COMPLEX LITIGATION, Member. I would like to express my gratitude to the editorial staff of St. Thomas Journal of Complex Litigation for their assistance and unwavering support throughout the process of writing and publishing this note. I would also like to dedicate this publication to my wife and two children for their patience and understanding when 'daddy' could not be there due to spending time on this paper. Perhaps one day my children will come across this article, twenty years from now, and use it as a source of inspiration and discover the truth that nothing truly is impossible if you work hard and put your mind to it. Finally, I would like to dedicate this paper to the One who gave me breath and the privilege of earning a law degree for His plan and purposes.

[1] U.C.C. § 2-301 (AM. LAW INST. & UNIF. LAW COMM'N 1951).

[2] U.C.C. § 2-601 (providing generally if tender of delivery fails to conform in any way to the contract, it is a breach. The "perfect tender rule" contrasts with the common law of contracts, which typically gives buyers the right to reject the seller's performance only if the breach is a "material breach." Note that under U.C.C § 2-601, breach can also occur by not delivering on time as specified by the contract and by shipping non-conforming goods.).

[3] U.C.C. § 2-615(a) (providing the conditions under which a party may claim excuse from performance required under a sale of goods contract).

[4] Legal Information Institute, *Force Majeure*, WEX, https://www.law.cornell.edu/wex/force_majeure (A "force majeure" is "[a] provision commonly found in contracts that frees both parties from obligation if an extraordinary event prevent one or both parties from performing. These events must be unforeseeable and unavoidable, and not the result of the defendant's actions, hence they are considered 'an act of god.'").

[5] U.C.C. § 2-204 (establishing that a contract can be formed by agreement; by offer and acceptance per § 2-206; by offer and varying acceptance under § 2-207; or by conduct under § 2-207(3)).

[6] U.C.C. § 2-206.

[7] U.C.C. § 2-207.

[8] U.C.C. § 2-207(3).

[9] Carol L. Chomsky, et al., *Learning Sales Law* 495 (2016).

affirmative defense under the UCC. Considering these facts, courts in Florida should not allow parties without a carefully worded *force majeure* clause to use UCC § 2-615 to claim excuse from performance during a pandemic.

I. Background And History of Health Outbreaks

The Centers for Disease Control and Prevention ("CDC") defines an influenza pandemic as "a global outbreak of a new influenza [ ] virus that is very different from current and recently circulating human seasonal influenza [ ] viruses."[10] During the 20th century, the world experienced its first influenza pandemic in 1918.[11] The 1918 pandemic (H1NI virus) was first detected in the United States in members of the military.[12] Experts estimate that at least 50 million died worldwide, with around 675,000 of those deaths occurring in the United States.[13]

A new pandemic (H2N2 virus) emerged in February 1957.[14] It began in East Asia and was colloquially known as the "Asian Flu."[15] Experts put its origin in Singapore and estimate that 1.1 million people died worldwide and 116,000 in the United States.[16]

Another pandemic arose in 1968; this pandemic was known as the H3N2 virus.[17] The H3N2 pandemic originated in the United States in September 1968; the number of deaths from the 1968 pandemic is estimated at 1 million worldwide and about 100,000 in the United States.[18]

Decades later, another pandemic (H1N1) arose on the global scene. First detected in the United States in the spring of 2009, it spread quickly across the globe.[19] This resulted in 12,469 deaths in the United States and between 151,700 and 575,400 fatalities worldwide.[20]

The point of highlighting the pandemics of the twentieth century is to establish a trend of business disruptions that took place. This note will focus on the impacts of the 1918 pandemic because its death toll and business disruptions were even more devastating than the COVID-19 pandemic.

The Federal Reserve Bank of St. Louis ("St. Louis Fed") produced a paper in 2007 showing the economic effects of the 1918 Influenza Pandemic in the regional area it oversees (Arkansas, Illinois, Indiana, Kentucky, Mississippi, Missouri, and Tennessee).[21] In the opening paragraphs of that paper, the St. Louis Fed noted that "the possibility of a worldwide influenza pandemic on the near future [was] of growing concern for many countries around the globe."[22] The St. Louis Fed wrote the paper in part to show what the social and economic costs of a modern-day pandemic would be; those who heeded its warning were better prepared for the COVID-19 pandemic.

---

[10] Ctrs. for Disease Control and Prevention, *Past Pandemics*, CDC, https://www.cdc.gov/flu/pandemic-resources/basics/past-pandemics.html (last visited Nov. 28, 2021).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Ctrs. for Disease Control and Prevention, *supra* note 10.
[15] *Id.*
[16] *Id.*
[17] Ctrs. for Disease Control and Prevention, *supra* note 10.
[18] *Id*.
[19] *Id.*
[20] *Id.*
[21] *See* Thomas A. Garrett, *Econ. Effects of the 1918 Influenza Pandemic: Implications for a Modern-Day Pandemic*, FED. RESERVE BANK OF ST. LOUIS (Nov. 2007), https://www.indexinvestor.com/resources/Research-Materials/Disease/Economic_Impact_of_1918_Influenza.pdf.
[22] *Id*. at 5.

The report found that the 1918 pandemic had devasting impacts on the local economy. For example, merchants in Arkansas reported that business had declined between 40% and 70%.[23] In Tennessee, industrial plants experienced labor shortages and miners reported a 50% decrease in production.[24] However, the economic effects were short-term.[25] In fact, the National Bureau of Economic Research estimates that the 1918 pandemic only resulted in a 1.5% decline in GDP and a 2.1% drop in consumption.[26] The economic contraction was greater in other countries where "real per capita GDP [was reduced] by 6% and private consumption by 8%, declines comparable to those seen in the Great Recession of 2008–2009."[27]

II. Frequency of Pandemics and Other Viruses

As noted, the first pandemic of the twentieth century occurred in 1918; thirty-nine years later, the 1957 pandemic emerged.[28] After that, it only took eleven years for the next pandemic to arrive in 1968.[29] However, the pandemic of 2009 would take another forty-one years to arrive. Thus, based on the history of pandemics prior to 2020, a pandemic occurred roughly every thirty years on average—basically once every generation.[30] Although this comment focuses on pandemics, it is important to note that smaller outbreaks, known as endemics, have disrupted global life and commerce. These include the Severe Acute Respiratory Syndrome (SARS) virus in 2003;[31] Influenza A H1N5 (bird flu) in 2007;[32] H1N1 (swine flu) in 2009;[33] Middle East Respiratory Syndrome (MERS) in 2012;[34] the West African Ebola virus between 2014 and 2016;[35] and the Zika virus between 2016 and 2017.[36] Researchers note the alarming frequency of these more minor outbreaks, taking place on average every decade.[37] Scientists attribute the increased frequency to overpopulation, poverty, global warming, and environmental degradation.[38]

A report recently released from the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services ("IPBES") establishes the link between biodiversity loss and

[23] Garrett, *supra* note 21 at 19.
[24] *Id*. at 20.
[25] *Id*. at 21.
[26] Steve Mass, *Soc. and Econ. Impacts of the 1918 Influenza Epidemic*, NAT'L BUREAU OF ECON. RSCH. (May 2020), https://www.nber.org/digest/may20/social-and-economic-impacts-1918-influenza-epidemic; *Gross domestic product (GDP)*, OECD DATA (2020) ("Gross domestic product (GDP) is the standard measure of the value added [and the income earned] through the production of goods and services in a country during a certain period.").
[27] Mass, *supra* note 26.
[28] Ctrs. for Disease Control and Prevention, *supra* note 10.
[29] *Id*.
[30] Author's calculation based on the average time in between each pandemic during the twentieth century ([39 years + 11 years + 41 years]/3 = 30.3 years).
[31] Vanessa Caceres, *What's the Difference Between an Epidemic and Pandemic?,* US NEWS & WORLD REPORT (Mar. 2020), https://health.usnews.com/conditions/articles/whats-the-difference-between-an-epidemic-and-pandemic.
[32] Allen G. P. Ross, et al., *Planning for the Next Global Pandemic*, NAT'L INST. OF HEALTH (Aug. 4, 2015), https://pubmed.ncbi.nlm.nih.gov/26253461/.
[33] *Id.*
[34] *Id*.
[35] Caceres, *supra* note 31.
[36] *Id.*
[37] Ross, et al., *supra* note 32.
[38] *Id*.

the increase in pandemic risk factors.[39] The report warns that "future pandemics will emerge more often, spread more rapidly, do more damage to the world economy and kill more people than COVID-19."[40] The scientific data presented in this note shows that pandemics have historically occurred roughly every thirty years—with smaller endemics occurring every decade. However, scientists warn that future pandemics will become more frequent and will be more damaging.[41] This warning has severe commercial and legal implications.

Business lawyers have been put on notice of the need to draft contracts more carefully to protect clients from pandemics and other outbreaks in the future. Failure to do so could leave business practitioners open to malpractice lawsuits and breach of the rules of professional conduct.[42] Moreover, given the historical and predicted future frequency of pandemics and similar outbreaks, parties to contracts governed by the UCC may not be able to rely on § 2-615 to escape liability.

III. Vulnerability of Global Supply Chains Due to Off-Shoring of Manufacturing Plants

Having established the history of pandemics and the warnings from scientists about increased frequency, this section will discuss the vulnerability of global supply chains and its implication for the ability of parties to perform under their contracts.

The COVID-19 pandemic produced a simultaneous demand and supply shock to global supply chains.[43] Trade restrictions and shortages of critical goods, such as pharmaceuticals, medical supplies, and other consumer products, highlight the vulnerability of supply chain networks.[44] The vulnerability of global supply chains has been building over the past three decades due to globalization.[45] Globalization "has been driven by the dramatic increase in the number of goods and services that are tradable."[46]

Underpinning the tradability of goods is the reduction in transportation costs and product perishability.[47] Therefore, for goods with high value relative to their size and shipping cost, it made sense for companies to manufacture them in a low-cost region and ship them.[48] As a result, many companies shifted to a global sourcing model—allowing them to take advantage of lower costs for labor, materials, land, and other factors.[49]

---

[39] *Pandemics to Increase in Frequency and Severity Unless Biodiversity Loss is Addressed*, UNESCO (Dec. 10, 2020), https://en.unesco.org/news/pandemics-increase-frequency-and-severity-unless-biodiversity-loss-addressed.
[40] *Id*.
[41] *Id.*
[42] MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 1983) (providing that "In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation.").
[43] *See* Maria del Rio-Chanona, et al., *Supply and Demand Shocks in the Covid-19 Pandemic: An Industry and Occupation Perspective*, OXFORD REVIEW OF ECON. POL'Y (Aug. 29, 2020).
[44] Willy Shih, *Glob. Supply Chains in a Post-Pandemic World*, HARVARD BUS. REV. (Sept.–Oct. 2020), https://hbr.org/2020/09/global-supply-chains-in-a-post-pandemic-world.
[45] Willy Shih, *Is It Time to Rethink Globalized Supply Chains?,* MIT SLOAN MGMT. REV. (Mar. 19, 2020), https://sloanreview.mit.edu/article/is-it-time-to-rethink-globalized-supply-chains/.
[46] *Id.*
[47] *Id.*
[48] Shih, *supra* note 45.
[49] *Id.*

Another factor contributing to the vulnerability of global supply chain networks is the reliance on subcontracting.

> [The] increased sophistication of components, manufacturing processes that require specialists, and the desire on the part of producers to have more flexible capacity . . . [resulted] in deeper tiering of supply chains whereby suppliers draw upon their suppliers who in turn draw on their own networks of suppliers.[50]

This vulnerability highlighted by the COVID-19 pandemic prompted President Biden to issue an executive order on February 24, 2021, "directing a whole-of-government approach to assessing vulnerabilities in, and strengthening the resilience of, critical supply chains."[51]

Companies and attorneys should follow the White House's lead and conduct an assessment of their vulnerabilities to minimize disruptions to their operations and their abilities to meet their contractual obligations.[52] Doing so may help reduce the risk of litigation for breach of contract.

IV. Legal Discussion of Excuse From Performance Under The UCC

The contemporaneous demand and supply shock of the global supply chain networks is one contingency contemplated by § 2-615 of the UCC.[53] This section will provide a legal discussion of the doctrine of commercial impracticability, which may shield breaching parties under some circumstances. However, as will be argued later, business lawyers should not overtly rely on § 2-615 as a source of protection to their clients from liability because courts are likely to find that, given the history and frequency of pandemics, parties cannot claim they are "unforeseeable."[54]

Section 2-615 of the UCC provides that:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
> (a) *Delay in delivery* or *non-delivery* in whole or in part by a seller who complies with paragraphs (b) and (c) is *not a breach* of his duty under a contract for sale *if performance* as agreed has been *made impracticable* by the occurrence of a *contingency* the non-occurrence of which was a basic assumption on which the contract was made *or by compliance* in good faith *with* any applicable *foreign or domestic governmental* regulation or order whether or not it later proves to be invalid.

[50] Shih, *supra* note 45.
[51] *Fact Sheet: Biden-Harris Admin. Announces Supply Chain Disruptions Task Force to Address Short-Term Supply Chain Discontinuities*, THE WHITE HOUSE (June 8, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/fact-sheet-biden-harris-administration-announces-supply-chain-disruptions-task-force-to-address-short-term-supply-chain-discontinuities/.
[52] Robert G. Devine, et al., *Supply Chain Disruption: Before the Breach and How Best to Protect*, WHITE & WILLIAMS LLP (Apr. 3, 2020), https://www.whiteandwilliams.com/resources-alerts-Supply-Chain-Disruption-Before-the-Breach-and-How-Best-to-Protect.html.
[53] *See* U.C.C. § 2-615 cmt. 1.
[54] E. Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 438 (S.D. Fla. 1975) (discussing the common law doctrine of unforeseeability).

> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.[55]

It is important to note that this section discusses that a delay in delivery or non-delivery is not grounds for a breach if performance was made impracticable by the occurrence of a contingency or good faith compliance with a governmental order.[56] Section 2-615 indicates that a delay in delivery is not a breach if the seller was complying with a governmental order or if the delivery was made impracticable by an unforeseen event.

The UCC doctrine of commercial impracticability traces its roots to the common law of contracts' doctrine of frustration of purpose, or impossibility.[57] In order for a breaching party to successfully claim commercial impracticability as a defense, "there must be a failure of a pre-supposed condition, which was an underlying assumption of the contract, which failure was unforeseeable, and the risk of which was not specifically allocated to the complaining party."[58]

A mere increase in cost alone or a rise or collapse in the market is not enough to constitute commercial impracticability.[59] One of the best definitions of commercial impracticability comes from the Restatement of Contracts:

> Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved. A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule stated in this Section. Performance may also be impracticable because it will involve a risk of injury to person or to property, of one of the parties or of others, that is disproportionate to the ends to be attained by performance.[60]

This is the most relevant definition for the purposes of this note. The COVID-19 pandemic caused severe shortages of raw materials and shut down major sources of supply, which rendered performance altogether impracticable for some sellers.[61] Readers will recall the severe shortages

[55] U.C.C. § 2-615 (emphasis added).
[56] *See id*.
[57] E. Air Lines, 415 F. Supp. at 438.
[58] *Id*. at 438.
[59] *Id.*
[60] RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981).
[61] *See* Jacob Gershman, *Coronavirus Contract Disputes Start Hitting the Courts*, WALL ST. JOURNAL (Apr. 20, 2020), https://www.wsj.com/articles/coronavirus-contract-disputes-start-hitting-the-courts-11587375001.

of toilet paper and other consumer goods during 2020.[62] These are the types of events that may fall within the scope of § 2-615 of the UCC.

One month after the country went into lockdown in 2020, a Wall Street Journal article detailed how COVID-19-related disputes started hitting the courts.[63] Some companies relied on *force majeure* clauses while others relied on the common law doctrine of commercial impracticability in seeking to get out of contractual obligations.[64] It may be seen that COVID-19-related disputes will only increase as the economy reopens and life begins to return to a semblance of normalcy.[65] Therefore, it is important for lawyers and judges to understand § 2-615 of the UCC and how to apply it properly.

Having defined commercial impracticability under the UCC, this section turns to Florida case law to understand how courts have previously applied § 2-615. This may aid practitioners in predicting how courts are likely to rule on breach of contracts cases governed by the UCC. It will also form the basis of this article's thesis; that is, courts should not allow parties without a carefully worded *force majeure* clause to use § 2-615 of the UCC to claim excuse from performance during the pandemic. In hearing a dispute as to whether commercial impracticability applies, the court will apply an objective standard.[66] Under this standard, an objective determination is made as to "whether the promise can reasonably be performed rather than a subjective inquiry into the promisor's capability of performing as agreed."[67]

The leading case in Florida on the issue of commercial impracticability was handed down by the United States Court of Appeals, Eleventh Circuit, in *Alimenta (USA), Inc., v. Gibbs Nathaniel (Canada) Ltd.*[68] In that case, Alimenta (the buyer) entered into a sale of goods contract with Gibbs (the seller) for the delivery of peanuts in 1980.[69] Gibbs failed to deliver the quantities specified in the contract and also delivered the peanuts later than specified in the contract.[70] Alimenta sued for breach of contract and Gibbs claimed excuse from performance under UCC § 2-615.[71] Specifically, Gibbs claimed that delay in delivery and non-delivery were excused by the occurrence of a drought in the peanut growing regions of the southeast and southwest.[72] The contract did not have a *force majeure* clause.[73] Alimenta claimed that Gibbs should be foreclosed from relying upon § 2-615 because crop failure due to droughts and natural disasters were inherent in the agricultural industry and were, therefore, foreseeable risks.[74]

The Eleventh Circuit, in *Alimenta*, noted that "relevant to the issue of foreseeability of the contingency of a drastically reduced production of edible peanuts are the facts surrounding and

---

[62] Marc Fisher, *Flushing out the true cause of the global toilet paper shortage amid coronavirus pandemic*, THE WASHINGTON POST (Apr. 7, 2020), https://www.washingtonpost.com/national/coronavirus-toilet-paper-shortage-panic/2020/04/07/1fd30e92-75b5-11ea-87da-77a8136c1a6d_story.html; *see also* Hanna Ziady, *Can't find what you want in the grocery store? Here's why*, CNN BUSINESS, https://www.cnn.com/2020/04/01/business/food-supply-chains-coronavirus/index.html (last updated Apr. 2, 2020).
[63] Gershman, *supra* note 61.
[64] *Id*.
[65] *Id.*
[66] Alimenta (U.S.A.), Inc. v. Cargill, Inc., 861 F.2d 650, 652 (11th Cir. 1988).
[67] *Id.*
[68] Alimenta (U.S.A.), Inc. v. Gibbs Nathaniel (Canada), Ltd., 802 F.2d 1362 (11th Cir. 1986).
[69] *Id*.
[70] *Id*. at 1363.
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] Alimenta, 802 F.2d at 1362.

antecedent to the execution of the three contracts involved."[75] In particular, the court pointed out that when the crops were planted in April of 1980, rainfall was adequate in April, May, and June.[76] Further, in the twenty-five years preceding 1980, "the nation's peanut industry experienced steady growth in total production with yield per acre increasing 250% over that period as the result of increased irrigation, better herbicides, and the development of the 'flo-runner variety.'"[77] It was not until July of 1980 that a hot and dry spell became a full-on drought that lasted until September of that year.[78]

The court next applied the objective standard to determine whether commercial impracticability applied. The court noted expert testimony from a climatologist who stated that July 1980 was the "driest and hottest . . . in 91 years of recorded data and that August, 1980 was the third driest and fifth hottest August."[79] The climatologist further testified that the drought was unprecedented and that he would have viewed the probability of it occurring prior to 1980 as "very low, near zero."[80] At the trial level, the issue of the reasonable foreseeability of the 1980 drought and its effect on the peanut industry was ultimately submitted to the jury.[81] The jury found that the occurrence of the drought was not reasonably foreseeable.[82] In reviewing the evidence, the United States Court of Appeals for the Eleventh Circuit affirmed the trial court's decision.[83]

Another important case to consider in predicting how Florida courts are likely to rule on issues of foreseeability is the case of *Eastern Air Lines, Inc. v. Gulf Oil Corp*.[84] On June 27, 1972, the parties signed an agreement whereby Gulf Oil ("Gulf") was to furnish jet fuel to Eastern Air Lines ("Eastern") at specific cities in the Eastern system.[85] Gulf breached the contract and claimed that the oil embargo of 1973 and the federal government's control over the price of oil represented a failure of pre-supposed conditions that excused its performance under the contract.[86] The implementation of the price controls was completely without precedent in the history of government price control action.[87] Consequently, Gulf Oil argued that the contract had become commercially impracticable within the meaning of UCC § 2-615.[88]

The United States District Court for the Southern District of Florida looked at the conditions prior to and surrounding the execution of the contract—just like the Eleventh Circuit Court did in *Alimenta*. The District Court found that the United States had become very reliant on foreign oil.[89] The court further noted that nationalization of oil resources and production shutdowns had become a way of life for oil companies operating in the Middle East.[90] The court pointed to previous disruptions to the oil industry prior to the oil embargo and the price controls implemented by the United States: the closing of the Suez Canal, the interruption of the flow of

[75] Alimenta, 802 F.2d at 1364.
[76] *Id*.
[77] *Id*.
[78] *Id*. at 1365.
[79] *Id*.
[80] *Id*.
[81] Alimenta, 802 F.2d at 1366.
[82] *Id*.
[83] *Id*.
[84] E. Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975).
[85] *Id*. at 432.
[86] *See id.*
[87] E. Air Lines, 415 F. Supp. at 434.
[88] *Id.* at 432.
[89] E. Air Lines, 415 F. Supp. at 433.
[90] *Id.*

Mid-East oil during the 1967 'Six-Day War,' and Libya's nationalization of its oil industry during the same period provide examples of a trend of higher prices and oil disruption.[91]

As a result, the United States District Court for the Southern District of Florida held that Gulf did not meet its burden of showing that its performance under the contract in delivering oil to Eastern Air Lines would result in it losing money.[92] Moreover, Gulf had the burden of establishing commercial impracticability by showing the extent to which it had suffered, or would suffer, losses in performing the contract.[93] The court went further by explaining that even if Gulf had established great hardship under UCC § 2-615, it would still not prevail because the events associated with the so-called energy crisis were reasonably foreseeable at the time the contract was executed.[94] In particular, the court held that "the record is replete with evidence as to the volatility of the Middle East situation, the arbitrary power of host governments to control the foreign oil market, and repeated interruptions and interference with the normal commercial trade in crude oil."[95] Gulf Oil "was well aware of and assumed the risk[s]."[96]

Regarding the unprecedented price controls implemented by the United States, the court stated that it was foreseeable because the records showed that domestic oil prices were controlled at material times, that Gulf foresaw that they might be de-controlled, and that Gulf was constantly urging the federal government that they should be de-controlled.[97]

a. How do the principles of the *Alimenta* and *Eastern Airlines* cases apply to resolving COVID-19-related disputes regarding UCC § 2-615?

The *Alimenta* decision is important to the discussion of excuse of performance under the UCC for several reasons. First, the case was governed by the UCC.[98] Second, the parties did not have a *force majeure* clause, which is important to this discussion because this note focuses on contracts without a *force majeure clause*. Third, the case points out that even though some risks (like droughts) are inherent to an industry, they may still be unforeseeable.[99] Fourth, in judging whether the doctrine of commercial impracticability applies, the court will look to the facts surrounding and prior to the execution of the contracts involved.[100]

Applying *Eastern Airlines*, whenever the circumstances prior to and surrounding the execution of a sale of goods contract establish a trend or pattern of disruption in an industry, courts are likely to find that a later massive disruption is foreseeable.[101] Second, the party claiming excuse of performance bears the burden of showing how it is harmed and will be harmed if it continues to render performance under the contract.[102]

[91] E. Air Lines, 415 F. Supp. at 433.
[92] *Id*. at 440.
[93] *Id.*
[94] *Id*. at 441.
[95] *Id*.
[96] E. Air Lines, 415 F. Supp. at 442.
[97] *Id.*
[98] U.C.C. § 2-102 (emphasis added) (The case is governed by the U.C.C. because growing crops, like peanuts, is specifically included in the definition of goods in §105(1) of the U.C.C.).
[99] Alimenta, 802 F.2d at 1363.
[100] *Id*. at 1364.
[101] E. Air Lines, 415 F. Supp. at 441.
[102] *See id.* at 440.

Based on these cases, this note contends that Florida courts should not allow a breaching party without a *force majeure* clause to rely on UCC § 2-615. As pointed out in section I of this note, pandemics are not a new phenomenon.[103] In fact, section II of this paper shows pandemics have occurred roughly once every thirty-three years.[104] Nevertheless, like in *Alimenta*, an individual may argue the preceding years between the pandemics were marked by relative calm and increased medical breakthroughs.[105] However, the facts surrounding and prior to the execution of contracts before the COVID-19 pandemic show otherwise. The events establish a pattern of outbreaks and disruptions: the severe acute respiratory syndrome (SARS) virus in 2003;[106] influenza A H1N5 (bird flu) in 2007;[107] H1N1 (swine flu) in 2009;[108] Middle East Respiratory Syndrome (MERS) in 2012;[109] the West African Ebola virus between 2014 and 2016;[110] and the Zika virus between 2016 and 2017.[111]

The court in *Alimenta* also looked at the objective data, including testimony rendered by experts.[112] The expert in *Alimenta* stated that the probability of a drought as bad as the one in 1980 was "very low, near zero."[113] However, based on the historical occurrence of a pandemic once every thirty-three years and the outbreaks from 2003 through 2017, the probability of the COVID-19 pandemic occurring in 2020 was anything but "very low, near zero." Moreover, there was a prescient report by the National Institute of Health in 2015 urging readers to "plan for the next global pandemic."[114] The researchers who wrote the report noted the alarming frequency of the outbreaks, taking place every decade on average.[115] Those same researchers attributed the increased frequency to overpopulation, poverty, global warming, and environmental degradation.[116] This was five years before the COVID-19 pandemic.

Another reason why Florida courts should not allow a breaching party without a *force majeure* clause to rely on UCC § 2-615 is the vulnerability of the global supply chain network.[117] As section III of this note shows, the vulnerability of global supply chains has been building over the past three decades due to globalization.[118] This means that parties to a contract governed by the UCC are charged with having either actual or constructive knowledge of the global supply chain. Sellers, especially, who source their raw materials or merchandise from subcontractors around the world are, in the words of the court in *Eastern Airlines*, "well aware of and assume the risks" and vulnerabilities that come with such a global sourcing model.[119] Prior to the COVID-19

[103] *See* discussion *supra* Section I (discussing the history of pandemics).
[104] *See* discussion *supra* Section II.
[105] *See* Alimenta, 802 F.2d at 1363 (The breaching party in *Alimenta* claimed that although droughts were inherent in the agriculture industry, the years preceding the 1980 drought were relatively calm and uneventful; therefore, the 1980 drought was unforeseeable.).
[106] Caceres, *supra* note 31.
[107] Ross, et al., *supra* note 32.
[108] *Id.*
[109] *Id*.
[110] Caceres, *supra* note 31.
[111] *Id.*
[112] Alimenta, 802 F.2d at 1365.
[113] *Id*.
[114] Ross, et al., *supra* note 32.
[115] *Id.*
[116] *Id.*
[117] Shih, *supra* note 45.
[118] *Id*.
[119] E. Airlines, 415 F. Supp. at 442.

pandemic, other disasters and geopolitical events have highlighted the vulnerabilities of the global supply chain.[120] Astute sellers either diversified their suppliers to minimize the risk of non-delivery or ensured that each contract contained a *force majeure* clause to protect them from liability.

Consequently, Florida courts should not allow a breaching party to use UCC § 2-615 as a substitute for sound business planning. Given the historical pattern of the outbreaks of pandemics and the warnings issued in 2015 to prepare for the next global pandemic, the COVID-19 pandemic was foreseeable. Therefore, courts should not allow breaching parties to claim commercial impracticability under UCC § 2-615 as an affirmative defense.

V. Solutions For Legal Practitioners

This section presents suggestions for business lawyers to protect their clients from liability during future pandemics. As counsel to companies involved in a sale of goods contract governed by the UCC, lawyers should not only seek to advise their clients on the legal issues involved but also on economic and other relevant factors. The American Bar Association Model Rules of Professional Conduct state that "in representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."[121] This note shows that the law is not the only consideration that is relevant to a client's situation. Increasingly, a lawyer should also consider the economic and political factors that may have a bearing on their client's situation.

First, lawyers should help their clients uncover and address hidden risks in their supply chain networks.[122] Such a study might reveal that many key precursor materials only come from one or two countries, such as South Korea and China.[123] Second, the company should map out the full supply chain, including distribution facilities and transportation hubs.[124] Suppliers should be ranked as "low-, medium-, or high-risk."[125] One way is to look at the "impact on revenues if a certain source is lost, the time it would take a particular supplier's factory to recover from a disruption, and the availability of alternate sources."[126]

Third, business lawyers should advise their clients to diversify their supply base. This can be done by adding more sources in locations not vulnerable to the same risks.[127] Related to the idea of diversifying supply base is the concept of regionalization where "a substantial proportion of key goods [are produced] within the region where they are consumed."[128] For companies in North America, this may mean shifting some production from China to Mexico and Central America.[129]

---

[120] *See* sections I and II of this note.
[121] MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 1983).
[122] *See* Shih, *supra* note 44.
[123] *Id*.
[124] *Id*.
[125] *Id*.
[126] Shih, *supra* note 44.
[127] *Id*.
[128] *Id*.
[129] Shih, *supra* note 44.

Fourth, companies should be advised to "hold intermediate inventory or safety stock."[130] This runs counter to the common practice of "just-in-time-inventory."[131] Safety stock ties up cash and runs the risk that goods may become obsolete.[132] However, this is a negligible cost compared with the costs of disruption, lost revenues, and higher prices from materials in short supply.[133]

Through these suggestions and others, lawyers can help their clients make their supply chain resilient for future disruptions that are certain to occur. As one supply chain guru put it, adopting a new vision suitable to the realities of the new era will "leverage the capabilities that reside around the world but also improve resilience and reduce the risks from future disruptions that are certain to occur."[134]

VI. Conclusion

The COVID-19 pandemic has resulted in the deaths of millions of people around the world.[135] It has also brought about business disruptions that have led to severe shortages in goods and services.[136] These disruptions and shortages will serve as the basis for numerous lawsuits over breach of contract as sellers are unable to deliver promised goods on time or deliver them at all. This note is aimed to help lawyers gauge how courts in Florida will apply UCC § 2-615 to breach of contract claims arising from the COVID-19 pandemic. In addition, this note has taken the position that previous pandemics and disease outbreaks prior to the COVID-19 pandemic established a trend of disruptions.

Therefore, given the history and the warnings issued by credible scientists, the COVID-19 pandemic was foreseeable. As such, breaching parties without a *force majeure clause* should not be allowed to rely on UCC § 2-615 as a shield from liability.

[130] Shih, *supra* note 44.
[131] *See* Uday Karmarkar, *Getting Control of Just-in-Time*, HARVARD BUS. REV. (Sept.–Oct. 1989), https://hbr.org/1989/09/getting-control-of-just-in-time (describing this process as being all about reducing lead times in the manufacturing process. Just-in-time production "presumes that to achieve such reductions the system should deliver to every operator, in any conversion process, whatever he or she needs just when it is needed. It saves the money tied up in downstream inventories, protecting against long lead times. Shorter lead times mean improved responsiveness and flexibility.").
[132] *Id*.
[133] *See id*.
[134] Shih, *supra* note 44.
[135] *Covid-19 Dashboard*, JOHNS HOPKINS UNIVERSITY & MEDICINE, https://coronavirus.jhu.edu/map.html (last visited Dec. 1, 2021).
[136] *See* Jacob Gershman, *Coronavirus Contract Disputes Start Hitting the Courts*, WALL ST. JOURNAL (Apr. 20, 2020), https://www.wsj.com/articles/coronavirus-contract-disputes-start-hitting-the-courts-11587375001.