

## NOTES

### CATCHING UP TO A NEW NORMAL: THE EFFECTS OF SHIFTING INDUSTRY STANDARDS ON CONTRACT INTERPRETATION

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*During the COVID-19 pandemic, industries around the world were forced to adapt to a new way of life dictated by rising public health concerns. The pandemic's rapid spread left parties struggling to determine whether contractual performance would be excused or reinterpreted. Issues of prevailing industry standards arose and brought into question the point at which parties and courts should define these standards. While some parties argued that industry standards at the time of contract formation are determinative of performance, others claimed that their agreement referenced industry standards that had changed and that, therefore, their performance obligations had changed as well.*

*By looking at contract disputes brought about by the COVID-19 pandemic, this Note examines potential issues of contract interpretation that arise when industry standards referenced by the parties change within the life of a contract. This Note addresses these issues in the context of different types of contracts and examines the use of specific language that references industry standards in the agreements. Ultimately, this Note proposes a general application of an ex ante interpretation of industry standards that would avoid issues of uncertainty even beyond the context of the COVID-19 pandemic.*

INTRODUCTION.....	2840
I. A BRIEF REVIEW OF CONTRACT INTERPRETATION .....	2844
A. <i>Contract Interpretation: How Courts Apply Industry Standards</i> .....	2844

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1. Interpreting the Written Word.....	2844
2. Ambiguity: Industry Custom and Practice, Trade Usage, and Industry Standards .....	2846
3. Parties' Intent to Be Bound by Industry Standards ..	2847
B. <i>Justifying Nonperformance During the COVID-19 Pandemic</i> .....	2848
II. CONTRACT PERFORMANCE DURING THE COVID-19 PANDEMIC .....	2850
A. <i>Differing Levels of Contract Negotiation</i> .....	2851
1. Bargained-For Contracts .....	2851
a. <i>Entertainment: An Industry Transformed (Possibly for Good?)</i> .....	2852
b. <i>Bargained-For Contracts in General</i> .....	2855
2. Contracts of Adhesion.....	2857
a. <i>Higher Education: In-Person Tuition and Fees for Remote Learning</i> .....	2857
b. <i>Contracts of Adhesion in General</i> .....	2858
B. <i>Taking a Look at Contract Language</i> .....	2860
1. Actual References to Industry Standards .....	2860
2. Substantive Standards Interpreted as Industry Standards .....	2861
3. Industry Standards Incorporated by Default .....	2862
III. LOOKING FORWARD: A UNIFORM APPROACH .....	2863
A. <i>Timing</i> .....	2864
B. <i>A Matter of Fairness and Public Health</i> .....	2865
C. <i>Why Does This Matter?</i> .....	2867
CONCLUSION .....	2868

#### INTRODUCTION

In July 2019, Marvel Studios (“Marvel”) officially announced the highly anticipated fourth phase of the Marvel Cinematic Universe, including *Black Widow*, which is the first film of Phase 4 and features Scarlett Johansson reprising her role as the titular character.<sup>1</sup> Discussions of a potential standalone film for Johansson’s character had been ongoing since 2014,<sup>2</sup> and

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1. See *SDCC 2019: All of the Marvel Studios News Coming Out of Hall H at San Diego Comic-Con*, MARVEL (July 21, 2019), <https://www.marvel.com/articles/movies/sdcc-2019-all-of-the-marvel-studios-news-coming-out-of-hall-h-at-san-diego-comic-con> [https://perma.cc/EHC7-6TQ7].

2. See Anthony Couto, *Feige: Black Widow's Past to Be Explored in Avengers 2 and Possible Solo Film*, IGN (Feb. 12, 2014, 9:06 PM), <https://www.ign.com/articles/2014/02/13/feige-black-widows-past-to-be-explored-in-avengers-2-and-possible-solo-film> [https://perma.cc/GHJ7-VDCY].

the release date for the film was initially set for May 1, 2020.<sup>3</sup> Unfortunately, world events dictated a much different 2020 than was expected.

On March 11, 2020, the World Health Organization declared the novel coronavirus (COVID-19) outbreak a global pandemic.<sup>4</sup> The pandemic drastically affected all aspects of everyday life and had a significant impact on the way various industries, including the entertainment industry, were able to operate.<sup>5</sup> Social distancing requirements led to government-issued stay-at-home orders.<sup>6</sup> Businesses closed their doors and implemented remote work where possible.<sup>7</sup> Schools sent students home and implemented virtual learning.<sup>8</sup> Some industries were even forced to shut down entirely.<sup>9</sup> Consequently, contract enforcement, performance, and interpretation had to adjust to this new way of life.<sup>10</sup>

Industries rushed to adapt to the new world in the pandemic to maintain their businesses.<sup>11</sup> For example, as theaters closed, production studios were forced to push back their 2020 film release dates for months at a time.<sup>12</sup> The Walt Disney Company (“Disney”) initially delayed the May 2020 release of *Black Widow* to November 6, 2020, but the release was pushed back even

3. See *SDCC 2019: All of the Marvel Studios News Coming Out of Hall H at San Diego Comic-Con*, *supra* note 1.

4. Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org., Opening Remarks at Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020> [<https://perma.cc/3Z2D-GRMZ>]; see *Covid-19 Pandemic Timeline Fast Facts*, CNN (Mar. 30, 2022, 9:15 AM), <https://www.cnn.com/2021/08/09/health/covid-19-pandemic-timeline-fast-facts/index.html> [<https://perma.cc/W5AM-YN27>].

5. See DELOITTE CTR. FOR TECH., MEDIA & TELECOMMS., COVID-19 OUTLOOK FOR THE US MEDIA AND ENTERTAINMENT INDUSTRY 4 (2020), <https://www2.deloitte.com/us/en/pages/technology-media-and-telecommunications/articles/covid-19-outlook-on-media-industry.html> [<https://perma.cc/9YSS-CPJJ>]; see also *infra* Part II.A.1.a.

6. See Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<https://perma.cc/C9SS-8BBB>].

7. See Kathryn Vasel, *The Pandemic Forced a Massive Remote-Work Experiment. Now Comes the Hard Part*, CNN (Mar. 11, 2021, 8:36 AM), <https://www.cnn.com/2021/03/09/success/remote-work-covid-pandemic-one-year-later/index.html> [<https://perma.cc/ANL7-5Z2H>]; see also Ruth Simon, *Covid-19's Toll on U.S. Business?: 200,000 Extra Closures in Pandemic's First Year*, WALL ST. J. (Apr. 16, 2021, 9:43 AM), <https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619> [<https://perma.cc/K5K3-C37F>].

8. See Marisa Porges, *Schools Are Closing for Coronavirus. Now What?*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/17/parenting/coronavirus-schools-lessons.html> [<https://perma.cc/82A8-9UGY>].

9. See Simon, *supra* note 7.

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

11. See generally Kevin Sneader & Bob Sternfels, *From Surviving to Thriving: Reimagining the Post-COVID-19 Return*, MCKINSEY & CO. (May 1, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/from-surviving-to-thriving-reimagining-the-post-covid-19-return> [<https://perma.cc/CX6C-DTGC>].

12. See *Here Are All the Movies Delayed Because of the Coronavirus—with Some New Release Dates*, VULTURE (Apr. 9, 2021), <https://www.vulture.com/2021/04/here-are-all-the-movies-and-tv-shows-affected-by-coronavirus.html> [<https://perma.cc/33MH-4439>].

further to May 7, 2021.<sup>13</sup> Disney ultimately settled on a release date of July 9, 2021, announcing that the film would be simultaneously released in theaters and on the studio's streaming service, Disney+, similar to the releases of the films *Soul*, *Raya and the Last Dragon*, and *Mulan*.<sup>14</sup> *Black Widow* enjoyed a relatively successful release, grossing \$181.5 million in the United States and \$371 million worldwide<sup>15</sup> and ending the year as the fourth-highest-grossing domestic film of 2021.<sup>16</sup>

However, on July 29, 2021, Scarlett Johansson sued Disney over its decision to move forward with the simultaneous release.<sup>17</sup> Johansson's lawsuit was not the only contract dispute caused by COVID-19. The pandemic's rapid spread significantly impacted a variety of long-term contracts, leaving many businesses struggling to determine whether contractual performance would be excused or reinterpreted in light of the pandemic.<sup>18</sup> The new industry standards led to a series of contractual disputes over whether parties' contracts were fully performed.<sup>19</sup> Some argue that the industry standards and customs at the time of a contract's formation should determine how that contract should be interpreted and ultimately enforced, regardless of how those standards have changed and what they may be at the time of performance.<sup>20</sup>

While many parties to contracts have pointed to the doctrines of impossibility, impracticability, or frustration of purpose and to force majeure clauses to excuse themselves from contract performance during the COVID-19 pandemic, this Note specifically considers cases in which parties do not seek to be excused from performance. Rather, in these cases, a party claims that its performance obligations reference an industry standard that

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13. See Michael Kennedy, *Everything We Know About Black Widow*, SCREEN RANT (Apr. 13, 2021), <https://screenrant.com/black-widow-movie-updates-release-date-story/> [<https://perma.cc/9P2N-PNA8>]; Ryan Lattanzio, *Disney Moves "Black Widow" to July, Releasing in Movie Theaters and Disney+ Streaming*, INDIEWIRE (Mar. 23, 2021, 2:33 PM), <https://www.indiewire.com/2021/03/black-widow-release-july-streaming-disney-plus-1234610752/> [<https://perma.cc/K85J-ASXC>].

14. See Lattanzio, *supra* note 13.

15. *2021 Worldwide Box Office*, BOX OFF. MOJO, <https://www.boxofficemojo.com/year/world/2021/> [<https://perma.cc/N3ZB-VFRU>] (last visited Apr. 2, 2022).

16. *Domestic Box Office for 2021*, BOX OFF. MOJO, [https://www.boxofficemojo.com/year/2021/?ref=bo\\_y1\\_table\\_2](https://www.boxofficemojo.com/year/2021/?ref=bo_y1_table_2) [<https://perma.cc/ML6P-JX3Z>] (last visited Apr. 2, 2022).

17. See Brooks Barnes & Nicole Sperling, *Scarlett Johansson Sues Disney over 'Black Widow' Release*, N.Y. TIMES (Sept. 24, 2021), <https://www.nytimes.com/2021/07/29/business/media/scarlett-johansson-black-widow-disney-lawsuit.html> [<https://perma.cc/7U34-EDYH>]; see also *infra* notes 93–98 and accompanying text.

18. See Yvette Ostolaza et al., *What Spanish Flu-Era Contract Fights Tell Us About Pandemics and Contractual Performance*, AM. LAW., Apr. 1, 2020.

19. See, e.g., Joe Flint & Erich Schwartzel, *Scarlett Johansson Sues Disney over 'Black Widow' Streaming Release*, WALL ST. J. (July 29, 2021, 5:57 PM), <https://www.wsj.com/articles/scarlett-johansson-sues-disney-over-black-widow-streaming-release-11627579278> [<https://perma.cc/H5C2-BUVQ>]; *In re Boston Univ. COVID-19 Refund Litig.*, 511 F. Supp. 3d 20 (D. Mass. 2021); *In re Columbia Tuition Refund Action v. Pace Univ.*, 523 F. Supp. 3d 414 (S.D.N.Y. 2021); *Barkhardar v. President & Fellows of Harvard Coll.*, 544 F. Supp. 3d 203 (D. Mass. 2021).

20. See *supra* note 19 and accompanying text.

has changed and that, based on the ex post industry standard, its obligations have been satisfied.<sup>21</sup>

How should a court interpret contract language that relies on industry standards when those standards have changed since contract formation due to a global disruption as significant as a worldwide pandemic? Even if parties have a mutual understanding of the industry standard at the time of contract formation, do they have an affirmative obligation to perform to the point of meeting an ex ante understanding of an industry custom even after the standard has shifted? How may this inquiry turn on whether the parties intended the standard to adjust or whether the language of the contract actually references or only implies an industry standard?

This Note addresses these questions and seeks to understand how changing standards may be applied to contract interpretation in an environment still learning to adjust to the current pandemic world. While courts and legal scholars have taken up issues of total relief and ways in which parties may look to excuse contract performance based on the pandemic,<sup>22</sup> this Note focuses on situations in which the parties can—and do—perform the contract fully and later dispute the performance of specific terms of the agreement.

Part I outlines the relevant principles of contract interpretation. This part also describes how parties and courts consider industry standards in situations of claimed ambiguity and addresses how extrinsic evidence of industry standards can and has influenced how courts have interpreted contracts.

Part II examines the effect of the COVID-19 pandemic on industry standards in cases in which plaintiffs claimed that contracts formed before the pandemic were breached. It addresses and compares how industry standards may be applied to interpret contract language in bargained-for contracts, such as those in the entertainment industry, and contracts of adhesion, such as those in education. This part addresses arguments that industry standards at the time of formation are binding on the interpretation of these contracts, analyzes how these industries have changed, and considers whether the customs at the time of performance should determine how courts interpret the contract language.

Part III recommends that contract interpretation of industry standards generally default to the standards at the time of formation. This part discusses the preexisting principles of judicial contract interpretation outlined in Part I and how the principles are applied in light of these new circumstances. It also considers potential issues related to interpreting a contract term in a case in which parties dispute the relevant time period for the industry standard. Finally, this part addresses public policy issues related to the enforcement of industry standards that have shifted and considers contracts beyond those affected by the COVID-19 pandemic. It examines future implications of the interpretation of industry standards. It also

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21. *See infra* Part II.

22. *See infra* note 73 and accompanying text.

examines the way contract law broadly may adjust to other potential, similar situations, whether they are other events that cause worldwide disruption or unexpected changes in light of rapid acceleration within an industry.

## I. A BRIEF REVIEW OF CONTRACT INTERPRETATION

While particular contract issues brought about by the COVID-19 pandemic are largely novel and unaddressed, general issues of contract interpretation based on industry standards have been widely confronted by courts and legal scholars.<sup>23</sup> This part reviews fundamental rules of contract interpretation, as well as the way courts have applied these rules in understanding industry standards in contracts. It then looks to how these rules and other doctrines have been applied to disputed interpretations of contracts. This Note further reviews doctrines of contract law that excuse contractual obligations altogether.

### A. *Contract Interpretation: How Courts Apply Industry Standards*

The goal of contract interpretation is to find the solution to a contracting problem that best reflects the intent of the parties in their agreement.<sup>24</sup> Over time, courts and scholars have developed and recognized rules of contract interpretation that are intended to guide courts and litigants when determining the mutual intent of the contracting parties.<sup>25</sup> The role of interpretation is to identify the meaning of a legal actor's words or actions, while the rules of interpretation outline how to discern the meaning of what parties say and do.<sup>26</sup> While these rules are not definitive, they are commonly used as tools to achieve the goal of determining parties' intent.<sup>27</sup>

#### 1. Interpreting the Written Word

Contract interpretation generally begins with the plain language of the contract.<sup>28</sup> When possible, a court will first employ a "plain meaning" analysis to resolve any questions of interpretation.<sup>29</sup> Where the language employed in a contract is unambiguous, courts must interpret the words of the contract based on their common and generally accepted meanings, unless the contract specifies particular meanings.<sup>30</sup> However, if the parties dispute

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23. See *infra* Part I.A.

24. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 568–69 (2003); see also Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 GEO. J.L. & PUB. POL'Y 13, 17 (2020).

25. See Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73, 82–83 (1999).

26. See Klass, *supra* note 24, at 16.

27. See Patrick S. Ottinger, *Principles of Contractual Interpretation*, 60 LA. L. REV. 765, 772 (2000).

28. RESTATEMENT (SECOND) OF CONTS. § 202(3)(a) (AM. L. INST. 1981) ("Where language has a generally prevailing meaning, it is interpreted in accordance with that meaning.")

29. See *Aleman Food Servs., Inc. v. United States*, 994 F.2d 819, 822 (Fed. Cir. 1993).

30. *Storino, Ramello & Durkin v. Rackow*, 45 N.E.3d 307, 313 (Ill. App. Ct. 2015).

the meaning of the contract's language, the court must determine what the parties meant and intended.<sup>31</sup> In construing the terms of a contract, the parties' intent must be gathered from the contract as a whole to glean the meaning of terms within the document's context.<sup>32</sup>

Interpreting a contract often includes examining the words within the "four corners" of the contract to determine the parties' intent.<sup>33</sup> The four corners doctrine calls for construction through the application of commonly understood English definitions and usages based on rules of grammar, syntax, and other canons of construction.<sup>34</sup> This examination limits the amount of evidence a court may consider in determining whether the contract language is clear and unambiguous.<sup>35</sup> Courts generally follow the four corners rule when determining contract ambiguity, sometimes in the form of the parol evidence rule.<sup>36</sup> The parol evidence rule prohibits parties from introducing extrinsic evidence intended to prove contractual terms that either contradict or add to the final expression of the written agreement.<sup>37</sup>

While many courts look to these rules of interpretation, common-law exceptions to the four corners doctrine and parol evidence rule exist,<sup>38</sup> and some courts apply a more contextual approach<sup>39</sup> and allow all credible evidence regarding parties' intention to determine whether the language of the contract is reasonably susceptible to the interpretation maintained by the party claiming ambiguity.<sup>40</sup> Ultimately, courts will generally look to all

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31. See 11 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 31:1 (4th ed. 1990).

32. See RESTATEMENT (SECOND) OF CONTS. § 202(2) (AM. L. INST. 1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.")

33. See *O'Brien v. Miller*, 168 U.S. 287, 297 (1897) ("The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."); see also *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352–53 (Miss. 1990) ("[P]articulate words . . . should not control; rather, the entire instrument should be examined. . . . This so-called 'four corners' doctrine calls for construction through application of 'correct English definition and language usage.' . . . If examination solely of the language within the instrument's four corners does not yield a clear understanding of the parties' intent, the court will generally proceed to another tier . . . ." (first and third alteration in original) (citations omitted) (first citing *Mounger v. Pittman*, 108 So. 2d 565, 567 (Miss. 1959); and then quoting *Thornhill v. Sys. Fuel. Inc.*, 523 So. 2d 983, 1007 (Miss. 1988) (Robertson, J., concurring in denial of petition for reh'g))).

34. See Rowley, *supra* note 25, at 88.

35. *Id.* at 89.

36. See Joshua M. Silverstein, *Contract Interpretation and the Parol Evidence Rule: Toward Conceptual Clarification*, 24 *CHAP. L. REV.* 89, 92 n.10 (2020) (citing STEVEN J. BURTON, *ELEMENTS OF CONTRACT INTERPRETATION* 126 (2009)).

37. See *id.* at 102.

38. See Rowley, *supra* note 25, at 268–303; see also Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 *BAYLOR L. REV.* 657, 718–42 (1997).

39. See Silverstein, *supra* note 36, at 92 n.10 ("Nine states . . . have adopted a contextualist or 'antiformalist' interpretive regime.")

40. See *id.*

applicable rules of interpretation to reach a reasonable interpretation of the disputed contract language.

## 2. Ambiguity: Industry Custom and Practice, Trade Usage, and Industry Standards

In contract interpretation, a court generally must look at whether the provisions at issue are reasonably susceptible to more than one interpretation to determine whether the provisions are ambiguous.<sup>41</sup> However, the prevailing view among courts and scholars is that a court is not required to find ambiguity before it may apply rules of interpretation to determine the meaning and consequence of the parties' written agreement.<sup>42</sup> Rather, a court should apply the rules along with all relevant evidence to ascertain the existence of any ambiguity and resolve it once identified.<sup>43</sup> In interpreting a specific contractual term, courts generally consider the meaning attributed to that term in the industry.<sup>44</sup>

Where particular terms have an industry-specific meaning, courts may apply the concept of trade usage.<sup>45</sup> A trade usage is "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."<sup>46</sup> Trade usage is generally admissible without a showing that the contract language is ambiguous.<sup>47</sup> However, trade usage is only relevant if both parties to the contract are involved in the same trade.<sup>48</sup>

Where trade usage is not applicable, courts have historically determined that industry standards can be applied to contracts in cases where both parties

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41. *See* *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997); *see also* *Natt v. White Sands Condo.*, 95 A.D.3d 848, 849 (N.Y. App. Div. 2012) ("Contract language is ambiguous when it is 'reasonably susceptible of more than one interpretation' and there is nothing to indicate which meaning is intended, or where there is contradictory or necessarily inconsistent language in different portions of the instrument.") (citations omitted) (first citing *Chimart Assocs. v. Paul*, 489 N.E.2d 231, 233 (N.Y. 1986); and then citing *Travelers Ins. Co. v. Castro*, 341 F.2d 882, 884 (1st Cir. 1965)).

42. *See* *Rowley*, *supra* note 25, at 82–83.

43. *See id.* at 83.

44. *See* *Pers. Preference Video, Inc. v. Home Box Off., Inc.*, 986 F.2d 110, 114 (5th Cir. 1993); *see also* *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992) (noting that a contract is ambiguous if it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business").

45. *See generally* Lisa Bernstein, *Custom in the Courts*, 110 NW. U. L. REV. 63 (2015).

46. U.C.C. § 1-303(c) (AM. L. INST. & UNIF. L. COMM'N 2021).

47. *See* Bernstein, *supra* note 45, at 72 ("[The Official Comments] reject the strict English and common law standards for establishing the existence of a custom, create a presumption that commercially accepted usages are reasonable, make clear that usages are admissible without a showing that the contract language is ambiguous, and make the question of whether an extant usage has been incorporated a question for the trier of fact." (footnote omitted)); *see also* RESTATEMENT (SECOND) OF CONTS. § 222 cmt. b (AM. L. INST. 1981) ("There is no requirement that an agreement be ambiguous before evidence of a usage of trade can be shown . . .").

48. *See, e.g.*, U.C.C. § 1-303(d) (AM. L. INST. & UNIF. L. COMM'N 2021).



to the contract are involved in that industry and have reason to know of those standards.<sup>49</sup> Generally, if there is a custom in an industry, courts deem parties engaged in that industry to have contracted in reference to that practice unless the contrary appears from the contract's other terms.<sup>50</sup> A party engaged in the business is bound to the prevailing industry custom.<sup>51</sup> Evidence of custom and practice in an industry is generally admissible to define an undefined term where a court has found ambiguity.<sup>52</sup>

### 3. Parties' Intent to Be Bound by Industry Standards

When parties argue that an ambiguous contract term should be understood in the context of an industry standard, a presumption that the parties intended to incorporate that standard may exist.<sup>53</sup> The party offering evidence of industry custom must show either that the other party was actually aware of the usage or that the existence of such usage is "so notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it."<sup>54</sup> Courts are to construe commercial contracts in accordance with the industry standards to which the contract relates.<sup>55</sup> Courts may look to extrinsic evidence—including the course of dealing between the parties or the usage of trade<sup>56</sup> or the course of performance<sup>57</sup>—which, unlike in other primary rules of construction, affirmatively invites the trial court to consider extrinsic proof even when there is no claim of ambiguity.<sup>58</sup>

In using industry standards to interpret contract language, courts hold that evidence of these standards is generally admissible to define an undefined term.<sup>59</sup> However, as with other rules of interpretation, extrinsic evidence

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49. *See* *Lambourne v. Manchester Country Props.*, 374 A.2d 122, 123 (Vt. 1977) (quoting *Blin v. Mayo & Follett*, 10 Vt. 56, 61 (1838)).

50. *See* *Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.*, 252 Cal. Rptr. 573, 579 (App. Ct. 1988).

51. *Id.*

52. *See* *Int'l Multifoods Corp. v. Com. Union Ins. Co.*, 309 F.3d 76, 87 n.4 (2d Cir. 2002) ("[T]he line between a contract that is so clear as a matter of ordinary meaning that evidence of industry practice ultimately cannot alter the apparent plain meaning of the language and a contract where industry practice informs interpretation may prove difficult to draw. But that is not to say that evidence of custom and usage is irrelevant to the assessment of whether ambiguity exists.").

53. *Jobim v. Songs of Universal, Inc.*, 732 F. Supp. 2d 407, 417 (S.D.N.Y. 2010).

54. *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 343 (N.Y. App. Div. 1997).

55. *See* *Glasser & Rowley*, *supra* note 38, at 666–67.

56. "Usage of trade" is "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. § 1-303(c) (AM. L. INST. & UNIF. L. COMM'N 2021).

57. RESTATEMENT (SECOND) OF CONTS. § 202(5) (AM. L. INST. 1981).

58. *See* *Glasser & Rowley*, *supra* note 38, at 668; *see also* *KMI Cont'l Offshore Prod. Co. v. ACF Petroleum Co.*, 746 S.W.2d 238, 241 (Tex. App. 1987) ("[T]he circumstances to be considered are not the parties' statements of what they intended the contract to mean, but circumstances known to the parties at the time they entered into the contract, such as what the industry considered to be the norm or reasonable and prudent.").

59. *See supra* note 52 and accompanying text; *see also* *Par-Co Drilling, Inc. v. Franks Petroleum Inc.*, 360 So. 2d 642, 644 (La. Ct. App. 1977) ("It is well settled that custom of the

about industry standards is not conclusory.<sup>60</sup> Courts note that private industry standards are typically viewed as advisory, as they lack the force of law.<sup>61</sup> Therefore, the admission of extrinsic evidence to show an established industry standard indicates the recognition of the term within the industry.<sup>62</sup>

*B. Justifying Nonperformance During the COVID-19 Pandemic*

In addition to causing general turmoil, the COVID-19 pandemic has also created significant issues in contractual relationships by preventing parties from fulfilling pre-pandemic contracts.<sup>63</sup> When a party claims that the other has breached a pre-contract standard, the breaching party can proceed in a few ways. This Note addresses how contracts should be interpreted when the breaching party in a breach-of-contract claim—rather than claiming a change in circumstance that excuses the party from performance and moving forward with the contractual obligations—claims that the meaning of the contractual obligations has undergone a change in industry standard to which the party has conformed. In general, the party that has not fulfilled the terms of the contract is liable for breach of contract unless that party provides justification for circumstances that the party claims are a sufficient basis for exemption from the contract terms.<sup>64</sup> Contract disputes based on noncompliance with the contract terms due to the pandemic often point to doctrines of impossibility, impracticability, or frustration of purpose or to force majeure clauses.<sup>65</sup>

Under the principle of impossibility or impracticability, a party may be excused from performance when an unanticipated event that could not have been foreseen makes performance impossible or impracticable.<sup>66</sup> Frustration of purpose also may excuse performance and applies when a change in circumstances after a contract was entered into makes one party's performance worthless to the other, frustrating the purpose of the contract.<sup>67</sup>

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place and the usual and customary manner of fulfilling like contracts is persuasive in determining the intention of the parties under a contract not specific in its wording.”).

60. See *supra* note 27 and accompanying text.

61. See *Volt Servs. Grp. v. Adecco Emp. Servs., Inc.*, 35 P.3d 329, 336 (Or. Ct. App. 2001).

62. See *id.*

63. See Schwartz, *supra* note 10, at 48.

64. See *Cater v. Barker*, 617 S.E.2d 113, 117 (N.C. Ct. App. 2005), *aff'd*, 625 S.E.2d 778 (2006) (“Non-performance of a valid contract is a breach thereof . . . unless the person charged . . . shows some valid reason which may excuse the non-performance.” (alterations in original) (quoting *Blount-Midyette v. Aeroglide Corp.*, 119 S.E.2d 225, 228 (1961))).

65. See Inna Vorotyntseva et al., *Comparative Legal Research on Contract Law Changes Under COVID-19 Pandemic: England, United States, Asia and Ukraine*, 10 IUS HUMANI L.J. 123, 135 (2021).

66. *Dermott v. Jones*, 69 U.S. 1, 7 (1865) (“[I]f a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God . . . .”); *Mineral Park Land Co. v. Howard*, 156 P. 458, 460 (Cal. 1916) (“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.”); RESTATEMENT (SECOND) OF CONTS. § 261 (AM. L. INST. 1981).

67. See *Chase Precast Corp. v. John J. Paonessa Corp.*, 566 N.E.2d 603, 605–06 (Mass. 1991); see also RESTATEMENT (SECOND) OF CONTS. § 265 (AM. L. INST. 1981).

Many contracts also include force majeure clauses, which similarly excuse a party's nonperformance under a contract when extraordinary events, such as an "act of god," prevent a party from fulfilling its contractual obligations.<sup>68</sup> The parties are allowed to define exactly what circumstances constitute force majeure and what the consequences of any event of force majeure would be in the contract.<sup>69</sup> In considering the applicability of force majeure, courts look to several factors: (1) whether the event qualifies as force majeure as defined by the contract, (2) whether the risk of nonperformance was foreseeable and able to be mitigated, and (3) whether performance is truly impossible.<sup>70</sup>

As the pandemic rendered many parties unable to satisfy their contractual obligations, defendants to breach-of-contract cases increasingly relied on these doctrines to attempt to excuse their nonperformance of contractual obligations.<sup>71</sup> Courts have ruled on the applicability of force majeure clauses and whether COVID-19 would constitute a defined event under the contracts in question.<sup>72</sup> Additionally, in the wake of the pandemic, legal scholars have written extensively on situations in which parties have been unable to perform the contract through the lenses of impossibility, impracticability, frustration of purpose, or force majeure clauses.<sup>73</sup>

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68. LORD, *supra* note 31; *see also* Aukema v. Chesapeake Appalachia, LLC, 839 F. Supp. 2d 555, 560 n.5 (N.D.N.Y. 2012).

69. *See, e.g., In re* Cablevision Consumer Litig., 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012); *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987) (holding that force majeure defense is narrow and only excuses nonperformance "if the *force majeure* clause specifically includes the event that actually prevents a party's performance"); LORD, *supra* note 31 ("What types of events constitute *force majeure* depend on the specific language included in the clause itself.>").

70. *See supra* note 69 and accompanying text; *see also* UPDATE: *Force Majeure Under the Coronavirus (COVID-19) Pandemic*, PAUL WEISS (Mar. 16, 2020), <https://www.paulweiss.com/media/3979438/16mar20-update-force-majeure.pdf> [<https://perma.cc/D5ZB-9RBD>].

71. *See, e.g.,* 1600 Walnut Corp. v. Cole Haan Co. Store, 530 F. Supp. 3d 555, 558 (E.D. Pa. 2021) (finding that the COVID-19 pandemic was covered in force majeure clause of commercial lease); *JN Contemp. Art LLC v. Phillips Auctioneers LLC*, 507 F. Supp. 3d 490, 501 (S.D.N.Y. 2020) ("[T]he pandemic and the regulations that accompanied it fall squarely under the ambit of Paragraph 12(a)'s force majeure clause."). *But c.f. In re* CEC Ent., Inc., 625 B.R. 344 (Bankr. S.D. Tex. 2020) (finding that force majeure clauses of leases did not allow debtor-operator of family entertainment and dining venues to withhold or abate rent during pandemic).

72. *See, e.g.,* Rudolph v. United Air Holdings, Inc., 519 F. Supp. 3d 438 (N.D. Ill. 2021) (holding that COVID-19 pandemic did not qualify as force majeure pursuant to airline's conditions-of-carriage agreement); *In re* Cinemex USA Real Est. Holdings, Inc., 627 B.R. 693 (Bankr. S.D. Fla. 2021) (holding that force majeure clause in debtor's commercial leases relieved debtor of obligation to pay rent).

73. *See, e.g.,* Laura Gates, *Force Majeure, Vis Major, Impossibility, and Impracticability Under Ohio Law Before and After COVID-19*, 90 U. CIN. L. REV. 283 (2021); S. Esra Kiraz & Esra Yildiz Ustun, *COVID-19 and Force Majeure Clauses: An Examination of Arbitral Tribunal's Awards*, 25 UNIF. L. REV. 437 (2020); Schwartz, *supra* note 10; Amy Sparrow Phelps, *Contract Fixer Upper: Addressing the Inadequacy of the Force Majeure Doctrine in Providing Relief for Nonperformance in the Wake of the COVID-19 Pandemic*, 66 VILL. L. REV. 647 (2021); David A. Shargel et al., *Revisiting Force Majeure and Other Contractual Considerations Amid COVID-19*, NAT'L L. REV. (Nov. 6, 2020),

However, the discussion has primarily centered on ways in which parties attempt to excuse their contractual obligations altogether, rather than on ways in which parties—whose contractual obligations have been altered by the pandemic and who are still able to perform the contract fully—may argue against breach-of-contract claims based on pre-pandemic understandings of a contract term.

## II. CONTRACT PERFORMANCE DURING THE COVID-19 PANDEMIC

When the COVID-19 pandemic shut down businesses and forced industries to rapidly accommodate “the new normal,”<sup>74</sup> parties found reasons to question contracts that were formed pre-pandemic but performed during the pandemic.<sup>75</sup> Where parties performed their contractual obligations, some questioned which interpretation of contract language should be enforced—particularly in cases in which parties claimed that a term was intended to be understood by the industry standard.<sup>76</sup> Industries always undergo changes, such as technological advancements, as they evolve and adapt to new realities, but the pandemic forced industries to make major shifts in an instant, without the usual time for gradual evolution and adjustments.<sup>77</sup>

This raises the question of what the relevant time frame should be when terms are interpreted according to industry standards, especially if those industry standards were forced to change dramatically between the formation of a contract and the time of performance. When it is possible to perform the contract obligations, does an affirmative obligation to perform according to the ex ante industry standard exist?

Based on the history of contract interpretation and existing precedent, it seems likely that courts would uphold an ex ante understanding of an industry standard when enforcing a term based on that standard.<sup>78</sup> However, the COVID-19 pandemic has raised an issue that courts have not previously encountered: what happens when an industry jumps significantly from one standard to another within the life of a contract? In light of this new situation,

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<https://www.natlawreview.com/article/revisiting-force-majeure-and-other-contractual-considerations-amid-covid-19> [<https://perma.cc/ALQ4-DYVL>].

74. This now widely used term describes the different environment and day-to-day lifestyle imposed by the early stages of the pandemic. See, e.g., Jeff Clyde G. Corpuz, *Adapting to the Culture of a ‘New Normal’: An Emerging Response to COVID-19*, 43 J. PUB. HEALTH e344, e344 (2021) (“The term ‘new normal’ first appeared during the 2008 financial crisis to refer to the dramatic economic, cultural and social transformations that caused precariousness and social unrest, impacting collective perceptions and individual lifestyles. This term has been used again during the COVID19 pandemic to point out how it has transformed essential aspects of human life.”).

75. See *infra* Parts II.A–B.

76. See *infra* Parts II.A–B.

77. See generally David C. Howe et al., *Paradigm Shifts Caused by the COVID-19 Pandemic*, ORGANIZATIONAL DYNAMICS, Oct.–Nov. 2021.

78. See RESTATEMENT (SECOND) OF CONTS. § 202 cmt. b (AM. L. INST. 1981) (“In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made.”).

courts may need to approach in a new way interpretation that is based on industry standards to address the problem at hand.<sup>79</sup>

#### A. Differing Levels of Contract Negotiation

There are several types of contracts that parties may enter into. This Note looks specifically at bargained-for contracts and contracts of adhesion. In bargained-for contracts, the parties generally negotiate the terms of the contract and come to a mutually accepted agreement under which both parties provide something of value that induces each party to exchange mutual performances.<sup>80</sup> Conversely, contracts of adhesion are generally drafted by one party (typically the party with stronger bargaining power) and signed by another party that generally has no opportunity to negotiate the terms of the contract.<sup>81</sup> The ways in which these different types of contracts are formed and the bargaining power of the respective parties pose unique issues in determinations of contract interpretation.<sup>82</sup> This section addresses how and why the interpretation of industry standards may vary based on the type of contract entered into and gives examples of how parties have sought to interpret contractual performance in their respective agreements.

##### 1. Bargained-For Contracts

This section describes bargained-for contracts in the context of the entertainment industry. Many contracts in the industry are heavily negotiated and often result in long-term relationships between the parties. Part II.A.1.a describes the effects of the COVID-19 pandemic on the entertainment industry and how the modifications brought on by the pandemic have changed the industry's landscape. This section addresses these shifts and the possibility that they may have long-term implications on the entire industry. It then takes a closer look at a recent contract dispute between Scarlett Johansson and Disney. Johansson claimed that the contract term "wide theatrical release" was an industry-standard term that implied exclusive theatrical release and that Disney's choice to simultaneously release *Black Widow* in theaters and on Disney+ was therefore a breach of their agreement.<sup>83</sup>

Part II.A.1.b examines bargained-for contracts more broadly. It considers potential reasons—such as similar bargaining power and levels of negotiation—why parties in long-term bargained-for agreements could claim that the contract allows for changing industry standards.

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79. See *infra* Parts II.A–B.

80. See RESTATEMENT (SECOND) OF CONTS. § 3 (AM. L. INST. 1981); see also *id.* § 71 (outlining the requirements of consideration).

81. See *Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

82. See *supra* Part II.A.

83. See *infra* note 97 and accompanying text.

a. *Entertainment: An Industry Transformed (Possibly) for Good?*

The COVID-19 pandemic brought about a massive disruption to the entertainment industry.<sup>84</sup> Most theaters, concert halls, and cinemas were forced to close, and television and film production came to a halt for months.<sup>85</sup> Changes to the industry, including the shift of the initial showing of movies from theaters to streaming services, that were expected to play out over multiple years happened over the course of a few months.<sup>86</sup>

As millions were forced by government stay-at-home orders to quarantine, viewers turned to at-home entertainment, resulting in the emergence of new streaming video services.<sup>87</sup> While the industry was already trending toward streaming services, many agree that the pandemic accelerated the pace of the trend.<sup>88</sup> Warner Bros. Pictures released all of its 2021 feature films simultaneously on the streaming service HBO Max,<sup>89</sup> while Disney opted for simultaneous streaming and theatrical releases for three of its 2021 films.<sup>90</sup> However, the studios' decisions to move to streaming services to debut their feature films have been criticized by some prominent voices in the industry<sup>91</sup> and has even led to litigation that claims that the simultaneous release constituted a breach of contract.<sup>92</sup>

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84. See Ryan Faughnder et al., *Shaken Studios. Empty Theaters. What Hollywood Lost During the Pandemic*, L.A. TIMES (Dec. 9, 2020, 10:00 AM), <https://www.latimes.com/entertainment-arts/business/story/2020-12-09/everything-hollywood-lost-during-the-pandemic> [<https://perma.cc/JA68-JQ9E>] (“The abrupt closure of nearly all of the nation’s 5,477 cinemas was probably the most visible sign of the industry’s disruption from COVID-19—one that industry veterans and filmgoers worry will do permanent damage.”).

85. See Tia Richards, *Predicting the Future of the Entertainment Industry After COVID*, USC NEWS (Mar. 30, 2021), <https://news.usc.edu/183870/future-of-entertainment-after-covid-movies-tv-streaming-usc-experts/> [<https://perma.cc/D3VU-H9DJ>].

86. See Faughnder, *supra* note 84.

87. See Brad Adgate, *The Impact COVID-19 Had on the Entertainment Industry in 2020*, FORBES (Apr. 13, 2021, 11:45 AM), <https://www.forbes.com/sites/bradadgate/2021/04/13/the-impact-covid-19-had-on-the-entertainment-industry-in-2020/> [<https://perma.cc/W7PF-S2FL>].

88. See, e.g., *id.* (reporting that many industry analysts agreed that the pandemic sped up the adoption of streaming services).

89. Julia Alexander, *Warner Bros. Will Release All of Its New 2021 Movies Simultaneously on HBO Max*, THE VERGE (Dec. 3, 2020, 1:30 PM), <https://www.theverge.com/2020/12/3/22150605/hbo-max-warner-bros-movies-2021-simultaneous-release-matrix-godzilla-suicide-squad-space-jam> [<https://perma.cc/9YYV-7VF7>].

90. See Rebecca Rubin, *‘Black Widow,’ ‘Cruella’ to Debut on Disney Plus and in Theaters as Disney Shifts Dates for Seven Films*, VARIETY (Mar. 23, 2021, 11:30 AM), <https://variety.com/2021/film/news/disney-postpones-black-widow-shang-chi-1234935874/> [<https://perma.cc/VRK9-LYWM>]; see also Erich Schwartzel, *‘Jungle Cruise’ Debut Is Latest Example of Covid-19, Co-Release Challenges*, WALL ST. J. (Aug. 1, 2021, 1:34 PM), <https://www.wsj.com/articles/jungle-cruise-tops-a-middling-weekend-box-office-11627839281> [<https://perma.cc/UV6C-TDPA>].

91. See, e.g., Kim Masters, *Christopher Nolan Rips HBO Max as ‘Worst Streaming Service,’ Denounces Warner Bros.’ Plan*, HOLLYWOOD REP. (Dec. 7, 2020, 4:36 PM), <https://www.hollywoodreporter.com/business/business-news/christopher-nolan-rips-hbo-max-as-worst-streaming-service-denounces-warner-bros-plan-4101408/> [<https://perma.cc/VJN7-UKH3>].

92. See *infra* notes 94–97 and accompanying text.

On July 29, 2021, Scarlett Johansson filed a lawsuit<sup>93</sup> against Disney over its decision to stream *Black Widow* on Disney+ simultaneously with the theatrical release.<sup>94</sup> Marvel<sup>95</sup> and Johansson entered an agreement dated as of May 9, 2017, and executed in 2019, for Johansson to star in the movie *Black Widow*.<sup>96</sup> Johansson's complaint claimed that the contract stated that the release of *Black Widow* would be a "wide theatrical release of the Picture (i.e., no less than 1,500 screens)" and that at the time of the agreement it was well understood by the parties that a "theatrical release" referred to an exclusive release in theaters for an extended period of time that was roughly 90–120 days.<sup>97</sup> Her claims essentially hinged on the definition of "theatrical release," a term which was not defined in the contract during the process of negotiation.<sup>98</sup>

Disney claimed that there was no breach of contract, as the agreement only required that the theatrical release be on 1500 screens and as the movie was ultimately released on over 30,000 screens worldwide.<sup>99</sup> Disney's response claimed that "[t]he hybrid release pattern was the best thing for [*Black Widow*] and all of the valued talent who contributed to its production, especially given the continued uncertainty in the theatrical market and unprecedented circumstances of the pandemic."<sup>100</sup> While Johansson's complaint emphasized the purported industry standard at the time of contract formation,<sup>101</sup> Disney's response stressed the unique circumstances of the pandemic that led to *Black Widow*'s simultaneous streaming and theatrical release.<sup>102</sup>

As noted, Johansson's agreement is dated May 9, 2017,<sup>103</sup> long before anyone would have known of the effects of a global pandemic on the contract

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93. Complaint, Periwinkle Ent., Inc., f/s/o Scarlett Johansson v. The Walt Disney Co., No. 21STCV27831 (Cal. Super. Ct. July 29, 2021). Johansson and Disney reached a settlement on September 30, 2021. Terms of the settlement were not disclosed. See Brooks Barnes, *Scarlett Johansson and Disney Settle Suit over 'Black Widow' Pay*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/business/scarlett-johansson-disney-black-widow.html> [<https://perma.cc/55JE-3WAH>]. The parties settled without reaching the merits, so the issue presented remains an open question.

94. See Flint & Schwartzel, *supra* note 19.

95. Marvel Entertainment LLC is a wholly owned subsidiary of The Walt Disney Company. *Marvel Corporate Information*, MARVEL, <https://www.marvel.com/corporate/about> [<https://perma.cc/N2SE-8GX7>] (last visited Apr. 2, 2022).

96. Defendant's Notice of Motion and Motion to Compel Arbitration and Stay Court Proceedings at 7, Periwinkle Ent., Inc., f/s/o Scarlett Johansson v. The Walt Disney Co., No. 21STCV27831 (Cal. Super. Ct. Aug. 20, 2021) [hereinafter Defendant's Motion].

97. Complaint, *supra* note 93, at 8; see *id.* at 3 ("This roughly 90–120 day theatrical 'window' was . . . industry-standard at the time the Agreement was finalized . . .").

98. See Julius Young, *Disney's 'Black Widow' Settlement with Scarlett Johansson Protected a 'Seismic Shift' in Hollywood: Expert*, FOX BUS. (Oct. 11, 2021), <https://www.foxbusiness.com/lifestyle/disney-black-widow-settlement-scarlett-johansson-seismic-shift-hollywood-expert> [<https://perma.cc/6ZMM-75YF>].

99. Defendant's Motion, *supra* note 96, at 9.

100. *Id.*

101. See generally Complaint, *supra* note 93.

102. Defendant's Motion, *supra* note 96, at 9.

103. The agreement date is when the obligations of the parties outlined in the contract begin. While Johansson's agreement was not executed until 2019, the parties' obligations to

in question. At the time of formation, Disney+ had not been released or even announced yet,<sup>104</sup> and few, if any, feature films in the industry had been released simultaneously in theaters and on streaming platforms.<sup>105</sup> This points to a seemingly reasonable inference that neither Johansson nor Disney would have anticipated that the term “theatrical release” would be disputed during the course of the contract. Yet by the time *Black Widow* was set for release, the industry had experienced major upheavals due to the pandemic.<sup>106</sup> Disney attempted to adapt by creating “Disney+ Premiere Access,” a premium release strategy designed to ensure people could still access major new releases in areas with closed movie theaters.<sup>107</sup> The films were released to Disney+ in most markets on the same day as their theatrical releases.<sup>108</sup> Prior to the release of *Black Widow*, Disney had used Disney+ Premiere Access to release three feature films.<sup>109</sup>

NBCUniversal called early premium video on-demand its “new normal” and launched Peacock, its streaming service, during the pandemic.<sup>110</sup> Industry experts seem to believe that this may be a permanent shift, estimating that more studios will launch films simultaneously in theaters and on streaming services—or via streaming alone.<sup>111</sup> Some believe that while the industry expects some kind of a return to pre-COVID-19 norms, consumption patterns and consumer habits learned during the pandemic will become embedded and may affect how the industry chooses to release films post-pandemic.<sup>112</sup>

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each other began at the agreement date, and the meaning the parties attached to the terms of the agreement would therefore center on the date on which the contractual obligations began.

104. See Todd Spangler, *Disney+ to Launch in November, Priced at \$6.99 Monthly*, VARIETY (Apr. 11, 2019, 4:59 PM), <https://variety.com/2019/digital/news/disney-plus-streaming-launch-date-pricing-1203187007/> [https://perma.cc/WU92-JRW7] (“Disney+ will launch in the U.S. on Nov. 12, 2019 . . . . The company announced the pricing, launch date, and other details Thursday at Disney’s 2019 Investor Day in Burbank, Calif.”); *Disney Investor Day 2019*, THE WALT DISNEY CO. (Apr. 11, 2019), <https://thewaltdisneycompany.com/the-walt-disney-companys-2019-investor-day-webcast/> [https://perma.cc/SE63-MDMV]; see also Complaint, *supra* note 93, at 3.

105. See Chris Lee, *Coronavirus Is Pushing Movies Out of Theaters and Online Faster than Ever Before*, VULTURE (Mar. 17, 2020), <https://www.vulture.com/2020/03/coronavirus-is-pushing-movies-online-faster-than-ever-before.html> [https://perma.cc/KEA9-SR94] (“After years of studios resisting the efforts of streaming giants such as Amazon and Netflix to release their movies ‘day and date’—online and in theaters at the same time—the global viral scare has finally persuaded Disney and Universal Pictures to dramatically close the first-run gap.”).

106. See *supra* notes 84–88 and accompanying text.

107. See Brandon Katz, *Don’t Worry ‘Mulan’ Fans, Disney+ Premiere Access Is Not as Confusing as You Think*, OBSERVER (Aug. 18, 2020, 9:54 AM), <https://observer.com/2020/08/disney-plus-premier-access-explained-mulan/> [https://perma.cc/RXM9-M4VQ].

108. See *id.*

109. See Rubin, *supra* note 90.

110. See Faughnder, *supra* note 84.

111. See Richards, *supra* note 85.

112. See Jatinder Sidhu, *4 Things to Know About the Future of Media and Entertainment*, WORLD ECON. F. (Aug. 17, 2021), <https://www.weforum.org/agenda/2021/08/4-things-to-know-about-the-future-of-media-and-entertainment/> [https://perma.cc/BEX4-TUWL].



*b. Bargained-For Contracts in General*

Johansson's *Black Widow* contract was negotiated over the course of several years<sup>113</sup> and was not the first instance in which Johansson and Marvel had entered into an agreement.<sup>114</sup>

While the exact details of Johansson's previous agreements with Marvel are not publicly available, the course of dealings between the parties could be informative as to the parties' intent in drafting the *Black Widow* contract.<sup>115</sup> In cases in which parties continually enter into agreements with each other and the series of contracts are substantially the same, the party arguing for an *ex ante* interpretation of the contract language could point to the course of dealings<sup>116</sup> to claim that the consistency of language used in the contracts demonstrates understanding of the language by which the parties intended to be bound.<sup>117</sup>

On the other hand, the party arguing for an *ex post* interpretation of the disputed term could claim that the use of consistent terminology in a series of long-term contracts could be intended to provide a flexible standard, which could save costs of specification.<sup>118</sup> When multiple long-term contracts have been agreed upon and performed and the possibility remains for additional future contracts of a similar nature to be drafted, it may be reasonable to believe that the parties could know of potential disruptions that could affect the course of one contract's performance.<sup>119</sup> Moreover, when parties are

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113. The contract at issue was dated as of May 9, 2017, and executed in 2019 "after years of extensive negotiation" in which Johansson was represented by "highly sophisticated entertainment lawyers and agents who had negotiated hundreds of motion-picture agreements." Defendant's Motion, *supra* note 96, at 7.

114. Johansson first portrayed the character "Black Widow" in 2010 and went on to reprise that role in six more films prior to *Black Widow*. See Complaint, *supra* note 93, at 3.

115. See Ottinger, *supra* note 27, at 780–81 ("Courts consider that one of the best ways to determine what parties intended in a contract is to examine the method in which the contract was performed, particularly if performance has been consistent for a period of many years. The manner in which parties have construed and thereby administered their own contract will be given weight by the court which is later called upon to resolve a contractual dispute between the parties.").

116. "A 'course of dealing' is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." U.C.C. § 1-303(b) (AM. L. INST. & UNIF. L. COMM'N 2021).

117. See, e.g., *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 644 F.2d 772, 779 (9th Cir. 1981); see also U.C.C. § 1-303(d) (AM. L. INST. & UNIF. L. COMM'N 2021) ("A course of performance or course of dealing between the parties . . . is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.").

118. See, e.g., Steven Shavell, *On the Writing and the Interpretation of Contracts*, 22 J.L. ECON. & ORG. 289, 289 (2006) ("To explain why parties write such incomplete contracts, it is frequently suggested that many eventualities are hard to anticipate or describe in advance and that leaving out details saves time and effort.").

119. See Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 5–6 n.28 ("Professor Palay has suggested that parties with 'strong relational ties' do not worry about a contract's initial terms. Instead, they assume that the contract will be adjusted in light of changed circumstances."); *id.* ("Since the costs of drafting, monitoring, and enforcing a once-and-for-all agreement outweigh the

continuously engaged in the industry and generally aware of technological advances that members of the industry would reasonably believe could eventually affect terms of their agreements, defendants could argue that the choice to not update the specific language and to instead rely on an industry-standard interpretation in negotiations demonstrates the intent to allow for judicial discretion in interpreting the language if the industry standard does in fact shift during the course of performance.<sup>120</sup>

Similar situations have been addressed by courts in the past in cases such as *Oglebay Norton Co. v. Armco, Inc.*,<sup>121</sup> in which the parties entered into a long-term contract for the shipment of iron ore.<sup>122</sup> The parties established a shipping rate based on a specific rate that was published in an industry magazine and that usually represented the price that a leading iron ore shipper charged for a similar service.<sup>123</sup> Nearly thirty years after the contract was executed, the contract pricing mechanisms failed, and Armco claimed the contract was no longer enforceable because the contract had failed to meet its purpose due to the complete breakdown of the rate-pricing mechanisms.<sup>124</sup> However, the evidence demonstrated a long-standing and close business relationship between the parties; the evidence further showed that the parties “contractually recognized Armco’s vital and unique interest in the combined dedication of Oglebay’s bulk vessel fleet, and the parties recognized that Oglebay could be required to ship up to 7.1 million gross tons of Armco iron ore per year.”<sup>125</sup> Therefore, the court found that the parties intended to be bound by the terms of the contract despite the failure of its pricing mechanisms.<sup>126</sup>

Based on the parties’ course of dealings and prior precedent regarding long-term contracts, a party seeking an ex post interpretation of the contract term may point to the relationship between the parties.<sup>127</sup> That party may then claim that, at the time of contracting, each party had a reasonable expectation that the other would act consistently with its interests by being flexible and cooperating to preserve the relationship if and when the circumstances surrounding the agreement at or after the time of contracting were changed.<sup>128</sup>

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benefits, it is far more efficient to cross bridges as they are reached.” (citing Thomas M. Palay, *A Contract Does Not a Contract Make*, 1985 WIS. L. REV. 561, 562)).

120. See Shavell, *supra* note 118, at 311 (“[S]ince the parties do not bear the costs to the court of engaging in interpretation, the parties might specify socially excessive interpretation to the degree that they can control the amount of interpretation.”); see also Hanoch Dagan & Ohad Somech, *When Contract’s Basic Assumptions Fail*, CAN. J.L. & JURIS. (forthcoming 2021) (manuscript at 9) (“Parties, to be sure, may deliberately choose to have some risks allocated ex-post.”).

121. 556 N.E.2d 515 (Ohio 1990).

122. See generally *id.*

123. *Id.* at 518.

124. *Id.*

125. *Id.* at 519.

126. *Id.* at 521.

127. See Hillman, *supra* note 119, at 7.

128. See *id.*

## 2. Contracts of Adhesion

This section explores contracts of adhesion under which one party will have little to no bargaining power and will enter a contract entirely drafted by the other party. Part II.A.2.a looks specifically at recent higher education contract disputes between students and universities. The pandemic shut down in-person learning during the 2020 spring semester, and many students claimed that the refusal by universities to partially refund tuition for the semester constituted a breach of their contracts with the universities, as the students claimed the agreements provided for in-person education.<sup>129</sup> Part II.A.2.b then addresses contracts of adhesion in general and reasons that the shorter time frame of many contracts of adhesion—compounded with the lack of negotiating power by one party to the agreement—could demonstrate that the parties had no intention to allow for the updating of industry standards within the term of the contract.

### *a. Higher Education: In-Person Tuition and Fees for Remote Learning*

When universities were forced to move to remote learning to abide by stay-at-home orders in March 2020, many students felt that they were deprived of the in-person education for which they had paid.<sup>130</sup> Students claimed that they contracted for an in-person education based on an expectation that the universities would provide an education consistent with the general understanding of an in-person semester.<sup>131</sup>

Universities refused to partially refund tuition to the students, which led to a series of lawsuits in which students claimed that there was a breach of contract based on their belief that payment of their full tuition was intended to contract for the expected full semester of in-person education.<sup>132</sup> The universities argued that the pandemic forced a shift to remote learning across the higher-education industry and that the education they provided was consistent with the in-person education for which the students had paid.<sup>133</sup>

Some courts have determined that it is not unreasonable to employ a standard of reasonable expectation and to give a contract the meaning that the party making the manifestation (the university) should reasonably expect the other party (the student) to give it.<sup>134</sup> While some courts have found that

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129. See *infra* Part II.A.2.a.

130. See, e.g., *In re Boston University COVID-19 Refund Litig.*, 511 F. Supp. 3d 20 (D. Mass. 2021); *In re Columbia Tuition Refund Action v. Pace Univ.*, 523 F. Supp. 3d 414 (S.D.N.Y. 2021); *Barkhordar v. President & Fellows of Harvard Coll.*, 544 F. Supp. 3d 203 (D. Mass. 2021).

131. See *supra* note 130 and accompanying text; *Rosado v. Barry Univ. Inc.*, 499 F. Supp. 3d 1152, 1157 (S.D. Fla. 2020) (“The Court agrees with Rosado that there is sufficient factual content alleged in the Amended Complaint to establish the existence of a valid contract with respect to in-person education.”); see also *Metzner v. Quinnipiac Univ.*, 528 F. Supp. 3d 15, 22 (D. Conn. 2021) (“According to Plaintiffs, Quinnipiac’s default or customary mode of educational delivery is to provide in-person instruction . . .”).

132. See *supra* notes 130–31.

133. *Id.*

134. See, e.g., *In re Boston University COVID-19 Refund Litig.*, 511 F. Supp. 3d at 24.

the students were unable to identify a specific contractual promise to provide in-person educational instruction in exchange for students' tuition and fees,<sup>135</sup> others have held that students were able to adequately allege the existence of an agreement between the parties for an in-person experience for the entire spring 2020 semester.<sup>136</sup> Additionally, many disputes still have not been decided, and additional court decisions about interpreting these education contracts would provide more clarity about how an industry adapting to the COVID-19 pandemic will affect contract interpretation during the performance of the contract.<sup>137</sup>

*b. Contracts of Adhesion in General*

The agreements between universities and students illustrate a different form of contracts than the bargained-for agreements used in the entertainment industry. A contract of adhesion describes a standard-form contract prepared by one party, to be signed by the party in a weaker position, with the weaker party having little to no choice about the terms.<sup>138</sup> Courts have largely recognized a contractual relationship between students and their universities,<sup>139</sup> and the drafting of the agreement is generally at the full discretion of the university.<sup>140</sup> The contract terms that govern the agreement are generally determined based on "the school's handbooks, policy manuals, brochures and other promotional materials."<sup>141</sup> Courts interpreting these terms are to employ the standard of reasonable expectation, which is the meaning the university, as the party making the manifestation, should reasonably expect the student to give it.<sup>142</sup>

Parties could argue that because expectations are driven entirely by the prevailing practice, the understanding is that the university will conform to

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135. *See, e.g.,* Fedele v. Marist Coll., No. 20 CV 3559, 2021 WL 3540432, at \*4–6 (S.D.N.Y. Aug. 10, 2021).

136. *See, e.g.,* Durbeck v. Suffolk Univ., 547 F. Supp. 3d 133, 146 (D. Mass. 2021).

137. *See* Salerno v. Fla. S. Coll., 488 F. Supp. 3d 1211, 1214 (M.D. Fla. 2020) (holding plaintiff adequately pled a breach-of-contract claim and denying motion to dismiss); *see also id.* ("This case is novel in the sense that there is no legal precedent in involving a pandemic's impact on a school's promise to provide in-person learning when doing so would be unsafe and/or against government mandates. And so, like the ripple in a pond after one throws a stone, the legal system is now feeling COVID-19's havoc with the current wave of class action lawsuits that seek tuition reimbursement related to forced online tutelage.").

138. *See Contract, supra* note 81.

139. *See, e.g.,* DMP v. Fay Sch. *ex rel.* Bd. of Trs., 933 F. Supp. 2d 214, 223 (D. Mass. 2013) ("Massachusetts law has long recognized that in the context of private education, there is a contractual relationship between the school and the student."); *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499, 504 (Ct. App. 1972) ("The basic legal relation between a student and a private university or college is contractual in nature."); *Wickstrom v. N. Idaho Coll.*, 725 P.2d 155, 157 (Idaho 1986) ("It is by now well-settled that the principal relationship between a college and its students is contractual.").

140. *See* Jonathan Flagg Buchter, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253, 265 (1973) ("[S]ince the institution maintains exclusive control over the drafting of the contract terms, the logic applied to contracts of adhesion could be employed.").

141. *See* Omori v. Brandeis Univ., 533 F. Supp. 3d 49, 54–55 (D. Mass. 2021).

142. *See* Schaer v. Brandeis Univ., 735 N.E.2d 373, 378 (Mass. 2000).

that prevailing industry practice.<sup>143</sup> In contracts of adhesion, it seems less plausible that the parties intended the standards to change over time, as the student party's decision to contract is based on what the student knows at the time of contracting and what the students reasonably expects are the terms of the agreement.<sup>144</sup> Without a showing to the contrary, it may be unlikely that both parties contemplated that the prevailing industry standard would change over the course of performance and that a university would be responsible for changing performance within the limited life of the contract.

In viewing education contracts and other contracts of adhesion, courts generally construe ambiguous terms of the contract against the party who wrote the terms, reasoning that the drafter's advantage in unilaterally drafting the contract should have resulted in clear expressions of the drafter's intent.<sup>145</sup> Where the student, as the party lacking bargaining power, claims a reasonable understanding of the ex ante industry standard of an in-person education, a court more likely would apply that interpretation in enforcing the agreement.<sup>146</sup> Seeking an ex post interpretation of a shifting industry standard against the party without the drafting power would likely create further inequalities; the party that was unable to specify the exact terms of the agreement in the first place would be required to perform a contract that it did not expect to perform.<sup>147</sup>

Contracts in higher education also differ from entertainment contracts in terms of the length of time in which the parties are involved in the agreement,<sup>148</sup> which could be relevant in determining the most reasonable interpretation of a contract term. Unlike in cases of bargained-for contracts that are negotiated over, and last for, a period of several years,<sup>149</sup> students typically have a limited period of time in which they may accept the terms of the agreement.<sup>150</sup> Students also rarely have any power to negotiate with the university and must accept the terms as drafted in order to attend.<sup>151</sup> The period of time in which the parties are bound by the contract is also typically shorter than that of an entertainment contract, as students typically agree to be bound to the contractual relationship when they enroll and pay tuition,

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143. See *supra* Part II.A.2.a.

144. See *supra* Part II.A.2.a.

145. See Buchter, *supra* note 140, at 264; see also Ottinger, *supra* note 27, at 787–88.

146. See Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 292 (1999).

147. See Ethan J. Leib & Steve Thel, *Contra Proferentem and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773, 780–82 (2015).

148. See *infra* note 150 and accompanying text.

149. See *supra* notes 113–14 and accompanying text.

150. Once a university extends an offer to a student, the student ordinarily has a deadline before which they must commit to attending the university, typically with the submission of an online form or letter of intent and a tuition deposit. See Justin Berkman, *College Decision Day: How to Notify Colleges*, PREPSCHOLAR: ONLINE SAT/ACT PREP BLOG (Dec. 18, 2015, 7:00 PM), <https://blog.prepscholar.com/college-decision-day> [<https://perma.cc/Z2CX-ZLPA>].

151. See *supra* note 140 and accompanying text.

which binds the parties for the semester or academic year.<sup>152</sup> The contracts between students and universities can be characterized as short-term contracts that are shorter than the likely term of their relationship.<sup>153</sup>

The shorter fixed time frames in which the parties are involved prior to executing the contract and the limited period in which the parties intend to be bound by the agreement could point toward a reasonable presumption that neither party intended to allow for updated industry standards to alter the meaning of the contract.<sup>154</sup> By applying a court-determined interpretation of a contract term, which neither party intended at the formation of the contract, courts could risk threatening freedom of contract and could produce uncertainties for future contracts.<sup>155</sup> On the other hand, in long-term bargained-for contracts, a presumption that the parties negotiated and planned for a specific promise and therefore assumed the risk of changing circumstances often exists.<sup>156</sup>

### B. Taking a Look at Contract Language

While the type of contract that the parties entered into is informative of how the industry standard would be interpreted, the fundamental rule that contract interpretation generally begins with the plain language of the contract remains.<sup>157</sup> Parties may incorporate industry standards into the agreement in several ways. For example, contract language may explicitly reference an industry standard, include a term that a party purports to be a substantive standard, or incorporate the standard by default without any reference to it.<sup>158</sup> The language that the parties choose to include in the contract could be viewed as a determining factor for how a court should interpret the contract based on industry standards. This section looks at examples of contract language that could provide for different interpretations of industry standards.

#### 1. Actual References to Industry Standards

In drafting a contract, parties sometimes choose to explicitly reference industry standards to define an average rate for the particular service or good,

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152. See generally K.B. Melear, *The Contractual Relationship Between Student and Institution: Disciplinary, Academic and Consumer Contexts*, 30 J. COLL. & UNIV. L. 175 (2003); see also *Paynter v. N.Y. Univ.*, 319 N.Y.S.2d 893, 894 (App. Term 1971) (“[A] student contracts with a college or university for a number of courses to be given during the academic year.”).

153. See Maija Halonen-Akatwijuka & Oliver Hart, *Short-term, Long-term, and Continuing Contracts 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 21005, 2015) (describing short-term contracts as those that are shorter than the likely term of their relationship). Since students enter their contracts at each tuition payment for a time frame of typically one academic year or semester, each short-term contract is shorter than the anticipated multiyear student university relationship. See *id.*

154. See Hillman, *supra* note 119, at 2–3.

155. See *id.*

156. See *id.*

157. See RESTATEMENT (SECOND) OF CONTS. § 202 (AM. L. INST. 1981).

158. See *infra* Part II.B.

the quality of workmanship, or the way in which the parties will fulfill their contractual obligations.<sup>159</sup> In *Oglebay*, the parties agreed to set their rates based on an industry standard, and the contract language indicated clear intent to be bound to that standard regardless of changes during the life of the contract.<sup>160</sup> The court found that the parties intended to be bound by those explicitly stated standards and that, upon the failure of the contract pricing mechanisms, the price would be the reasonable price at the time of delivery if the price is to be fixed based on an agreed upon market or other standard.<sup>161</sup>

Parties may also choose to reference industry standards by using terms such as “commercially reasonable efforts,” “best efforts,” and other similar standards.<sup>162</sup> In these cases, courts frequently apply a reasonableness test, which will often be based on the particular facts and circumstances of the situation presented.<sup>163</sup> Courts may look to external standards or circumstances and need not limit themselves to the express terms of the contract to define these industry standards.<sup>164</sup> Based on a court’s application and interpretation of these explicit industry standards, it appears more likely that where parties explicitly reference industry standards in the agreement, the parties intended to be bound to the industry standard regardless of industry shifts during the course of the agreement.

## 2. Substantive Standards Interpreted as Industry Standards

In other contracts, parties may claim that the interpretation of industry standards should be applied even where the existing language may seem to state a substantive standard. In the *Black Widow* case, Johansson argued that the term “wide theatrical release” included in the contract was understood throughout the industry to refer to an industry standard that required an *exclusive* theatrical release.<sup>165</sup> While “wide theatrical release” was specified in the agreement as “no less than 1,500 screens,” which could seem to state a substantive standard, Johansson claimed that this happened to be an industry standard.<sup>166</sup>

A court could read a substantive standard as being a clear and explicit contract term; a court may further deem such term unambiguous.<sup>167</sup> On the other hand, claiming that a term should be interpreted according to industry

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159. *What Is the Relevance of “Industry Standards” Under the Law?*, HG.ORG LEGAL RES., <https://www.hg.org/legal-articles/what-is-the-relevance-of-industry-standards-under-the-law-36794> [<https://perma.cc/DQW3-YEEA>] (last visited Apr. 2, 2022).

160. *Oglebay Norton Co. v. Armco, Inc.*, 556 N.E.2d 515, 519 (Ohio 1990).

161. *Id.* (citing RESTATEMENT (SECOND) OF CONTS. § 33 cmt. E (AM. L. INST. 1981)).

162. *See Best Efforts, Commercially Reasonable Efforts, and Reasonable Efforts Provisions in Commercial Contracts*, LEXISNEXIS (May 23, 2019), <https://www.lexisnexis.com/supp/largelaw/no-index/coronavirus/commercial-transactions/commercial-transactions-best-efforts-commercially-reasonable-efforts-and-reasonable-efforts-provisions-in-commercial-contacts.pdf> [<https://perma.cc/5WE8-XS3H>].

163. *See id.*

164. *See id.*

165. *See supra* notes 97–98 and accompanying text.

166. *See supra* notes 97–98 and accompanying text.

167. *See supra* Part I.A.2.

standards could allow a party to claim that the contract term is ambiguous, which would lead a court to apply rules of contract interpretation to determine the meaning of the term.<sup>168</sup> However, when unambiguous contract language exists, courts usually interpret the words of the contract according to their common and generally accepted meaning if the contract does not otherwise specify.<sup>169</sup> If parties claim in litigation that an industry standard replaces a substantive standard that they had negotiated for, it could appear that they are claiming an industry standard to avoid enforcement of the literal term. This would likely run counter to the purpose of contract interpretation.<sup>170</sup> Consequently, where a substantive standard exists and is defined in the contract, it seems unlikely that a court would choose to apply an industry standard that contradicts the contract's plain language.<sup>171</sup>

### 3. Industry Standards Incorporated by Default

While some contracts include explicit language referring to industry standards and others include substantive language that a party then claims embodies an industry standard, some do not include any language referencing the industry standards by which the contract will be performed. In these cases, in which industry standards are applied in interpretation, a party may claim that the standards were incorporated by default.<sup>172</sup>

Contracts between students and universities are likely examples of such agreements. In the cases addressed previously, students did not claim that the agreement they entered into with the school explicitly referenced an industry standard or that other specific language in the contract could be purported to be an industry standard.<sup>173</sup> As one court has noted, these education contracts are “often set forth in a combination of the school’s handbooks, policy manuals, brochures and other promotional materials.”<sup>174</sup>

It is possible that where neither party includes reference to industry standards or even substantive language that could be purported to point to industry standards, demonstrated intent to be bound by industry standards possibly may not exist.<sup>175</sup> Where the parties are not aware of the usage of industry standards or are not familiar and involved in the industry, courts may be less inclined to enforce an industry standard interpretation.<sup>176</sup> However, in cases in which the party wholly responsible for drafting a contract of adhesion is aware of the industry standards and is engaged in the relevant industry, the other party to the agreement could claim that the acceptance of

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168. *See supra* Part I.A.2.

169. *See* Storino, Ramello & Durkin v. Rackow, 45 N.E.3d 307, 313 (Ill. App. Ct. 2015).

170. *See supra* Part I.A.

171. *See supra* notes 25–32 and accompanying text.

172. *See infra* notes 173–74.

173. *See supra* Part II.A.2.i.

174. *See* Omori v. Brandeis Univ., 533 F. Supp. 3d 49, 54–55 (D. Mass. 2021).

175. *See supra* Part I.A.3.

176. *See* U.C.C. § 1-303(g) (AM. L. INST. & UNIF. L. COMM’N 2021).



the terms was based in part on an understanding that the industry standard was incorporated by default.<sup>177</sup>

It seems unlikely that there can be an overarching resolution based on the form the industry standard takes in the contract language or even the type of contract. The multiple possibilities presented appear to show the necessity of reviewing all aspects of the contract to determine a reasonable interpretation of an industry standard and if or why it should be incorporated.

### III. LOOKING FORWARD: A UNIFORM APPROACH

While industry shifts can change the understanding of an industry standard, the potential implications of applying an ex post standard give reason to support general enforcement of the ex ante interpretation of the contract terms. Rapid shifts within an industry, such as those addressed in this Note, are often unexpected and are often the product of necessity.<sup>178</sup> Parties and courts can almost never be certain as to the timing of the shift—how long the shift will last, whether the industry will revert to the ex ante standard, or if the standard will shift yet again.<sup>179</sup> This raises uncertainties regarding both the point at which the industry standard should be fixed and how to universally apply this interpretation standard.<sup>180</sup>

While an ex ante interpretation of a contract term promotes certainty in application, that interpretation still may disproportionately prejudice one party.<sup>181</sup> This raises questions as to which party should bear the burden of performing to meet an ex ante standard when the industry dictates a different standard.<sup>182</sup> Additionally, where industries shift specifically due to a matter of public health, such as a pandemic, additional public health implications of performing to meet the ex ante standard may arise.<sup>183</sup> However, these situations are highly case-specific and may be better suited for applications of the doctrines of impossibility or impracticability and wherein a general application of an ex ante standard may be unreasonable.

This part also addresses how the issues discussed in this Note may be applied outside the context of the COVID-19 pandemic. While industries are learning to adapt and attempting to settle into the new normal created by the COVID-19 pandemic,<sup>184</sup> the pandemic is likely not the last industry-shifting event we will encounter in the near future.<sup>185</sup> Based on existing research, it appears that industry-shifting events will be more prevalent in the future due to both rapid technological advancements and expected future pandemics,

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177. *See supra* Part II.A.2.b.

178. *See, e.g., supra* Parts II.A.1.a, II.A.2.a.

179. *See infra* Part III.A.

180. *See infra* Part III.A.

181. *See infra* Part III.B.

182. *See infra* Part III.B.

183. *See infra* Part III.B.

184. *See supra* note 74 and accompanying text.

185. *See infra* Part III.C.

and similar issues of contract interpretation could arise in light of these events.<sup>186</sup>

### A. Timing

In situations like the COVID-19 pandemic, in which an industry is forced to shift seemingly overnight, it is unknown how long the shift will last and whether that shift will be permanent.<sup>187</sup> While industry experts may look to earlier trends to speculate as to the permanence of the change,<sup>188</sup> it is just as possible that the industry shift will be temporary. While some experts believe that the entertainment industry is inevitably headed toward a more permanent shift to streaming services even post-pandemic,<sup>189</sup> there is some indication that a slight return to normal may precede any sort of permanent change.<sup>190</sup> On the other hand, universities and colleges have already resumed in-person education, with less indication that education will be forced toward a permanent shift of the overall industry standard.<sup>191</sup>

When an industry has experienced an expected shift at a greatly accelerated pace, it is also possible that the industry could settle at a middle ground between the *ex ante* and *ex post* industry standards once the initial event subsides.<sup>192</sup> Additionally, where an industry standard shifts and then resolves to the original standard during the course of performance of a contract or goes back as soon as the contract is completed, parties would have to decide which point in the life of the contract would bind the relevant industry-standard interpretation of the agreement. In each case, the moment of adjudication would significantly affect how the courts would interpret the contract term, and the standard could become arbitrary in application. Without a point at which the standard is fixed, parties could face uncertainty over what they are agreeing to by including industry standard terms, and they may experience a loss of autonomy to contract. Due to these factors, this Note contends that a fixed point at which the standard is interpreted is

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186. *See infra* Part III.C.

187. *See* Alexander W. Bartik et al., *The Impact of COVID-19 on Small Business Outcomes and Expectations*, 117 PROC. NAT'L ACAD. SCI. 17,656, 17,662 (2020).

188. *See id.*

189. *See supra* notes 111–12 and accompanying text.

190. *See* Danny Dorling, *When Will Life Return to Normal After the Pandemic?*, THE CONVERSATION (Dec. 2, 2021, 8:04 AM), <https://theconversation.com/when-will-life-return-to-normal-after-the-pandemic-172726> [<https://perma.cc/NQ8T-SRX9>].

191. *See* Adam Weinberg, Opinion, *5 Ways COVID-19 Will Change Higher Education Forever, and How Colleges Can Adapt*, USA TODAY (Aug. 4, 2020, 11:27 AM), <https://www.usatoday.com/story/opinion/2020/08/04/how-covid-19-change-higher-education-long-term-column/5571095002/> [<https://perma.cc/5TXA-LT58>] (outlining five ways in which higher education may feel the lasting effects of the pandemic, focusing on student and parent sentiment toward value of education, access to remote instruction, and potential growth of some universities' brands).

192. *See* Janna Anderson et al., *Experts Say the "New Normal" in 2025 Will Be Far More Tech-Driven, Presenting More Big Challenges*, PEW RSCH. CTR. (Feb. 18, 2021), <https://www.pewresearch.org/internet/2021/02/18/experts-say-the-new-normal-in-2025-will-be-far-more-tech-driven-presenting-more-big-challenges/> [<https://perma.cc/S4NN-BQFE>].

required to maintain a uniform approach to interpretation and for parties to maintain their freedom to contract.

*B. A Matter of Fairness and Public Health*

While promoting an ex ante standard for the interpretation of contract terms may address the issue of timing, it may raise additional public policy issues. Generally, contract interpretation seeks to promote parties' freedom to contract, and courts are often reluctant to unilaterally reform a contract to make it "better."<sup>193</sup> A court may therefore be more inclined to promote situations in which both parties claim they are able to perform to meet the terms of the contract, as a court often will only excuse performance in narrow circumstances where the parties are fully unable to perform.<sup>194</sup> However, this section argues that, even when it is possible to perform to meet an ex ante standard, it may not always be the most efficient solution.

Although it may be beneficial to promote contract enforcement, the acceptance of an ex ante standard for interpretation could be prejudicial to the party forced to perform to a standard that is, likely for valid reasons, not currently held throughout the industry.<sup>195</sup> This raises the question of which party should bear the burden of having to perform to meet the standard at the time of formation when the industry dictates a different standard. Often, when circumstances surrounding a contract change and become adverse to a party's interest, the contract term is still enforced, as there is a presumption that over the course of bargaining and negotiation the parties assumed that risk.<sup>196</sup> However, when the changing circumstance could not have reasonably been anticipated by either party during the period of contract formation, it may be untenable to argue that either party should have reasonably assumed such risk.

In disputes such as entertainment contracts for theatrical releases, an ex ante exclusive theatrical release standard—such as the standard Johansson claimed in her case—could require producers to release a movie exclusively in theaters while theaters were still closed, at limited capacity, or even open but with reduced turnout.<sup>197</sup> While *Black Widow* was seen as a box office success nearing pre-pandemic levels,<sup>198</sup> other films, especially releases not

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193. 17A AM. JUR. 2D *Contracts* § 329 (2022).

194. See Thomas J. Hall, *Defenses of Impossibility of Performance and Frustration of Purpose*, N.Y.L.J., Oct. 19, 2017 ("Courts apply the doctrine [of impossibility] narrowly . . . . The related doctrine of frustration of purpose may apply more broadly, but only where it would make little sense to perform on a contract because of an intervening event.").

195. See *infra* notes 197–204 and accompanying text.

196. See Hillman, *supra* note 119, at 2.

197. See *supra* Part II.A.1.b; see also Jake Coyle, *Who's Going Back to the Movies?: So Far, Not Everyone*, AP NEWS (Nov. 11, 2021), <https://apnews.com/article/coronavirus-pandemic-entertainment-lifestyle-business-arts-and-entertainment-a4e505df1bcff8717662721521f282a> [<https://perma.cc/UP9R-5V5Y>].

198. See Scott Mendelson, *Box Office: 'Black Widow' Is Either 2021's Most Successful Disappointment or Its Most Disappointing Success*, FORBES (Aug. 10, 2021, 4:15 PM), <https://www.forbes.com/sites/scottmendelson/2021/08/10/box-office-black-widow-marvel->

based on existing intellectual property, would be more likely to experience the heavy impact of the pandemic.<sup>199</sup> In the case of entertainment contracts under which the actor receives a fixed rate,<sup>200</sup> the production company performing to meet an ex ante standard would likely be disproportionately impacted while the actor would feel essentially no impact. It may therefore be unreasonable, even when it is possible, to enforce an ex ante standard, where one party would be unduly burdened by the performance that the party agreed to prior to the changed circumstances. On the other hand, an ex post standard could be considered unreasonable when an actor's pay is based entirely on theatrical box office revenue and when the production company is held to an ex post standard allowing for other sources of revenue for the motion picture outside the theatrical release.

In cases of shifts in industry standards, one party is often more affected than the other.<sup>201</sup> One party may be more likely to reasonably expect altered performance due to a history of negotiation or level of experience in the industry.<sup>202</sup> In the case of contracts of adhesion, a court may be more inclined to apply the rule of contra proferentem, which says that ambiguous language should be construed against the interests of the party that drafted the language, regardless of whether that interpretation prejudices that party more.<sup>203</sup> In bargained-for contracts, courts may look at the history of negotiation to determine whether one party may have more reason to intend to be bound to an updated standard.<sup>204</sup> These opposing hypothetical situations indicate that interpretation requires a case-specific inquiry as to whether performance would truly be unjustifiably prejudicial to one party over the other. These situations also indicate that a general application may be unreasonable. This Note reasons that when there is no clear determination as to whether one party should reasonably bear the burden of shifted standards, excusing the party from performing the contract may therefore be more fitting than enforcement of an ex ante standard.

Additionally, potential public health effects of the enforcement of an ex ante interpretation may exist, particularly in the case of a pandemic.<sup>205</sup> In cases of certain contracts, public policy implications at the point of interpretation should be considered.<sup>206</sup> When enforcement would be counter to public health interests during the pandemic, courts have used interpretation

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most-successful-disappointment-or-its-most-disappointing-success/ [https://perma.cc/B8VJ-GP8S].

199. See Coyle, *supra* note 197.

200. See generally Darlene C. Chisholm, *Profit-Sharing Versus Fixed-Payment Contracts: Evidence from the Motion Pictures Industry*, 13 J.L. ECON. & ORG. 169 (1997).

201. See *supra* Parts II.A.1.a, II.A.2.a.

202. See *supra* Part II.A.1.

203. See Leib & Thel, *supra* note 147.

204. See Browning Jeffries, *Preliminary Negotiations or Binding Obligations?: A Framework for Determining the Intent of the Parties*, 48 GONZ. L. REV. 1, 3–4 (2012–13).

205. See David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 1002–05 (2021).

206. See *id.*

to skirt around certain contract provisions.<sup>207</sup> Historically, during times of widespread disease and health emergencies, courts still applied a general public health exception to performance, even when a party's performance was clearly neither impossible nor impracticable.<sup>208</sup> However, matters of public health are likely addressed through doctrines that allow for a party to be excused from contract performance because while courts may want to enforce contracts as written,<sup>209</sup> they are unlikely to do so when there are clear public health implications to performance.<sup>210</sup>

### C. Why Does This Matter?

While current contracts are still affected by the COVID-19 pandemic, a common expectation of an eventual return to some form of normalcy exists.<sup>211</sup> The COVID-19 pandemic brought to the forefront issues of prevailing industry standards and the time in which the standard is binding,<sup>212</sup> and these implications will likely apply to contract law well beyond the specific events of this pandemic.

Advances in technology have made industries more volatile than ever before,<sup>213</sup> and as businesses attempt to keep up with these changes, long-term contracts may end up seeming more ambiguous and facing more uncertainties. Scholars have referred to a “Law of Accelerating Returns,”<sup>214</sup> proposed by Ray Kurzweil, in which the rate of change in a wide variety of evolutionary systems—including but not limited to technological growth—tends to increase exponentially.<sup>215</sup> Kurzweil claims that whenever a technology encounters an obstruction a new technology will be invented to allow us to overcome that obstacle.<sup>216</sup> Technological changes and advancements have caused substantial upheaval in the past, and society may need to learn to adapt more quickly in response to changing technologies.<sup>217</sup> The length of time between the implementation of fundamentally upending

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207. *See id.*

208. *See id.* at 981.

209. *See supra* note 193 and accompanying text.

210. *See generally* Hoffman & Hwang, *supra* note 205.

211. *See* Dorling, *supra* note 190.

212. *See supra* Part II.

213. *See* Alison E. Berman & Jason Dorrier, *Technology Feels Like It's Accelerating—Because It Actually Is*, SINGULARITYHUB (Mar. 22, 2016), <https://singularityhub.com/2016/03/22/technology-feels-like-its-accelerating-because-it-actually-is/> [<https://perma.cc/F9BZ-DU7F>].

214. Ray Kurzweil, *The Law of Accelerating Returns*, KURZWEIL (Mar. 7, 2001), <https://www.kurzweilai.net/the-law-of-accelerating-returns> [<https://perma.cc/4ML8-J8EN>]. *See generally* Brian S. Haney, *The Perils and Promises of Artificial General Intelligence*, 45 J. LEGIS. 151 (2018); Robert D. Kalinoski, *The Role of Law in Our Technological World*, 33 MD. BAR J. 3 (2000); Ian Samuel, *The New Writs of Assistance*, 86 FORDHAM L. REV. 2873 (2018).

215. Kurzweil, *supra* note 214.

216. *See id.*

217. *See* Evan Selinger, Opinion, *Q&A: If Technology Improves Exponentially, Can Society Keep Up?*, BOS. GLOBE (July 15, 2021, 3:00 AM), <https://www.bostonglobe.com/2021/07/15/opinion/qa-if-technology-improves-exponentially-can-society-keep-up/> [<https://perma.cc/8P38-PWYX>].

technologies has been decreasing exponentially,<sup>218</sup> which may point toward more rapid and frequent industry shifts.<sup>219</sup> This could potentially lead to increased disputes about contract interpretation in industries undergoing change.

Aside from technological changes, there are also potential health-related industry-upsetting events that can be expected in the near future.<sup>220</sup> Research suggests that future pandemic risks are significant and that the view that COVID-19 is a “once in a lifetime” pandemic is not necessarily accurate.<sup>221</sup> The frequency and severity of epidemics will likely increase as a result of human activities and their impact on the environment.<sup>222</sup> Therefore, industries likely will be forced to experience rapid change and encounter similar uncertainties as to how industry-standard contract terms may be best applied. To avoid these uncertainties and inconsistencies in interpretation and based on how courts historically interpret industry standard terms, this Note proposes that the adoption of an *ex ante* industry standard is the reasonable resolution to this issue.

#### CONCLUSION

As demonstrated by the ongoing COVID-19 pandemic, questions of prevailing industry standards as applied to contracts are becoming increasingly relevant in contract interpretation. These issues bring about concerns of applicable timing, equity in contracting, and the degree to which external industry-shifting factors should affect a party’s performance obligations. Ultimately, these concerns will likely become more prevalent and necessary to address as industries in the future are forced to shift once again to accommodate novel developments. Given the current uncertainty—about both the shift forced by the pandemic and the general application of industry standards in contracts—a general application of an *ex ante* interpretation offers a clearer and more consistent solution to these current and future issues.

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218. See *The Year Man Becomes Immortal*, TIME, <https://content.time.com/time/interactive/0,31813,2048601,00.html> [<https://perma.cc/T5JD-6WRE>] (last visited Apr. 2, 2022).

219. See Tom Fisher, *Get Used to It: More Accelerated Change in Technology Is on the Way*, FORBES (Dec. 28, 2020, 8:20 AM), <https://www.forbes.com/sites/forbestechcouncil/2021/12/28/get-used-to-it-more-accelerated-change-in-technology-is-on-the-way/> [<https://perma.cc/C73M-S6VN>].

220. See Michael Penn, *Statistics Say Large Pandemics Are More Likely than We Thought*, DUKE GLOB. HEALTH INST. (Aug. 23, 2021), <https://globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought> [<https://perma.cc/98PS-9A6B>].

221. See Eleni Smitham & Amanda Glassman, *The Next Pandemic Could Come Soon and Be Deadlier*, CTR. FOR GLOB. DEV. (Aug. 25, 2021), <https://www.cgdev.org/blog/the-next-pandemic-could-come-soon-and-be-deadlier> [<https://perma.cc/777K-68WG>].

222. See *Coronavirus and Climate Change*, HARVARD T.H. CHAN SCH. OF PUB. HEALTH, <https://www.hsph.harvard.edu/c-change/subtopics/coronavirus-and-climate-change/> [<https://perma.cc/M65Z-4VLB>] (last visited Apr. 2, 2022).