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Commercial Impracticability in Contracts

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COMMERCIAL IMPRACTICABILITY IN CONTRACTS

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As a basic premise of the common law, the Latin dictum *pacta sunt servanda* commands that contracts should be performed absolutely.[1] The sanctity of a contract, manifested in a party's absolute liability for obligations assumed thereunder, is its recurring refrain. This theme is continually echoed by the judiciary.[2]

Nonetheless, when an event or a contingency[3] occurs subsequent to contract formation but prior to its performance, rendering that performance impracticable, performance is said to be excused and the contract is discharged.[4] Impracticability covers those sets

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[1] BLACK'S LAW DICTIONARY 999 (5th ed. 1979).

[2] As recently as 1985, that theme was echoed by the Court of Appeals for the Eleventh Circuit in Cook v. Deltona Corp., 753 F.2d 1552 (11th Cir. 1985). The court stated: "Contracts are born of the need for certainty. They are the merchant's exchange of serendipity for serenity, the deal upon which he can rely, for better or worse, months or years hence. A contract is insurance against change." *Id.* at 1557.

[3] A sampling of the case law indicates that the definition of "contingency" has been expanded to include recent economic and political events. *See, e.g.*, Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) (war); Neal-Cooper Grain v. Texas Gulf Sulphur, 503 F.2d 283 (7th Cir. 1974) (foreign governmental regulation); American Trading & Prod. Co. v. Shell Int'l Marine Ltd., 453 F.2d 939 (2d Cir. 1972) (interrupted trade routes—Suez Canal closure); Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (same); Glidden Co. v. Hellenic Lines Ltd., 275 F.2d 253 (2d Cir. 1960) (same); Peerless Casualty Co. v. Weymouth Gardens Inc., 215 F.2d 362 (1st Cir. 1954) (war); Aluminum Co. of America v. Essex Group Inc., 499 F. Supp. 53 (W.D. Pa. 1980) (substantial increase in cost); Iowa Elec. Light & Power v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978) (oil energy crisis & embargo); *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 405 F. Supp. 316 (J.P.M.L. 1975) (same); Lipsett Indus. v. Barth Smelting & Ref., 17 U.C.C. Rep. Serv. (Callaghan) 406 (Sup. Ct. Spec. T. N.Y. County 1975) (labor strikes); Publicker Indus. v. Union Carbide, 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975) (oil energy crisis and embargo); Mineral Park Land Co. v Howard, 172 Cal. 289, 156 P. 458 (1916) (substantial increase in cost); Mansfield Propane Gas v. Folger Gas, 231 Ga. 868, 204 S.E.2d 625 (1974) (oil energy crisis and embargo); Mishara Constr. v. Transit-Mixed Concrete, 365 Mass. 122, 310 N.E.2d 363 (1974) (labor strikes); International Paper Co. v. Rockefeller, 161 App. Div. 180, 146 N.Y.S. 371 (1914) (substantial increase in cost).

[4] *See* E. FARNSWORTH, CONTRACTS §§ 9.5-9.9 (1982); J. CALAMARI & J. PERILLO, CONTRACTS 476-515 (2d ed. 1977); Berman, *Excuse for Non Performance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963); Birmingham, *A Sec-*

of circumstances where performance is literally possible but is so radically different from that contemplated by the parties as to become impracticable.[5] This doctrine is predicated on the theory that the parties to a contract made their bargain with specific circumstances in mind, and that their basic assumptions about the world in which the contract was to be performed were thereafter upset by a contingency whose nonexistence was a basic assumption of the contract.[6] The upsetting event or unbargained-for contingency may have occurred either because the parties did not anticipate the possibility of its happening or if they did foreshadow its occurrence, they did not consider it probable. Alternatively, the parties may deliberately have failed to specify what would happen in the event of nonperformance.[7] It then becomes reasonable for the court to conclude that this contract was not intended by the parties to apply to the new set of events and that performance should be dispensed with or modified.[8]

The judicial defense of impracticability was not merely an escape mechanism from self-made contractual duties. It was a recognition that, in commercial affairs, it was sometimes unwise and unreasonable to disregard economic disruptions and political upheavals in the performance of business deals.[9] The doctrine appears to accommodate and to balance the ongoing tension between those changes a party negotiates by way of contract and those radical and unbargained-for changes which would render enforcement of the contract unwise. The inevitable conclusion reached is that the resulting contract could not have been contemplated to apply to these new events. Thus, the doctrine of impracticability seeks to

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ond Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligation in the Light of Economic Theory, 20 HASTINGS L.J. 1393 (1969).

[5] *See* J. CALAMARI & J. PERILLO, *supra* note 4, at 477-78.

[6] *See* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966); E. FARNSWORTH, *supra* note 4, § 9.5, at 675-76.

[7] *See* 6 A. CORBIN, CONTRACTS § 1331 (2d ed. 1962).

[8] *See* Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911) (railroad's duty to issue passes discharged when federal law prohibited common carriers from doing so); Cordes v. Miller, 39 Mich. 581 (1878) (landlord's duty to rebuild wooden building discharged when municipal ordinance prohibited erection of wooden buildings).

It should also be noted that, in the alternative, a court could order reformation of a contract in the form of an upward price adjustment, awarding the promisor additional compensation if he performed his contractual obligations when performance would otherwise have been excused. *See, e.g.*, Fattore Co. v. Metropolitan Sewerage Comm'n, 505 F.2d 1 (7th Cir. 1974) (limited to government contract area).

[9] *See* 6 A. CORBIN, *supra* note 7, § 1332, at 365.

balance the need to promote economic efficiency and the need to honor the contractual intentions of the parties.

Today, section 2-615[10] of the Uniform Commercial Code (the "U.C.C." or the "Code") sets the minimum requirements for excusing performance of contracts for the sale of goods. Section 261 of the Restatement (Second) of Contracts[11] adopts the U.C.C. test of impracticability for all other types of contracts. Both provisions require that the nonoccurrence of the contingency was a "basic assumption on which the contract was made." The Code has made no attempt to define or categorize those contingencies which entitle a party to claim impracticability. In their favor, it may be said that the drafters of the Code intentionally failed to name specific instances of discharge so that the courts would not be hampered by specificity.

Despite this legislative shift from the common law doctrine of impossibility to a more liberal standard of impracticability, it can be argued that the judiciary has failed to heed this liberalization.[12] A survey reviewing the case law reveals that this new terminology did not necessarily result in new thinking in the area. A single case,

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[10] U.C.C. § 2-615 (1978). Section 2-615 provides:

EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

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

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Id.

[11] RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). Section 261 states: "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." *Id.*

[12] *See* Jennings, *Commercial Impossibility—Does it Really Exist?*, 2 WHITTIER L. REV. 241 (1980); Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 NOTRE DAME L. REV. 203 (1979).

Aluminum Co. of America v. Essex Group[13] appeared as a beacon on this judicially recalcitrant landscape. In this case, the court, for the first time, rejected the legal maxim that the courts will not make a contract for the parties.[14] Instead, the court ordered a complex scheme for price determination to replace the scheme outlined in the contract.[15] Perhaps it was the court's recognition that the allocation of risks, produced by the continued judicial adherence to the common law standard of impossibility, was not satisfactory.[16] That doctrine had introduced a related difficulty, where it was no more satisfactory or equitable to hold a contract totally discharged than to hold the contract to be fully enforceable.[17] An all-or-nothing solution is, on occasion, no solution at all. The *Alcoa* court recognized that a compromise settlement was the proper and equitable solution.[18]

The basic philosophical question raised by the *Alcoa* decision was whether the courts should be permitted to rewrite the terms set forth by the parties in the contract. On the one hand, there is the recognition of the need to reform a contract when some external unforeseen event has produced a major imbalance. On the other hand, there is a legitimate fear that if the judiciary were to appropriate to itself a mandate to rewrite contract terms, its effect would be to impact negatively on the predictability and the usefulness or the *raison d'etre* of a contract.[19] Is the judiciary, as an in-

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[13] 499 F. Supp. 53 (W.D. Pa. 1980).

[14] *Id.* at 79-80.

[15] *See id.* at 80.

[16] *Id.* at 79.

[17] *Id.* at 78.

[18] *Id.*

[19] This decision divided both the courts and the legal scholars. Some legal scholars were concerned that this attempt at judicial reformation was, at best, naive and, at worst, not within the domain of the judiciary.

For scholarly reviews of the doctrine of impracticability, see generally Dawson, *Judicial Revision of Frustrated Contracts*, 1982 JURID. REV. 86; Dawson, *Judicial Review of Frustrated Contracts: the United States*, 64 B.U.L. REV. 1 (1984); Hawkland, *The Energy Crisis & Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75 (1974); Henszey, *U.C.C. Section 2-615—Does "Impracticability" mean "Impossibility"*, 10 U.C.C. L.J. 107 (1977); Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks under U.C.C. Section 2-615*, 54 N.C.L. REV. 545 (1976); Jennings, *supra* note 12; Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977); Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419 (1969); Schmitt & Wollschlager, *Section 2-615 "Commercial Impracticability": Making the Impracticable Practicable*, 81 COM. L.J. 9 (1976); Sirriani, *The Developing Law of Contractual Impracticability and Impossibility: Part I*, 14 U.C.C. L.J. 30 (1981); Sommer, stitution, better able to do so? Would this mean the death knell of "freedom of contract"? How do judges derive the power to impose contract terms without the voluntary consent of the parties? Would this mean that businessmen would be captive to judicial discretion and therefore subject to a particular judge's values? Or, should the parties be encouraged to reach compromise settlements themselves?

The purpose of this Article is to examine and analyze the case law since the enactment of section 2-615 of the Uniform Commercial Code and to attempt to formulate clear guidelines in the area of the law of impracticability. It is the further aim of this Article to review the jurisprudence since the *Alcoa* decision in 1980, and to analyze to what extent, if any, that beacon of equitable reform has been followed or extinguished. The question to be answered is whether such liberalization as permitted by the legislature has actually been achieved. Has the introduction of new terminology in the U.C.C. and the Second Restatement been more than a semantic change or is the doctrine still attached and wedded to the old juristic concepts? Some commentators have reasoned that the judicial decisions following the enactment of the Code simply prolonged the common law doctrine of impossibility rather than replaced it with a new standard.[20]

Historical Background

The early common law tolerated no deviation from the obligations set forth in the terms of the contract. This view assumed that when the parties contracted to perform, performance was to be enforced exactly as written.[21] A promise was absolute and the promisor was held accountable for his failure to perform, irrespective of

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Commercial Impracticability—An Overview, 13 Duq. L. Rev. 521 (1975); Speziale, *The Turn of the Twentieth Century as the Dawn of Contract "Interpretation": Reflections in Theories of Impossibility*, 17 Duq. L. Rev. 555 (1978-79); Squillante & Congalton, *Force Majeure*, 80 Com. L.J. 4 (1975); Wallach, *supra* note 12; Note, *U.C.C. § 2-615: Excusing the Impracticable*, 60 B.U.L. Rev. 575 (1980); Note, *Commercial Impracticability and Intent in U.C.C. Section 2-615: A Reconciliation*, 9 Conn. L. Rev. 266 (1977); Note, *U.C.C. § 2-615: Sharp Inflationary Increases in Cost as Excuse From Performance of Contract*, 50 Notre Dame Law. 297 (1974); Note, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 Nw. U.L. Rev. 1032 (1978) [hereinafter Note, *Contractual Flexibility*].

[20] Jennings, *supra* note 12, at 242; Wallach, *supra* note 12, at 229; Note, *Contractual Flexibility*, *supra* note 19, at 1033.

[21] *See* E. Farnsworth, *supra* note 4, § 9.5, at 670-71.

the reason for such failure.[22] A promise could be qualified, if at all, only to the extent expressly stipulated by the promisor in his contract. It was the promisor who assumed the risk of change. The case most often cited for this rule of absolute liability is *Paradine v. Jane*.[23] The *Paradine* court stressed that the promisor was in a better position to guard against unforeseen contingencies.[24]

Because the rigid application of the doctrine of absolute liability proved unworkable, the theory of the implied condition was developed by the courts. *Taylor v. Caldwell*[25] is the seminal case establishing the common law doctrine of impossibility. The court in *Taylor* held that, in the absence of an express term relieving either party from performance under certain circumstances, an implied condition may be found to excuse performance. The court stated: "[I]n contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[26] The *Taylor* court, in recognizing that the parties had not been sufficiently provident

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[22] *Id.*

[23] 82 Eng. Rep. 897 (K.B. 1647).

[24] *Id.* at 897. The court in *Paradine* stated: "[w]hen the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Id.*

In *Paradine*, the landlord brought an action to recover unpaid rent. The tenant raised as his defense that, because he had been dispossessed of the rented property by the invading army of an enemy, he should be excused from the obligation to pay further rental payments to the landlord. This defense was held to be insufficient at law because the promisor is made to bear the risks of performance to which he obliged himself, especially since he is in a position to guard against unforeseen contingencies.

Although there appears to be wide agreement among scholars that the rule of absolute liability is derived from *Paradine v. Jane*, one scholar argues that three cases excusing performance pre-date that case: Williams v. Lloyd, 82 Eng. Rep. 95 (K.B. 1628), where the subject matter of the contract of bailment was destroyed, Hyde v. Dean & Canons of Windsor, 78 Eng. Rep. 798 (K.B. 1557), where a party to a personal services contract died, and Abbott of Westminster v. Clerke, 73 Eng. Rep. 59 (K.B. 1536), where a supervening illegality due to a subsequent Act of Parliament excused performance. *See* Schlegel, *supra* note 19, at 422.

For a more recent statement of the rule of absolute liability, see Leavitt v. Dover, 67 N.H. 94, 95-96, 32 A. 156, 156 ("[h]aving voluntarily entered into an absolute contract, without any qualification or exception . . . at a stipulated price . . ., he must abide by his contract").

[25] 122 Eng. Rep. 309 (K.B. 1863). The contract in *Taylor* concerned the rental of a music hall for a series of performances. The hall was destroyed by a fire of unknown origin, without the fault of either of the contracting parties.

[26] *Id.* at 314.

to provide for relief, found that if the parties, at the time of contracting, had cast their minds to the happening of the contingency, the identical result would have been reached. In excusing performance, the court was merely executing the parties' intentions rather than supplanting them and imposing a judicially derived settlement. The promisor's absolute liability was not diminished, but merely made subject to compliance with implied conditions. The court did not, therefore, reject outright the theory of absolute liability, but instead reaffirmed it on its own terms.

The major criticism of the doctrine of implied conditions is its lack of a logical foundation.[27] Application of the doctrine involves judicial speculation to determine what the parties would have provided had they anticipated the event in question. Is the judiciary better equipped to divine the true intentions of the parties to the contract? The implied terms could never be based on the actual intention of the parties since no such intent had ever actually been expressed. In short, this fiction can be thought of as a judicial technique for reaching a fair and just result for individual litigants without undermining a basic tenet of the common law.

The *Taylor* rule, narrowly interpreted, stood for the postulate that the destruction of a specific thing excused performance. It remained for the English coronation cases, most notably, *Krell v. Henry*,[28] to expand this rule to encompass the nonhappening of an event, and to introduce the legal theory of frustration of purpose as a means of discharging contractual obligations without liability. In *Krell*, rooms with a view of a processional route were leased for the specific purpose of viewing the King's coronation procession. When the coronation was cancelled due to the illness of the King, the rental of the rooms remained physically possible even though the underlying purpose of the lease contract had been destroyed. The *Krell* court held that further performance, namely, the payment of the balance, was excused.[29]

This formulation, although closely related to the doctrine of impossibility, is conceptually different. Frustration of purpose is predicated on the legal premise that the supervening event is so radically and fundamentally different from the set of circum-

[27] *See, e.g.*, Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966) (doctrine of implied conditions is "fictional" and "unrealistic").

[28] [1903] 2 K.B. 740 (C.A.); *see also* Chandler v. Webster, [1904] 1 K.B. 493 (C.A.); McElroy & Williams, *The Coronation Cases I*, 4 Mod. L. Rev. 241 (1941).

[29] *Krell*, 2 K.B. at 754.

stances contemplated by the contract that the contract cannot be said to be "wide enough to apply to the new situation."[30] Where the parties' particular purpose has been frustrated by an unanticipated contingency, the parties are discharged from further performance since the bargain has lost its value. This is the focus of the English doctrine; whereas, the threshold question in American jurisprudence is whether the parties intended to be bound despite the fundamentally changed set of circumstances. The English theory has not met with wide acceptance in American case law.[31]

At the beginning of the twentieth century, the test of impracticability was introduced in *Mineral Park Land v. Howard*[32] as another measure of determining impossibility, thus excusing performance. The rule as stated in that case was that "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."[33] Until this decision, the court had never excused the promisor's performance for hardship alone, or because a contract had become unprofitable.[34] Nevertheless, for the first time, the court recognized that a contract which could not be performed except at a prohibitive cost was no different from a contract whose subject matter had been destroyed. Both types of contracts were deemed impossible to perform.[35] In *Mineral Park*, the promisor undertook to remove from the promisee's land all the gravel and earth necessary to fulfill a contract with the public authorities for the construction of a bridge. The promisor, having removed approximately half of the amount necessary for the proposed bridge, abandoned that site and obtained the remaining gravel from another source. The promisee, in an action for damages, alleged that there remained sufficient gravel to complete the contract.[36] The promisor contended that, notwithstanding that

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[30] *See* Davis Contractors v. Fareham Urban Dist. Council, [1956] App. Cas. 696, 721.

[31] *See* Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944); Crown Ice Machine Leasing v. Sam Senter Farms, 174 So. 2d 614 (Fla. Dist. Ct. App.), *cert. denied*, 180 So. 2d 656 (Fla. 1965); Perry v Champlain Oil, 101 N.H. 97, 134 A.2d 65 (1957); Wood v. Bartolino, 48 N.M. 175, 146 P.2d 883 (1944).

[32] 172 Cal. 289, 156 P. 458 (1916).

[33] *Id.* at 293, 156 P. at 460 (quoting 1 BEACH ON CONTRACTS § 216).

[34] Even after the *Mineral Park* case, the case law often refrains from excusing performance on the basis of hardship alone. *See, e.g.*, Freidco v. Farmers Bank of Del., 529 F. Supp. 822 (D. Del. 1981). *See also infra* notes 99-127 and accompanying text.

[35] *Mineral Park*, 172 Cal. at 293, 156 P. at 460.

[36] *Id.* at 290, 156 P. at 458.

fact, his performance should be excused because the remaining gravel was underwater and the cost of dredging and drying the underwater gravel was approximately ten to twelve times the expense of obtaining the same gravel above ground from another source.[37] The court, ruling in favor of the promisor, stated that the definition of "available" gravel was only that gravel which could be obtained in a practical and reasonable way.[38] An expense ten to twelve times that stipulated in the contract is more than just a hardship; rather, such a prohibitive cost is sufficient to excuse the promisor from liability for nonperformance.

Similarly, pre-Code cases have ordered upward adjustments of the contract price precisely because performance of contractual obligations in the face of impossible odds justified reformation of the contract terms. In *City of Vernon v. City of Los Angeles*,[39] the city of Los Angeles and the adjacent city of Vernon had agreed, in a series of four contracts, to transfer Vernon's sewage through the sewage system of Los Angeles for discharge in a nearby bay.[40] When a subsequent court order forced Los Angeles to abate the nuisance it had thereby created and to build a disposal plant at a cost of $41 million with $500,000 yearly operating expenses, Los Angeles attempted to have the contract declared impracticable.[41] The court held that the contract was not abrogated by this unforeseen event, and that Vernon and Los Angeles should continue the arrangement, but at a higher cost.[42] Perhaps this was an instance of a court-ordered adjustment because of the public interest involved. In another pre-Code case, *Dillon v. United States*,[43] a court similarly ordered reformation of the contract to include restitution to the promisor in the form of additional compensation for extra effort and work completed.[44] The court held that, had the seller not performed, the supervening event or the crop failure was of a kind to constitute impracticability and thereby excuse per-

[37] *Id.* at 291, 156 P. at 460.

[38] *Id.* The court stated: "[W]here the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel." *Id.*

[39] 45 Cal. 2d 710, 290 P.2d 841 (1955).

[40] *Id.* at 711, 290 P.2d at 842.

[41] *Id.* at 715, 290 P.2d at 846.

[42] *Id.* at 717, 290 P.2d at 847-48.

[43] 156 F. Supp. 719 (Ct. Cl. 1957).

[44] *Id.* at 723.

formance.[45] *Dillon* involved a contract to sell a specified quantity of hay grown in Oklahoma to a federal calvary station. After the government declared the state a disaster area due to a severe blight, the seller imported the hay from a neighboring state in order to fulfill his contractual obligations.[46] The court awarded a quantum meruit recovery in the amount of the increased cost.[47] One could easily argue that this fell within the "failure of a source" category rather than impracticability.

Thus, pre-Code case law allowed for a full discharge of a promisor's contractual obligations, reformation of the contract, or restitution of compensation to the promisor for additional benefits conferred upon the promisee. Nonetheless, how does one determine, with any degree of exactitude, the point at which increased cost crosses the boundary from the mere hardship stage to the prohibitive stage? When does a difference in degree become a difference in kind?

Modern Law of Impracticability

As the law gradually evolved from a rule of absolute liability to the standard of impracticability, the primary focus of attention turned from the fictional mental condition of the parties towards the objective criterion of practicability. As previously mentioned, the U.C.C.[48] and the Restatement (Second) of Contracts[49] have each adopted the objective test. The focal point of the present approach is to determine what risks, if any, each party to the agreement had assumed. The court must then determine whether or not the promisor had, either by the terms or the nature of the agreement, assumed the risk of the occurrence of the contingency which subsequently rendered performance impracticable. Viewed in terms of the promisor's undertaking, if it is found that the promisor had assumed such risk, the risk will be allocated to the promisor and he will not be discharged from liability for nonperformance. Conversely, where it does not appear either from the express terms of the contract or from its surrounding circumstances that

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[45] *Id.* at 722. The court asserted that, had the seller not performed, the contract would have been abrogated because of the blight. *Id.*

[46] *Id.* at 721-22. The federal government declared Oklahoma a disaster area, but the army's commanding officer insisted upon compliance with the contract terms. *Id.* at 720-21.

[47] *Id.* at 723.

[48] *See supra* note 10.

[49] *See supra* note 11.

the promisor assumed the risk of the contingency, the effect of the Code is to shift the risk to the promisee. Comments to the Code emphasize that the drafters intended the judiciary to look to the commercial context in which a problem arose rather than to apply a rule of law mechanically.[50]

Both the U.C.C. and the Restatement (Second) of Contracts made deliberate departures from the common law doctrine of impossibility by abandoning use of the term "impossibility" and replacing it with the term "impracticability."[51] Both provisions set forth three conditions to be met before performance would be deemed impracticable. First, there must be an occurrence of a contingency. Secondly, the nonoccurrence of this contingency must have been a basic assumption on which the contract was made. Lastly, performance was rendered impracticable by this occurrence. The adoption of the "basic assumption" language is demonstrative of the drafters' intention to steer away from the legal fiction of the "implied term."

Another important theoretical change was the abandonment of the foreseeability test of the First Restatement.[52] Previously, the risk of the contingency's happening had been judged by whether or not the promisor had reason to anticipate the occurrence and whether or not he was contributorily at fault for that event's happening. The question "did the promisor *assume* the risk of the contingency" had become "did the promisor *foresee* the risk of the contingency." Whether or not the tort law standard of foreseeability applied, that of the reasonable man who in like circumstances would have anticipated the supervening contingency, was unclear. What is clear is that the foreseeability test demands that the parties should have foreseen the occurrence. However, most times the parties either did not foresee the risk of occurrence as probable or,

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[50] *See* U.C.C. § 2-615 official comment 8 (1978); Hawkland, *supra* note 19, at 77. Hawkland's article quotes from the unpublished notes of Professor Karl Llewellyn, the U.C.C. draftsman. In his unpublished notes, Professor Llewellyn emphasizes the attempt by the Code to depart from the common law of impossibility and to replace it with a liberal approach to excuse contractual obligations:

> [T]he courts in the better cases have long sought to excuse the seller where his performance had become impossible or unduly burdensome but the result in any given case remained uncertain. This Act, in addition to eliminating this element of uncertainty, introduces a practical, commercial approach to the problem which has not yet been generally recognized even by the sounder cases.

Hawkland, *supra* note 19, at 77.

[51] *See supra* notes 10 and 11.

[52] RESTATEMENT (FIRST) OF CONTRACTS § 457 (1932).

because they were unable to agree as to its allocation, omitted it from the contract altogether.

Another problem frequently associated with the foreseeability test is the danger that hindsight provides a clear perspective which would view the contingency as reasonably foreseeable after the fact, even though very few might actually have envisioned its occurrence. Furthermore, the burden of proof necessary to adduce that a particular event was not foreseeable is a difficult one to discharge.

Certain inequities might arise where, in drafting a force majeure clause, events of a general kind might have been provided for, even though the particular contingency at issue was not foreseen. In such an event, the force majeure clause would operate to excuse performance even though the court's object of inquiry should have focused on whether that particular contingency was foreseeable and not whether contingencies of that type were provided for. Some doubt has been introduced as to the consequences of section 2-615 on force majeure clauses and whether that section operates to abrogate the effect of deliberate efforts made by parties to exculpate themselves from liability on the occurrence of a foreshadowed contingency. One commentator, after reviewing the notes of Professor Karl Llewellyn, the draftsman of section 2-615, suggests that its provisions do not apply to contradict the express wishes of the parties or to impair their right to assume greater liability than that imposed by the Code.[53] The provisions were designed to apply to those parties who had not made such specific provisions in their contract. This section would apply particularly to the small businessman who had not hired skilled legal advisors to assist in the drafting of such exculpatory provisions.[54]

Although the word "foreseeable" does not appear within the text of section 2-615, the official comment to this provision does employ the term "unforeseen supervening circumstances."[55] Nevertheless, there appears to be a distinction drawn between "unforeseen" supervening contingencies and "foreseeable" events. Contingencies that are unforeseen refer to actualities, that is, did the

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[53] *See* Hawkland, *supra* note 19, at 79.

[54] *See id.* at 77.

[55] *See* U.C.C. § 2-615 official comment 1 (1978). The comment states in pertinent part that, "[t]his section excuses a seller from timely delivery of goods contracted for, where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting." *Id.*

parties actually foresee the particular contingency at the time of contract, whereas the foreseeable events standard assumes a more objective test. The question then becomes whether the ordinarily prudent person, in the position of the promisor, could reasonably have been expected to foresee or predict the happening of the contingency. The "unforeseen" test would appear to impose a less rigid requirement on the parties.

It should be noted that the Second Restatement's adoption of the U.C.C. framework was entirely contrary to the First Restatement's provisions in this area. The First Restatement had devoted seventeen sections to the topic of impossibility and to the related doctrine of frustration of purpose.[56] A distinction was also drawn between objective impossibility and subjective impossibility with the former excusing liability for nonperformance, whereas the latter did not.[57]

Additionally, the First Restatement listed with specificity those contingencies which would operate to discharge the promisor from his contractual duties.[58] The Second Restatement and the Code specifically reject this strategy.[59] The drafters believed that a precise definition of the term impracticability ought not to be given and intentionally adopted somewhat nebulous standards. The law of excuse could be liberalized by granting the judiciary more discretion to apply the rule as enunciated.[60] An analysis of the case law seems to indicate that the judiciary has not grasped this great opportunity to grant the necessary relief.

CASE LAW

Since both the Code and the Restatement have specifically rejected the test of foreseeability as the only standard by which to measure impracticability, several factors are now considered significant indices, such as increased cost, foreseeability, and assumption of risk. Foreseeability alone does not *ipso facto* mean risk assump-

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[56] RESTATEMENT (FIRST) OF CONTRACTS §§ 288, 454-69 (1932).

[57] *Id.* § 455. Comment to section 455 differentiates between "the thing cannot be done" and "I cannot do it." *See* RESTATEMENT (FIRST) OF CONTRACTS § 455 (1932) official comment.

[58] *See, e.g.*, RESTATEMENT (FIRST) OF CONTRACTS (1932) §§ 458, 461 (illegality); *id.* § 459 (death of promisor); *id.* § 459 (serious illness of promisor); *id.* § 460 (physical incapacity of necessary party); *id.* § 461 (nonexistence of any other facts that the parties agreed to, either expressly or impliedly must be in existence at the time of performance).

[59] *See supra* notes 10 and 11.

[60] *See* U.C.C. § 2-615 official comment 8 (1978).

tion. Nor does increased cost by itself indicate risk allocation. Neither factor can be isolated. They are really intertwined and each seeks to answer the same question: How did the contracting parties choose to allocate risk, especially if there was no express provision in the contract, on this matter? Are drastic price variations foreseeable, or phrased differently, which of the contracting parties assumed the risk of a dramatic price swing? Whether the court prefers to state its legal holding in terms of the element of foreseeability, or in terms of the increased cost factor, the court is really making a determination as to which facts or elements are probative and dispositive of the parties' assumption of risk. Nonetheless, upon analysis of the case law following the adoption of the Code, it would appear that the courts have continued to employ the old common law "foreseeability" test despite the lack of this term in the text of section 2-615.

The first case to be adjudicated on the basis of section 2-615 was *Transatlantic Finance Corp. v. United States*.[61] In that action, the promisor, Transatlantic, had agreed to transport, at a fixed cost, a full cargo of wheat from Texas to a port in Iran for the United States government. The charter, which did not specify the route to be taken, had been executed during the Mideast Crisis of 1956. One month following contract formation, the Egyptian government closed the Suez Canal to commercial traffic. A representative of Transatlantic contacted the United States Department of Agriculture and requested instructions concerning disposition of the cargo while simultaneously seeking an agreement for additional payment to transport cargo by an alternate route, around the Cape of Good Hope.[62] Transatlantic was advised of the American government's expectation that the charter be performed according to its terms and of the government's rejection of any claim for additional compensation.[63]

Transatlantic argued that the Suez Canal blockage constituted a supervening contingency sufficient to render the contract impossible to perform.[64] Transatlantic further contended that since it had complied with the government's demand for delivery of the

[61] 363 F.2d 312 (D.C. Cir. 1966). Technically, the transaction in question occurred prior to the adoption of the Code, but the decision of Judge Skelly Wright set the tone, as well as the criteria and pattern of analysis, for subsequent decisions on section 2-615 cases.

[62] *Id.* at 314-15.

[63] *Id.* at 315.

[64] *Id.*

cargo at an additional expense of approximately fifteen percent over the originally projected price, a benefit was conferred upon the government for which the government should pay under the theory of quantum meruit.[65]

The *Transatlantic* court introduced its holding by applauding the new standard of the Code as a far more realistic theory than its predecessor, the fictional implied term test.[66] The court next repeated those elements which must converge before a finding of impracticability could be made.[67] Although the charter in *Transatlantic* did not indicate the precise route, the court held that the usual and customary route for such a voyage was via the Suez Canal, and that the closing of the Canal was an unexpected contingency.[68]

Nonetheless, the crucial issue was whether or not Transatlantic had assumed the risk of this supervening event. Transatlantic had to adduce evidence which would prove affirmatively that the risk of the contingency's occurrence had been allocated expressly by the contract or could be implied from the nature and events surrounding the contract.[69] Knowledge by the parties that the Canal might become a danger zone was recognized by the court, but the court's dilemma resided in its attempt to characterize the significance of such knowledge. Judge Skelly Wright found that "[f]oreseeability or even recognition of a risk does not necessarily prove its allocation."[70] This finding was at variance with the earlier common law position which held that an event that can be anticipated is an event that must be guarded against.[71]

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[65] *Id. Compare* City of Vernon v. City of Los Angeles, 45 Cal. 2d 710, 290 P.2d 84 (1955) *with* Dillon v. United States, 156 F. Supp. 719 (Ct. Cl. 1957) (pre-Code cases allowing quantum meruit recovery for claims against the government).

[66] *Transatlantic*, 363 F.2d at 315. To place the new test in context, the court stated: "The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance." *Id.*

[67] *Id.* The three factors considered were: (1) an unexpected contingency occurred; (2) the unexpected occurrence must not have been allocated either by agreement or by custom; and (3) that occurrence must have rendered performance commercially impracticable. *Id.*

[68] *Id.* at 316.

[69] *Id.* at 316-17.

[70] *Id.* at 318.

[71] For the first time, the court recognized that:

> Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy. Moreover, that some abnormal risk was contemplated is proba-

The court did not view the parties' implied expectation on the use of the of the Suez Canal route as dispositive of the issue of allocation to the promisee. Transatlantic was held to have assumed this risk. The court, however, did not enumerate which facts in particular led to this conclusion. Perhaps it was the fact that Transatlantic voluntarily had agreed to proceed with delivery of the cargo with full knowledge of the Canal's closure, without clear-cut instructions from the American government as to an agreement for additional compensation.[72] However, in light of these vagaries, it appears that Transatlantic had opted for the best choice available to it at the time. To return to Texas with the unloaded cargo would surely have served no one's purposes. Further, there did not appear to be a requirement that delivery be made at a specified date, nor did it appear that the cargo would be damaged by the detour.

Judge Skelly Wright suggested that the party best able to absorb the risk was Transatlantic if only because, as the owner, it was in the best position to purchase adequate insurance to cover the contingency's occurrence.[73] At most, the promisor had to assume an increased expense, rendering the transaction less profitable. Judge Skelly Wright affirmed that increased cost alone would constitute impracticability only in the rarest of circumstances. [74] His views would appear to be in congruence with the official com-

> tive but does not necessarily establish an allocation of the risk of the contingency which actually occurs.

Id.

[72] *Id.* at 314-15. The owners, Transatlantic, never ceased their required performance, nor did they argue that the contract had terminated. Logical thinking would find an internal inconsistency between a claim for additional compensation and a claim for discharge of the contract, both claims being based on the doctrine of impracticability.

[73] *Id.* at 319. The court declared:

> If anything, it is more reasonable to expect owner-operators of vessels to insure against the hazards of war. They are in the best position to calculate the cost of performance by alternative routes (and therefore to estimate the amount of insurance required), and are undoubtedly sensitive to international troubles which uniquely affect the demand for and cost of their services.

Id.

[74] *Id.* The court reasoned:

> While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone.

Id.

ment to the Code.[75] Although the *Transatlantic* court spoke in the new language of section 2-615, it seemingly reverted quickly to the common law notion of impossibility. The court held that in order for the Code to apply, the transaction has to become a nullity.[76] Can a cogent argument not be made that this decision disregarded the commercial realities of the case?

National Presto Industries v. United States,[77] although it predates the adoption of the Code's section on impracticability, is frequently cited in subsequent Code-based decisions because of its elaborate discussion of the notion of "assumption of risk." The plaintiff, National Presto, brought an action for reformation of a fixed price contract in which it sought additional compensation for the extra work necessitated in order to fulfill its obligations under a government contract.[78] The plaintiff did not seek to be excused

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[75] *See* U.C.C. § 2-615 official comment 4 (1978). This comment states:

> Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section.

Id. (citation omitted).

[76] Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 320 (D.C. Cir. 1966). The court stated:

> When performance of a contract is deemed impossible it is a nullity . . . . If the performance rendered has value, recovery in *quantum meruit* for the entire performance is proper. But here Transatlantic has collected its contract price, and now seeks *quantum meruit* relief for the additional expense of the trip around the Cape. If the contract is a nullity, Transatlantic's theory of relief should have been *quantum meruit* for the entire trip, rather than only for the extra expense . . . . There is no interest in casting the entire burden of commercial disaster on one party in order to preserve the other's profit.

Id. at 320.

[77] 338 F.2d 99 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965).

[78] *Id.* at 108. The facts of the case were somewhat unique. The government had contracted with National Presto for the production of 105-millimeter artillery shells using a novel process which would eliminate the turning procedure necessary under the conventional hot forge method, a system whereby heat had to be applied twice and any excess amounts of steel would be removed by a turning process. *Id.* at 101. During the negotiation stage preceding the formal contract there was considerable discussion about the need to include a facilities schedule for plunge grinders, the necessary turning equipment. Despite these oral discussions, there was no inclusion or mention of the plunge grinders or turning equipment in the formal contract because the government refused to make such inclusion. *Id.* at 101-02.

from performance since it had met its contractual obligations. The United States made the argument that a fixed price contract, by its very nature, meant that the promisor was to assume any risks associated with its performance, including the risk of price increases.[79]

Two judicial comments serve to highlight the unique features of the case. First, despite the government's insistence upon certain technical specifications, Judge Davis held that both parties were equally ignorant about the novel production method required under the contract and that neither had any greater technical expertise than the other.[80] Nonetheless, where government officials prepare and insist on compliance with specifications, the Court of Claims is more ready to find against the government.[81] Such specifications imported into the contract lend credence to the notion that the government had represented, and may at times even be held to warrant, that thorough adherence to these specifications was the most cost efficient. Secondly, the court held that the government was not as interested in the end product, the artillery shells, as it was in the perfection of the new manufacturing process.[82]

One of the most significant aspects of the court's holding in *National Presto* is that the fixed price nature of a contract does not *ipso facto* mean an allocation of risk or an acceptance of the entire loss by the promisor. Consideration must be given to all facts surrounding the case.[83] In addition, the *National Presto* court specifically rejected the notion that the remedy of reformation was not an appropriate one in these circumstances, and ordered that the parties share the additional cost incurred.[84]

Foreseeability was the threshold issue in *Mishara Construc-*

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[79] *See id.* at 109.

[80] *Id.* at 108.

[81] *See, e.g.*, Dillon v. United States, 156 F. Supp. 719 (Ct. Cl. 1957) (court allowed *quantum meruit* recovery for plaintiff who followed governmental instructions).

[82] *See* National Presto Indus. v. United States, 338 F.2d 99, 110 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965).

[83] *See id.* at 111-12.

[84] *See id.* The court stated:

> [I]t is equitable to reform the contract so that each side bears a share of the unexpected costs, instead of permitting the whole loss to remain with the party on whom it chanced to light . . . . Where that arrangement has allocated the risk to neither side, a judicial division is fair and equitable.

Id. at 112.

tion v. Transit-Mixed Concrete Corp.[85] The defendant in *Mishara* had negotiated to supply the plaintiff with all its concrete requirements for a housing project. When a labor dispute disrupted work, the defendant refused to make further deliveries under the contract. After work resumed, and until the project's completion approximately two years later, a picket line was constantly maintained on the plaintiff's job site. The defendant never resumed deliveries. Mishara was able to locate an alternate source of supply for the balance of its concrete requirements, but at a higher cost.[86] It sued the defendant for the additional cost it had incurred. Transit-Mixed argued that it should be relieved of its contractual obligations because of the existence of a picket line and the consequent difficulties in making deliveries, which was a contingency, the nonoccurrence of which was a basic assumption on which the contract was made.[87]

In discussing the issue of impracticability, this court fused the terminology of the English doctrine of frustration with the American common law foreseeability language. Were the unanticipated circumstances such that performance of the promise would be "vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract."[88] Specifically, "[w]as the contingency which developed one which the parties could reasonably be thought to have foreseen as a real possibility which could affect performance?"[89]

The *Mishara* court suggested that a labor dispute would not itself constitute an excuse for nonperformance but, within a certain contextual framework, it could become grounds for excuse. Ultimately, the court found that labeling a labor dispute as grounds for excuse would depend upon the parties' knowledge of the "history of and prospects for" such disputes at the time of contracting and the "severity of the effect of such disputes on the ability to perform."[90] The *Mishara* court concluded that the trend of contract law appeared to be moving towards recognizing strikes as excuses for nonperformance.[91] This conclusion would impel the infer-

[85] 365 Mass. 122, 310 N.E.2d 363 (1974).
[86] *Id.* at 124, 310 N.E.2d at 364.
[87] *See id.* at 126-27, 310 N.E.2d at 366-67.
[88] *Id.* at 129, 310 N.E.2d at 367 (quoting S. Williston, Williston on Contracts § 1931 (1938)).
[89] *Id.*
[90] *Id.* at 130, 310 N.E.2d at 368.
[91] *Id.*

ence that the *Mishara* court would have excused performance in contract law rather than strictly on the basis of section 2-615.

INCREASED COST AS A BASIS FOR EXCUSE

The Second Circuit, in *United States v. Wegematic Corp.*,[92] announced contemporaneously with the *Transatlantic* case, held in a similar fashion and interpreted the Code in the same way. Wegematic had undertaken to deliver a computer with specified capabilities to the Federal Reserve Board. Wegematic found, prior to delivery but subsequent to contract formation, that it could meet the Board's specifications, if at all, only at an additional cost of between $1,000,000 and $1,500,000. The court rejected Wegematic's impracticability argument, and once again affirmed the proposition that impracticability is not to be determined solely on the basis of increased costs.[93]

In 1974, a New York Supreme Court decided the case of *Maple Farms v. City School District of Elmira.*[94] The plaintiff, Maple Farms, had agreed to supply milk to the defendant school district at a fixed price. Six months later, the price of raw milk had increased by 23 percent.[95] The plaintiff argued that its hardship would be compounded and its contemplated losses tripled because of similar fixed price contracts with other school districts. The substantial price increase in raw milk was occasioned primarily by the Soviet-American agreement to sell large amounts of grain to Russia, which in turn created grain shortages in the United States. The plaintiff argued that it could not have foreseen the execution of this agreement. The *Maple Farms* court refused to release the plaintiff from its contract terms. The court stated that the issues raised by the facts of this case were analogous to those of *Transatlantic*, and thus it was persuaded to follow that decision.[96]

The *Maple Farms* court further stated that the contingencies—the sale of wheat to Russia, poor harvests and general market conditions—even if not actually foreseen by the plaintiff supplier, could have been anticipated and should have been provided for. The court charged the promisor with knowledge of "escalating

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[92] 360 F.2d 674 (2d Cir. 1966).

[93] *Id.* at 677.

[94] 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. Chemung County 1974).

[95] *Id.* at 1081, 352 N.Y.S.2d at 786.

[96] *Id.* at 1084-85, 352 N.Y.S.2d at 789 (citing with approval Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966)).

inflation" after the "previous year's low."[97] If knowledge may be imputed, and foreseeability is interchangeable with such imputed knowledge, then consequently fixed price contracts must allocate risk to the promisor.[98] As to what extent increased cost should be the basis for discharging a contract, the court stated that "[t]here is no precise point, though such could conceivably be reached, at which an increase in price of raw goods above the norm would be so disproportionate to the risk assumed as to amount to 'impracticability' in the commercial sense."[99] Therefore, whether or not a court would be justified in granting relief will depend, in large part, upon the court's resolution of questions of fact regarding the various levels of inflation. Courts will not allow a relatively insignificant economic loss to constitute a valid excuse for nonperformance.

A number of cases arose in the mid-to-late 1970's as a result of the 1973 Mideast war, the resultant Arab oil embargo and formation of the OPEC cartel. In early 1975, the U.S. District Court for the Eastern District of Pennsylvania decided, in *Publicker Industries v. Union Carbide Corp.*,[100] that a loss in excess of $5.8 million due to a 25 percent increase in the cost of ethylene did not render the contract "impracticable" within the meaning of section 2-615. The contract contained a price escalator clause. With only one year remaining on a three year supply contract, Union Carbide informed Publicker that it could not continue to supply ethanol at the price originally agreed upon due to unforeseen and exorbitant price increases engendered by the oil producing nations.[101] The *Publicker* court undertook to determine whether the sole purpose of the price escalator clause, with the added ceiling provision, was to allocate the risk to the promisor, Union Carbide. The very existence of a price ceiling was held to compel the conclusion that the

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[97] *Id.* at 1085, 352 N.Y.S.2d at 790.

[98] *See id.* The court reasoned:

> Here the very purpose of the contract was to guard against fluctuation of price of half pints of milk as a basis for the school budget. . . . It did not provide in the contract any exculpatory clause to excuse it from performance in the event of a substantial rise in the price of raw milk. On these facts the risk of a substantial or abnormal increase in the price of raw milk can be allocated to the plaintiff.

Id.

[99] *Id.* The court concluded by stating that on the facts of this case, the point of "impracticability" had not been reached. *Id.* at 1085-86, 352 N.Y.S.2d at 790.

[100] 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975).

[101] *Id.* at 989-90.

risk of substantial unforeseen price increases was to be borne solely by the promisor. The court further stated that it was unaware of any case in which a less than 100 percent cost increase was held sufficient to excuse performance.[102] The court relied on the *Transatlantic* and *Maple Farms* decisions as precedent despite the fact that the price increases in those cases were on a much smaller scale. The court also expressed doubt as to whether the rise in Arab oil prices was a "contingency" within the meaning of section 2-615.[103]

Another federal district court, in *Eastern Air Lines v. Gulf Oil Corp.*,[104] held that the market conditions created by the OPEC cartel and the energy crisis did not compel the conclusion that this was a "contingency the nonoccurrence of which was a basic assumption on which the contract was made." In June 1972, the parties had entered into an agreement whereby Gulf Oil was to furnish jet fuel to Eastern. The parties had agreed to provide a price index clause which was to reflect changes in the price of crude oil. The court found that since the parties recognized price increases to be a "way of life," they must have intended that increases in crude oil prices "be borne by Eastern in a direct proportional relationship of crude oil cost per barrel to jet fuel cost per gallon."[105] In the aftermath of the Mideast war, a two-tier price control system was imposed by the U.S. government with parallel prices fixed for "old" and "new" oil, with May 1972 being the date frozen for old oil. This kind of governmentally imposed price structure was unprecedented, as was the 400 percent oil price increase unilaterally imposed by OPEC between September 1973 and January 1974.[106] As a result, Gulf alleged that the price of crude oil had risen without a concomitant rise in the escalator indicator, thereby rendering the contract commercially impracticable.

The court rejected Gulf's commercial impossibility defense, finding that Gulf did not establish severe hardship as required by section 2-615, since the energy crisis was "reasonably foreseeable at the time the contract was executed."[107] More significant, however,

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[102] *Id.* at 992.

[103] *Id.* at 992-93.

[104] 415 F. Supp. 429 (S.D. Fla. 1975).

[105] *Id.* at 432-33. The court also held that the defendant Gulf had the burden of showing the extent to which it had suffered, or would suffer, losses in performing the contract and that this burden had not been sustained. *Id.* at 440-41.

[106] *Id.* at 433-34.

[107] *Id.* at 441. Perhaps, the admission by Gulf's foreign oil expert witness, that by 1969

was the court's conclusion that once an event is characterized as a foreseeable contingency, that event and all its effects, no matter how improbable at the time of contracting, become lumped together as foreseeable.[108] By holding that the foreseeability test was probative of the allocation of risk, the court dismissed outright the impracticability argument despite its simultaneous finding that the parties intended to pass the risk of a price increase from Gulf to Eastern.[109] The court similarly disregarded Gulf's argument based upon the imposition of a price control system because Gulf had benefitted from its foreign oil import increases by a related price increase per barrel.[110] Most startling was the court's pronouncement that, since section 2-615 has its "roots in the common law doctrine of frustration or impossibility,"[111] the restrictive concept of foreseeability would be the basis of the decision.

The oil energy crisis had the further effect of precipitating a greater demand for nuclear energy. In *In re Westinghouse Electric Corp. Uranium Contracts Litigation*,[112] Westinghouse had negotiated, prior to the Mideast developments, a series of fixed price contracts to supply uranium to various utilities. Subsequent developments in the energy field caused enormous price increases for

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"the handwriting was on the wall," *id.* at 433, contributed to the court's failure to recognize the energy crisis as a contingency contemplated by the Code. *See also* Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978) (defendant uranium supplier not excused from performance, Arab oil embargo, emergence of OPEC cartel held to have been foreseeable to some degree), *rev'd for lack of jurisdiction*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980). *See generally* Duesenberg, *Contract Impracticability: Courts Begin to Shape § 2-615*, 32 Bus. Law. 1089 (1977); Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 Com. L.J. 75 (1974); Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under U.C.C. Section 2-615*, 54 N.C.L. Rev. 545 (1976) (articles dealing with price increases for natural resources, especially oil).

[108] *See* Eastern Air Lines v. Gulf Oil Corp., 415 F. Supp. 449, 441 (S.D. Fla. 1975). Judge King stated that, "[i]f a contingency is foreseeable, it and its consequences are taken outside the scope of U.C.C. § 2-615, because the party disadvantaged by fruition of the contingency might have protected himself in his contract." *Id.* (citation omitted).

[109] *Id.* at 441. *Cf.* Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980) (mutual mistake of fact is an unforeseeable risk and therefore the doctrine of commercial impracticability was properly invoked). *See infra* notes 122-30 and accompanying text.

[110] *Eastern Air Lines*, 415 F. Supp. at 440-41. Gulf too benefited from its foreign oil import increases by a price increase of approximately $3.88 to $4.43 per barrel compared with profits of $0.88 to $0.92 respectively one year earlier. Because intra-company profit was so extensive, Gulf did not find the court to be sympathetic to an argument of increased costs and the concomitant economic hardship rendering performance impracticable.

[111] *Id.* at 438.

[112] 405 F. Supp. 316 (J.P.M.L. 1975).

uranium, resulting in Westinghouse's announcement that it could not honor its obligations under these contracts. Estimates of projected losses began at a minimum figure of $2 billion and rose considerably higher.[113]

The court lacked sympathy for Westinghouse's position and rejected its impracticability defense on the grounds that Westinghouse was largely responsible for the short position it found itself in. Having offered fixed price contracts to the utilities as an encouragement to employ nuclear energy, and having entered into these contracts without a schedule for procuring the uranium, Westinghouse was held to have contributed greatly to the tremendous gap between supply and demand in the uranium market.[114] Although the full extent of the consequences engendered by the oil crisis could not have been totally foreseen, this factor, in and of itself, could not be isolated as dispositive of the case. Since Westinghouse could not adequately prove that it had exhausted all its possible alternatives to ensure an adequate supply of uranium, Westinghouse could not abrogate its contracts with the utilities.

Despite these prior holdings that once an event is foreseeable all of its consequences are similarly foreseeable, the District Court for the Northern District of Iowa, in *Iowa Electric Light & Power Co. v. Atlas Corp.*,[115] strongly disagreed. A number of factors were thought to have contributed to the price increase for uranium concentrate[116] and Atlas' projected losses of $4 million.[117] The court in *Iowa Electric* specifically stated that a distinction should be

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[113] *Id.* at 317. In its announcement, Westinghouse declared itself to be seventy million tons short of its contractual commitments to twenty-seven utilities. In its contracts with the utilities, Westinghouse guaranteed delivery at fixed prices, ranging from $8.00 to $12.00 per pound. The price of uranium started rising in 1974, so that by the date of its announcement in September 1975, the market price of uranium had climbed to $40.00 per pound. By January 1975, Westinghouse had uranium commitments for about 60,000 tons and available uranium of approximately 20,000 tons. *See* Wall St. J., Sept. 9, 1975, at 5, col. 2.

[114] *Westinghouse*, 405 F. Supp. at 318-19.

[115] 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd for lack of jurisdiction*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

[116] It was speculated that the oil energy crisis, stricter governmental regulations regarding safety and the environment, increased market demand for the product, and internal production factors contributed to the price increase. *Id.* at 134.

[117] Insignificant annual price increases, set by contract, paled in comparison to the unanticipated increase in the price of uranium concentrate (yellowcake) by 1978. At the time of the lawsuit, Atlas was projecting a loss for fiscal years 1977 through 1979, not including corporate overhead, interest and profits of $4,000,000. The buyer, Iowa Electric, brought an action for specific performance to which the defendant-seller Atlas counterclaimed with a suit for reformation of the contract, specifically for a price increase.

drawn between a party's ability to foresee the happening of an event and its ability to anticipate the myriad consequences of that event. The court found that the severity of certain consequences was of a kind to change the nature of that event in its totality.[118]

Notwithstanding this finding, the court decided that the contract had to be enforced as written because the seller was unable to show how much of the price increase was truly attributable to outside factors and how much was a function of its own internal decisions and actions.[119] Presumably, internal actions are of a kind that the seller could have controlled and therefore could have guarded against by way of contract. Furthermore, where there is evidence that the seller needed such a long term supply contract for its own purposes to obtain corporate financing, it is clear that the seller must have been aware of the possibility of monetary losses. Such awareness was interpreted to mean that the seller assumed the risk of an increase.[120]

ALUMINUM CO. OF AMERICA v. ESSEX GROUP, INC.

In 1980, *Aluminum Co. of America v. Essex Group, Inc.*[121] was decided by the District Court for the Western District of Pennsylvania. In this case, the court for the first time rejected the legal truism that the courts will not rewrite a contract for the parties. Instead, the court ordered that a complex price scheme set by the parties in their contract would be replaced entirely by a court-determined price scheme. The facts of the case were not unusual. A long term contract of sixteen years had been signed by the parties wherein the promisor-seller, Alcoa, agreed to convert specified amounts of alumina supplied by the buyer Essex and to redeliver it to Essex as aluminum. The parties arrived at a price figure using

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[118] The court stated that, "many of those costs were not foreseen or considered likely to occur or to be so substantial," *id.* at 132, and consequently, "[i]t would be unfair to expect Atlas to have prophesied the magnitude of the increases complained of." *Id.* at 135.

[119] In dicta, the court offered some thoughts on the judiciary's role. Although a contract was conceded not to be a sacred document, the court noted that, "[v]oluntary attempts at reaching equitable agreements and foregoing expensive litigation should be encouraged." *Id.* at 136.

[120] *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 405 F. Supp. 316 (J.P.M.L. 1975); *see also* Jennie-O-Foods v. United States, 580 F.2d 400 (Ct. Cl. 1978) (doctrine of commercial impracticability may be utilized to avoid liability only when the promisor has exhausted all its alternatives; that is, when all means of performance are commercially senseless).

[121] 499 F. Supp. 53 (W.D. Pa. 1980).

an indexing system structured by a prominent economist. Included in this figure were three components with variable prices. One composite was tied to an index of construction costs nationwide, another to labor costs at the plant, and a third index to the wholesale prices for industrial commodities maintained by the United States Department of Labor. This complicated price scheme worked well until the non-labor costs at the seller's plant exceeded the Labor Department index. Claiming that it would suffer losses in excess of $75 million, Alcoa sought reformation of the contract in the form of an upward price adjustment.[122]

The court noted that during the negotiations the buyer, Essex, had insisted on a protective ceiling on the indexed price of Alcoa's services. The question, therefore, was whether Alcoa, by omitting a similar provision, had accepted the risk of "any and every deviation of the selected index from its costs, no matter how great or how highly improbable?"[123] Judge Teitelbaum held that, even though the parties obviously intended to limit their respective risks, the seller alone could not be held to have assumed these risks. The evidence of such intention was apparent in the complex price formula, the 65 percent ceiling, the care and the expense of the negotiation and drafting process, and in Essex' prior negotiations with several other aluminum producers. The court suggested that this omission could be interpreted to imply that the parties deemed the risk to be too remote.[124]

The *Alcoa* court addressed the problem in terms of three basic legal theories: mutual mistake, impracticability and frustration of purpose—all of which "are qualified by the same notions of risk assumption and allocation."[125] Viewing the two notions as related, the *Alcoa* court further discussed the situation in which parties are conscious of the uncertainty of future values:

> The proper question is not simply whether the parties to a contract were conscious of uncertainty with respect to a vital fact, but whether they believed that uncertainty was effectively limited within a designated range [of probability] so that they would deem outcomes beyond that range to be highly unlikely.[126]

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[122] *Id.* at 57-58.
[123] *Id.* at 68.
[124] *Id.* at 69.
[125] *Id.* at 70.
[126] *Id.*

Under this reasoning, a loss of $75 million due to an indexing miscalculation could not be within the range of predictability. Furthermore, the court distinguished earlier Code decisions on the basis of the absolute extent of the loss and in the proportion of the loss involved.

Nonetheless, it appears that the court was more concerned with the remedies to be awarded to the successful litigant. The court in *Alcoa* held that to let the chips fall where they may, would cause unjust enrichment and defeat the aims of commerce.[127] The court recognized that to decree rescission in this instance would result in a windfall gain for Alcoa and a deprivation of a long term supply source for Essex. In lieu of the traditional all-or-nothing approach, the court framed a remedy modifying the price term to avoid an injustice. This equitable solution appears very much in line with the official comment to section 2-615. [128]

POST-*ALCOA* JURISPRUDENCE

It can easily be concluded that in the aftermath of *Alcoa* the courts have, for the most part, rejected the philosophical and legal implications of *Alcoa*. A careful survey and analysis of the case law in the six years since that landmark decision shows that the judiciary is wary of assuming unto itself the right to intervene and rewrite contracts. In the year immediately following the *Alcoa* decision, several federal district court cases[129] were decided on the

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[127] *Id.* at 79. The court stated that:

> To decree rescission in this case would be to grant ALCOA a windfall gain in the current aluminum market. It would at the same time deprive Essex of the assured long term aluminum supply which it obtained under the contract and of the gains it legitimately may enforce within the scope of the risk ALCOA bears under the contract. A remedy which merely shifts the windfall gains and losses is neither required nor permitted by Indiana law.

Id.

[128] *See* U.C.C. § 2-615 official comment 6 (1978). This comment states:

> In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of "excuse" or "no excuse," adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.

Id.

[129] Freidco v. Farmers Bank of Del., 529 F. Supp. 822 (D. Del. 1981) (court must examine the agreement of the parties and the circumstances surrounding their negotiations to determine if they contemplated that the commercial risk involved would be borne by the party claiming discharge, despite impracticability of performance. If so, that party is not

basis of section 2-615.

In *In re Westinghouse Electric Corp. Uranium Contracts Litigation: Florida Power & Light Co. v. Westinghouse Electric Corp.*,[130] Westinghouse, after its sale to the Florida utility, agreed in 1965 to supply the utility with its fueling needs. As part of the deal, the utility alleged that Westinghouse had expressly agreed to remove the irradiated or spent fuel from Florida's plant site.[131]

At this time, use of nuclear fuel as a form of energy was in its embryonic stage; irradiated or spent fuel had never been commercially reprocessed. It was only one year after negotiations had commenced that the first commercial reprocessing plant was licensed in the United States.

In 1975, Westinghouse advised the utility that no such removal would take place. By April 1977, any development of domestic facilities for commercial reprocessing purposes was precluded by Executive Order. The utility brought an action for specific performance to compel Westinghouse to remove the spent fuel and damages to compensate the utility for having to expand its storage pits. In holding for the utility, the court stated that:

> [R]isk allocation is determined by the totality of the circumstances, including the comparative abilities of the parties to make informed judgments as to the extent of the risk; each party's interest in avoiding the risk; and the extent to which that interest was a factor in the negotiation of the contract . . . . [T]he foreseeability of the risk alone may well be sufficient for it to be regarded as implicitly assumed by the promisor.[132]

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excused and may be held liable for damages for nonperformance); *In re* Westinghouse Elec. Corp. Uranium Contracts Litig.: Florida Power & Light Co. v. Westinghouse Elec. Corp., 517 F. Supp. 440 (E.D. Va. 1981) (impracticability by reason of additional expense is not to be determined by reference to loss, or by failure to profit, or from one particular contract term in isolation, but rather, is to be judged from the perspective of the entire undertaking); Louisiana Power & Light Co. v. Allegheny Ludlum Indus., 517 F. Supp. 1319 (E.D. La. 1981) (loss must be especially severe and unreasonable before performance will be excused based on increased cost).

[130] 517 F. Supp. 440 (E.D. Va. 1981).

[131] *Id.* at 443. At the time of the trial, Florida Light had stored 411 spent fuel assemblies and anticipated a total of 981 spent fuel assemblies to be generated over the life of the contract, at a cost of $9,473,242. *Id.* at 448.

[132] *Id.* at 456. Focusing on the totality of the circumstances of the case, the court stated, "[k]nowing full well Florida's requirements, and knowing that reprocessing, not being available even then as a practical matter, was highly uncertain, Westinghouse agreed to a contract term which in plain, unequivocal, unqualified language, required it to remove the spent fuel from Florida's plants." *Id.* at 457 (emphasis omitted).

The *Florida Power* court disagreed with the *Alcoa* case, but attempted to reconcile the difference on the ground that *Alcoa* involved an erroneous prediction as to the equivalence of values, while *Florida Power* involved merely a mistake of judgment by Westinghouse. The court reasoned that even though Westinghouse's performance would be more expensive, it would not give Florida any unbargained-for benefit.[133]

In the same year, the District Court for the Northern District of Illinois, in *Wabash Inc. v. Avnet Inc.*,[134] was similarly petitioned to reform a contract for an upward price adjustment. The parties had agreed to respectively purchase and sell IPM, a subsidiary of Avnet, in compliance with a court order requiring Avnet's divestiture of IPM. The agreement was required to be submitted to the Federal Trade Commission (the "FTC") for approval. The variable originally chosen by the parties to determine the purchase price was not approved by the FTC. Instead, the FTC approved the Department of Commerce's GNP as the most appropriate index, since in the past it had accurately reflected the company's sales. However, in 1980, due to the inflationary-recessionary cycle, the subsidiary's sales fell almost thirteen percent, while the GNP rose by fifteen percent. The plaintiff estimated that, if the disparity continued, the sales price would be an additional $3 million.[135]

The court refused to reform the contract merely because it contained a variable which was not consonant with the parties' expectations of economic events. Economic events which are unpredictable to some extent cannot be the subject of an action to discharge or to reform merely because the parties are disappointed with the manner in which events unfolded. In assessing the impact of *Alcoa*, the court in *Wabash* stated that "[u]nder the logical consequences of that case, there would be no predictability or certainty for contracting parties who selected a future variable to measure their contract liability. Whichever way the variable fluctuated, the disappointed party would be free to assert frustrated expectations and seek relief via reformation."[136] This reasoning was well-grounded in previous case law.[137]

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[133] *Id.* at 458.

[134] 516 F. Supp. 995 (N.D. Ill. 1981).

[135] *Id.* at 997.

[136] *Id.* at 999, n.5.

[137] As support for his decision, Judge Shadur quoted the 1978 New York decision of George Backer Management Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 219, 385 N.E.2d

The District Court for the Eastern District of Louisiana was similarly called upon in *Louisiana Power & Light Co. v. Allegheny Ludlum Industries*[138] to adjudicate a claim based upon section 2-615 in light of the *Alcoa* decision. In 1974, Allegheny agreed to supply condenser tubing at a fixed price to the utility for use at the latter's nuclear power plant. Costs of raw materials, including electrolytic nickel and low carbon ferrochrome, and the cost of labor had increased markedly[139] from the contract date until May 1975, prompting Allegheny to seek additional compensation. The utility subsequently repudiated its contract with Allegheny, and, after re-soliciting bids, found an alternate supplier. However, it sought to recover the difference in cover price as well as expenses incurred in the re-solicitation process. In its defense, Allegheny invoked section 2-615 of the Code, and claimed that the contract should be deemed discharged since the severe shortage of critical raw materials and increased labor costs constituted an unexpected contingency necessitating the price increase of condenser tubing. Had the contract been performed as agreed, the projected losses to Allegheny would have been $428,500, or a 38 percent increase over the original contract price.

The court, in deciding in favor of the utility, stated that Allegheny's absolute cost of performance did not increase to the extent necessary to excuse performance under the doctrine of commercial impracticability. The court went on to emphasize that "commercial impracticability" could not be used to guarantee a trial to every discontented buyer or seller. Such an application of law would constitute an abuse of the doctrine of commercial impracticability.[140]

1062, 1066, 413 N.Y.S.2d 135, 139 (1978):

> [F]reedom to contract would not long survive courts' ready remaking of contracts that parties have agreed upon .... All the more so when a litigant seeks to invoke the power of the court, not merely to sever the contractual relationship between the parties, but, as here, to continue that relationship in a modified form.

Wabash, 516 F. Supp. at 999, n. 5.

[138] 517 F. Supp. 1319 (E.D. La. 1981).

[139] *Id.* at 1321. The factors had a 24% price increase, a 185% price increase and a 21% price increase, respectively, from March of 1974 to May of 1975. *Id.* at 1321.

[140] *Id.* at 1326. The court reasoned:

> [T]he mere invocation of the term "commercial impracticability" is not a talisman behind which a defaulting seller may hide and be guaranteed a trial .... Were that the case, every seller or buyer caught in a burdensome position under a contract would find it hard to resist the natural temptation to compel renegotiation of unprofitable contracts by threatening to invoke a claim of commercial impracticability, knowing that it would be assured of a trial on the merits and knowing that even if it lost at trial, it would be required to do no more than to fulfill its obliga-

The *Louisiana Power* court, in citing *Alcoa*, chose to distinguish that decision by the sheer magnitude of the losses that *Alcoa* would have sustained had it been compelled to perform under the original contract terms. The court found no comparable losses in this instance. Additionally, the beneficiary, Louisiana, would not have been the recipient of a "windfall profit" as was the buyer in *Alcoa*.

In 1983, two decisions, one from the Ninth Circuit and the other from the Third Circuit, reached the same conclusion—that an argument of commercial impracticability or frustration should not "provide a means of escape from a contract less profitable than anticipated."[141]

The first of these decisions, *Waegemann v. Montgomery Ward & Co.*,[142] involved commercial space that had been leased to Montgomery Ward pursuant to an agreement which calculated the rent according to the property taxes index. When the voters of the State of California passed Proposition 13, which had resulted in a significant reduction of real estate taxes, the lessor estimated that they received only one-third of the current fair market rent and claimed their lease was frustrated. The Ninth Circuit held that a profit margin less than anticipated is limited to the category of a bad bargain, but does not transcend into the area of extreme hardship, meritorious of a commercial impracticability defense.[143]

In the Third Circuit decision, *Camerlo v. Howard Johnson Co.*,[144] the appellant Camerlo sought to have a lease declared void and unenforceable. In 1960, Mrs. Camerlo leased twelve acres of land for a ninety-nine year term, giving an option to renew forever, to the respondents' predecessor in title. The rent was calculated on a six percent return, on land valued at $200,000.[145] When interest rates soared dramatically, the appellant argued that the lease became unconscionable and that performance should be excused on the basis of impracticability. The court, in rejecting the appellant's argument, cited the *Alcoa* decision as its reference to the law of

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tion under the contract. Such a rule of law would constitute a misuse of the protections afforded by the doctrine of commercial impracticability.

Id. at 1326.

[141] Waegemann v. Montgomery Ward & Co., 713 F.2d 452, 455 (9th Cir. 1983). *See also* Camerlo v. Howard Johnson Co., 710 F.2d 987 (3d Cir. 1983).

[142] 713 F.2d 452 (9th Cir. 1983).

[143] *Id.* at 454-55.

[144] 710 F.2d 987 (3d Cir. 1983).

[145] *Id.* at 989.

impracticability. However, the court did not discuss the case or its legal implications. The *Camerlo* court simply affirmed the trial court's decision that *Alcoa*'s facts were clearly distinguishable and, therefore, was not binding precedent.[146]

Another case from the Third Circuit indicates that given the proper circumstances, they may be receptive to the defense of commercial impracticability. In *Sharon Steel Corp. v. Jewell Coal & Coke Co.*,[147] the court was called upon to address the issue of commercial impracticability and to delineate the proper scope of an arbitration clause. The parties agreed in 1978 that the buyer, Sharon Steel, would purchase 120,000 tons of coke annually for a five year period. The price per ton was computed according to a formula which included seven variables.[148] By January of 1983, the depressed market conditions in the steel industry led to a reduction in the market price of coke to an amount well below that set by the contract. At that point, the buyer informed the seller that, due to the drastic economic changes, it considered itself relieved of any further contractual obligations.[149]

The court in *Sharon Steel* did not deal solely with the issue of commercial impracticability since it was intertwined with an arbitration issue. Instead, it compelled arbitration as specified in the contract. The arbitration panel was to decide whether, in these circumstances, the exculpatory clause which exempted the buyer from rendering "performance [which was] commercially impracticable" applied to "any other cause beyond the buyer's reasonable control."[150] The court, however, summarized prior case law and quoted the *Alcoa* decision specifically as dispositive of the issue that a change in market prices could support a claim for commercial impracticability. The tone of this decision, together with its favorable assessment of the *Alcoa* case, lends credence to the view that this court favors a liberal construction of section 2-615.

In contrast, the District Court for the Northern District of Ohio, in *Printing Industries Association v. International Printing & Graphic Communications Union, Local 56*,[151] held that "[t]his

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[146] *Id.* at 992.

[147] 735 F.2d 775 (3d Cir. 1984).

[148] *Id.* at 776. The seven variables were labor, royalties, equipment, trucking, power, black lung expense, and "other." *Id.*

[149] *Id.* at 777.

[150] *Id.* at 776-77.

[151] 584 F. Supp. 990 (N.D. Ohio 1984).

[c]ourt is respectfully at odds with the reasoning and result in *Alcoa*."[152] The plaintiff, a multi-employer bargaining association, simultaneously filed actions against four unions which represented the printing industry employees in the Cleveland area. The plaintiff sought reformation of the cost of living allowance (the "COLA") provisions contained in its contract.

The purpose of the COLA provisions was to keep the employees' salaries in consonance with any inflationary living cost increases. The index chosen by the parties was the Cleveland Consumer Price Index, as distinct from the National Consumer Price Index. For reasons inherent to the housing situation in Cleveland, the two indices diverged between 17.9 points and 21.5 points by August 1982 and February 1983, respectively. The plaintiff-employer argued that this disparity granted the employees a pay increase rather than simply a salary adjustment in accordance with inflation rates. This court refused to reform the contracts on two grounds. First, the court rejected the argument that the plaintiff's proposition was supported by the *Alcoa* case and indicated that a court's willingness to reform contracts would undermine the policy of finality which is essential in contract law.[153] The court supported this proposition by making mention of the *Westinghouse* and *Wabash* cases, which also noted grave misgivings about extending the decision in *Alcoa*. Secondly, the court held that *Alcoa* was distinguishable on its economic facts alone, since the disparity of twenty points in the two indices in the present case would not reach the level of loss sufficient for a claim of commercial impracticability,[154] as *Alcoa* did.

In 1985, the Eleventh Circuit dissected the theoretical underpinnings of the *Alcoa* decision without specifically mentioning it by name. In *Cook v. Deltona Corp.*,[155] the plaintiff-buyer had contracted to purchase from the seller-defendant corporation, a real estate lot which, at the date of the contract, was still undeveloped and under water. To proceed with this landfill development, the seller was obligated to obtain the necessary dredge and fill permits

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[152] *Id* at 998. *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litig.: Florida Power & Light Co. v. Westinghouse Elec. Corp., 517 F. Supp. 440 (E.D. Va. 1981); Wabash, Inc. v. Avnet, Inc., 516 F. Supp. 995 (N.D. Ill. 1981).

[153] *Printing Indus. Ass'n*, 584 F. Supp. at 998.

[154] The court stated that Alcoa's projected $75,000,000 loss "constituted the level of loss sufficient to make out a claim for commercial impracticability and frustration of purpose." *Id.* at 1001.

[155] 753 F.2d 1552 (11th Cir. 1985).

from three separate authorities: the county, the state and the Army Corps of Engineers.[156] After the contract had been executed by the parties, the defendant was unable to deliver marketable title to the lot because the Army Corps of Engineers failed to issue the required permit. When the buyer, Cook, attempted to recover his downpayment, the seller refused to make the refund. Upon litigation of the dispute, the seller conceded nonperformance but raised the impossibility defense and argued that the substantial and unforeseeable increase in regulatory requirements for the issuance of the required permits excused performance. The court reviewed the purpose of the doctrine of impracticability and concluded that the contract is the exclusive medium for a party to insure against change. The court stated:

> [T]he most profitable approach to an impossibility claim is not to pass on the relative difficulty caused by the supervening event, but to ask whether that supervening event so radically altered the world in which the parties were expected to fulfill their promises that it is unwise to hold them to the bargain.[157]

The court further decided that the key to determining how radical that change had become is determining the foreseeability of the supervening event. In contrast to the trend established by section 261 of the Second Restatement, which appears to soft-pedal the requirement of foreseeability, Judge Hill held that the crux for resolution of any impracticability case turned on the sole criterion of foreseeability.

Unlike the decision in *Alcoa*, which would permit the separation of the consequences from the actual contingency, making allowance for radical consequences which might not be predictable, this court held that, once an event could be anticipated, the fact that the full scope of consequences could not be foreseen would not operate to serve as an excuse.[158] This subtle distinction between anticipating an event and prophesying its myriad and multi-

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[156] *Id.* at 1555-57. There was no prohibition on Deltona's ability to sell these lots, but the corporation was on notice that it was mandatory to obtain these permits.

[157] *Id.* at 1558.

[158] *See id.* The court reasoned:

> While it may be true that the extent of the ensuing regulations could not have been foreseen by the company in 1971, it is equally true that the winds of change were blowing and that [the company] was aware of that fact. This awareness disables [the company's] assertion that the increase in regulation changed basic assumptions upon which the contract was founded.

Id.

ple consequences, introduced by the *Alcoa* court, was totally rejected in this Eleventh Circuit decision. The strong language of this decision illustrated the inclination of the court to eradicate any liberalization of the affirmative defense of impracticability.

CONCLUSION

Case law on the doctrine of impracticability, decided since the enactment of section 2-615 of the U.C.C., reveals an area of contract law wrought with inactivity and stagnation. This section of the Code, intended to serve as the "flexible adjustment machinery" of Article 2, recognized the commercial senselessness of requiring full performance of a contract where political and/or economic disruptions rendered such performance impracticable. In spite of the intent of the draftsmen of section 2-615 to achieve innovation and liberalization of the law, the judiciary, for the most part, shut the door to further judicial interpretation and expansion.

In 1980, the *Alcoa* case deliberately departed from a line of cases which had, until that point, held that Code impracticability was very much like the common law doctrine of impossibility. Perhaps it was the recognition by the court in *Alcoa* that the traditional alternatives of enforcement of a contract or its rescission were really no solution since it was not in the best commercial interest to place the burden of a contract, whose performance had become burdensome, entirely on one party. Instead the court adjusted the contract in a manner which mandated that each party absorb a portion of the loss.

Since that unique decision, there have been numerous cases dealing with the question of whether to follow the precedent set by *Alcoa*, or to distinguish that case on its unique facts. These cases have chosen to isolate *Alcoa* to its facts because of the enormity of its losses. It is worthy of remark that no case since *Alcoa* has had comparable losses or concomitant windfall gains. At the district court level, the decisions have elected to distinguish *Alcoa*. The United States Court of Appeals has, on three separate occasions,[159] criticized the *Alcoa* decision as one in which the court has made a contract for the parties. Only on one occasion has the Court of Appeals for the Third Circuit been willing to consider the entire com-

[159] *See* Cook v. Deltona Corp., 753 F.2d 1551 (11th Cir. 1985); Waegemann v. Montgomery Ward & Co., 713 F.2d 452 (9th Cir. 1983); Camerlo v. Howard Johnson Co., 710 F.2d 987 (3d Cir. 1983).

mercial context within which the agreement was made.[160] However, even then, the court was unable to address the issue, since by the terms of the original contract, the case was referred back to an arbitration panel.

It is asserted that the importance of the *Alcoa* case lies in the fact that it demonstrated the judiciary's potential power to provide a more equitable solution to the traditional remedies heretofore employed under section 2-615 of the Code. Post-*Alcoa* jurisprudence, however, has shown that the bench is largely unwilling to develop the analysis or the methodology initiated by *Alcoa*, nor to provide the remedy of reformation as a compromise solution to the doctrine of impracticability.

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[160] *See* Sharon Steel Corp. v. Jewell Coal & Coke Co., 735 F.2d 775 (3d Cir. 1984).