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The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*

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I. Introduction

Excuse is a traditional contract defense. The law of excuse was well established under common law principles by the early 1900's. Thereafter, the defense was largely dormant until recently when the Organization of Petroleum Exporting Countries (OPEC) oil cartel and domestic inflation combined to bring an increasing number of attempts to rely on the defense.

Those who sought to use the defense in contracts for the sale of goods probably anticipated a liberalization in the courts in regard to the acceptance of commercial impracticability as a contract defense. This anticipation was fed by the well-known hope of the Uniform Commercial Code (Code) draftsmen to make the impracticability defense more readily available than it had been under traditional common law approaches.

These expectations have been frustrated by the courts. The frustration is due to a number of factors which this article will explore. One of the frustrating factors is based on tradition—the courts have adhered to the common law standards for excuse and have ignored the draftsmen's intent to liberalize those standards. For this reason, this article begins with a study of the history of excuse.

Other judicially created barriers to the use of the defense are new. First, courts often require that the party claiming excuse show an absence of a kind of fault not required at common law. The party raising the defense must show not only that circumstances have changed significantly because of unanticipated events occurring since the contract was formed, but that the impact of these changes could not have been avoided or reduced by some action that could have been taken after the contract was formed but before the time for performance. Furthermore, the party claiming the defense must also isolate the varying causes of the claimed impracticality, and only those causes which were unforeseeable at the time the contract was formed and which could not thereafter have been avoided in whole or in part will be considered in determining whether the change in circumstances rises to a sufficient level to justify excuse.

A second barrier to the use of the defense is the distinct possibility that a failure to comply with the Code's post-excuse requirements will cause the party claiming the defense to lose it, even though the defense has otherwise been established.

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Finally, the article explores a relatively undeveloped area of the law of excuse—the consequences of excuse, including the possibility of partial excuse through price revisions imposed by the courts in an effort to split the losses caused by the impracticability of performance between the two parties to the contract.

II. The History of Excuse

Most scholars have concluded that the original Anglo-American approach to excuse was to impose absolute liability for unconditional promises made by the parties to a contract.[1] The most generally cited authority for this proposition is *Paradine v. Jane,*[2] an early English case in which a tenant who was forcefully evicted from leased property by an invading army was denied excuse from the obligation to pay rent. The accuracy of this assessment of the origins of the law of excuse has been questioned.[3] However, there is no disagreement that excuse eventually became an established contractual defense. As the law of excuse began to develop, it was generally divided into three categories: (1) impossibility, where the destruction of the subject matter of a contract made performance objectively impossible; (2) frustration, where the contract was capable of being performed, but the underlying purpose of the contract no longer existed; and (3) more recently, commercial impracticability, where performance was possible and the purpose of the contract would be fulfilled but a change in circumstances made the performance of the promisor's obligations economically unattractive.

The case most generally accepted as firmly establishing the doctrine of impossibility is *Taylor v. Caldwell,*[4] where a music hall which had been rented for a series of performances was destroyed by fire without the fault of either party. In recognizing that the parties ought to be excused from their obligations, the court utilized an implied condition analysis to qualify the seemingly absolute nature of the parties' promises:

> [W]here, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach,

1 Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks under UCC Section 2-615,* 54 N.C. L. REV. 545, 549 (1976); Joskow, *Commercial Impossibility, The Uranium Market and the Westinghouse Case,* 6 J. LEGAL STUD. 119, 151 (1977); Note, *UCC § 2-615: Sharp Inflationary Increases in Cost as Excuse from Performance of Contract,* 50 NOTRE DAME LAW. 297 (1974); Comment, *Uniform Commercial Code Section 2-615: Commercial Impracticability from the Buyer's Perspective,* 51 TEMP. L.Q. 518 (1978); Annot., 84 A.L.R.2d 12 (1962).

2 Aleyn 26, 82 Eng. Rep. 897 (1647).

3 Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis,* 6 J. LEGAL STUD. 83, 97 (1977).

4 3 B. & S. 826, 122 Eng. Rep. 309 (1863).

> performance becomes impossible from the perishing of the thing without default of the contractor.[5]

Impossibility cases, especially ones involving the destruction of specific goods, continue to arise. Excuse is generally accepted as a defense so long as the requirements of section 2-613 of the Code, which will be discussed shortly, are satisfied.

The frustration cases are ordinarily traced back to the coronation cases, most notably *Krell v. Henry.*[6] The lessee had hired rooms overlooking the coronation route. When the coronation was cancelled due to the unexpected illness of the king, the tenant was excused from his obligation to pay for the rooms because both parties were aware of the specific purpose for which these rooms had been rented.

The most commonly cited modern American case involving frustration is *Lloyd v. Murphy.*[7] The defendant had leased a location for five years for the sole purpose of conducting a new car dealership. The lease prohibited any other business activity, and any sublease or assignment without the lessor's prior consent. Four months later, federal regulations curtailed the sale of new cars. The lessor waived the restrictions on the use of the leased premises and on subletting or assigning the lease, but the tenant abandoned the leasehold anyway, claiming that the purposes of the lease were frustrated by the governmental restrictions on the sale of new cars. The court refused to recognize the frustration defense, both because the governmental regulations were foreseeable, and because the frustration was less than total.[8]

5 *Id.* at 833-34, 122 Eng. Rep. at 312. For a modern illustration of *Taylor v. Caldwell,* see Goddard v. Ishikawajima-Harima Heavy Indus. Co., 29 App. Div. 2d 754, 287 N.Y.S.2d 901 (1968) (destruction of factory excuses contract for manufacture of boats).

6 [1903] 2 K.B. 740. *See generally* McElroy & Williams, *The Coronation Cases,* 4 MOD. L. REV. 241 (1941).

7 25 Cal. 2d 48, 153 P.2d 47 (1944). *See also* Pauley Petroleum Inc. v. United States, 591 F.2d 1308 (Ct. Cl. 1979).

8 25 Cal. 2d at 53-58, 153 P.2d at 50-53. The opinion explains the requirements of a frustration defense in the following language:

> Although the doctrine of frustration is akin to the doctrine of impossibility of performance since both have developed from the commercial necessity of excusing performance in cases of extreme hardship, frustration is not a form of impossibility even under the modern definition of that term, which includes not only cases of physical impossibility but also cases of extreme impracticability of performance. Performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration.
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> The question in cases involving frustration is whether the equities of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case, and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected. . . .
>
> The doctrine of frustration has been limited to cases of extreme hardship so that businessmen, who must make their arrangements in advance, can rely with certainty on their contracts. The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable.
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> . . . .
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> . . . [D]efendant [has not] sustained the burden of proving that the value of the lease has been destroyed. The sale of automobiles was not made impossible or illegal but merely restricted and if governmental regulation does not entirely prohibit the business to be carried on in the

Impracticability cases arise when a change of some sort makes the expectation of performance by the promisor economically unattractive because of a factor which was not taken into consideration by the parties at the time the contract was formed. If the factor actually existed at the time the contract was formed, but the parties were not aware of it, the case is ordinarily labeled a mistake case.[9] Where the factor occurs subsequently, the impracticability label is the one ordinarily used to describe the legal significance of the occurrence.

The leading pre-Code case on commercial impracticability is *Mineral Park Land Co. v. Howard.*[10] The plaintiff had agreed to sell the defendant all of the gravel and earth the defendant needed for the construction of a bridge. The total amount of gravel was estimated at a little over 100,000 cubic yards. The defendant took only half of his needs from the plaintiff. Sufficient quantities of earth and gravel were present on the land to satisfy the defendant's requirements, but the remaining earth and gravel were below the water level. Removing this earth and gravel from below the water level would have driven the cost up ten to twelve times higher than the contract price, and would have added delay and expense in drying the materials before use.

The only precedents cited by the court involved contracts containing an obligation to take a fixed quantity, or contracts requiring payment for goods whether taken or not. In cases where it was later discovered that the quantities called for by the contract were not physically present, performance had been excused. The court thought these cases were analogous:

> The parties were contracting for the right to take earth and gravel to be used in the construction of the bridge. When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity, available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were "available," we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all

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> leased premises but only limits or restricts it, thereby making it less profitable and more difficult to continue, the lease is not terminated or the lessee excused from further performance. Defendant may use the premises for the purpose for which they were leased. New automobiles and gasoline continue to be sold. Indeed, defendant testified that he continued to sell new automobiles exclusively at another location in the same county.
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> . . . .
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> The consequences of applying the doctrine of frustration to a leasehold involving less than a total or nearly total destruction of the value of the leased premises would be undesirable. Confusion would result from different decisions purporting to define "substantial" frustration. . . .
>
> . . . No case has been cited by defendant or disclosed by research in which an appellate court has excused a lessee from performance of his duty to pay rent when the purpose of the lease has not been totally destroyed or its accomplishments rendered extremely impracticable or where it has been shown that the lease remains valuable to the lessee.

25 Cal. 2d at 53-58, 153 P.2d at 50-53 (citations omitted).

9 The *Restatement of Contracts* does recognize the concept of existing impossibility. *Restatement of Contracts* § 456 provides: "Existing Impossibility. Except as stated in § 455, or where a contrary intention is manifested, a promise imposes no duty if performance of the promise is impossible because of facts existing when the promise is made of which the promisor neither knows nor has reason to know." This rule is continued by *Restatement (Second) of Contracts* § 286 (Tent. Draft 1974).

10 172 Cal. 289, 156 P. 458 (1916).

> fair intents then, it was impossible for defendants to take it.
>
> "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." (1 Beach on Contr. § 216.) We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But, where 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.[11]

The *Mineral Park* case was, however, the exception to the rule. Impracticability was rarely accepted as an excuse for a variety of reasons. The principal reason was the deeply held judicial belief that one of the main functions of the law of contracts was to allocate the various risks which might affect performance, and that only the most compelling cases, involving a substantial degree of cost discrepancy, should escape this allocation of risk.

In general, there has been a tradition of judicial hostility to the last two categories of excuse.[12] As the subsequent discussion indicates, the more recently decided cases have continued to demonstrate the same hostility to these categories of excuse.

III. The Three U.C.C. Excuse Sections

In the area of contracts for .the sale of goods, the modern excuse cases revolve around three Code sections which are aimed at this problem. Section 2-613 deals with the destruction of specific goods; section 2-614 deals with transportation and payment problems; and section 2-615 deals, in part, with changes in laws and government regulations, including foreign developments as well as domestic ones. These are specific treatments of the common excuse problems which have developed historically.

Section 2-613 codifies the common law of excuse first established in cases like *Taylor v. Caldwell,* involving the destruction of the subject matter of the contract. Section 2-613 provides:

> Casualty to Identified Goods
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> Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324) then
>
> (a) if the loss is total the contract is avoided; and
>
> (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the de-

11 *Id.* at 293, 156 P. at 459-60.
12 Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code,* 79 Com. L.J. 75 (1974).

> terioration or the deficiency in quantity but without further right against the seller.

There are two critical components to a successful section 2-613 defense. The first is the absence of "fault," defined as a "wrongful act, omission or breach" by section 1-201(16).[13] The second is that the goods have been identified to the contract.[14] In essence, this means that the parties must have contracted with specific goods in mind. Thus, for example, in *Valley Forge Flag Co. v. New York Dowel & Molding Import Co.*,[15] a seller was not excused from his obligation to deliver wooden dowels to a buyer by the destruction of a shipment of dowels from Malaysia from which the seller had expected to fill the buyer's order. The source of the dowels had not been specified in the contract. Consequently, the dowels had not been identified to the contract, and lack of identification prevented the seller from relying on section 2-613.

The majority of the decided cases involve contracts for the sale of crops. When a crop failure prevents the grower from fulfilling his contracts, a potential excuse defense arises under section 2-613, and also under section 2-615.[16] Ordinarily, a defense under either section would require that the contract specify the land on which the crop will be grown.[17] A failure to describe the land means that the crop has not been identified as required by section 2-613. A failure to describe also eliminates a section 2-615 defense because the possibility of a crop failure is considered foreseeable, and a failure to provide expressly for excuse upon the occurrence of a foreseeable event is invariably treated as an assumption of that risk.[18]

A few recent cases have permitted a grower to show that the crop was expected to come from the grower's own fields, even when the contract is silent about this expectation, if the grower can establish a local usage of trade to that effect.[19] So long as the contract is silent about the source of the crop, these cases treat the usage of the trade as a source of contract terms which merely supple-

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13 *See* text accompanying notes 30-33 *infra.*

14 Identification occurs under the circumstances set out in U.C.C. § 2-501, which provides, in part:

> In the absence of explicit agreement identification occurs
> (a) when the contract is made if it is for the sale of goods already existing and identified;
> (b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;
> (c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

15 90 Misc. 2d 414, 395 N.Y.S.2d 138 (Civ. Ct. 1977). *See also* Bunge Corp. v. Recker, 519 F.2d 449 (8th Cir. 1975); Low's Ezy-Fry Potato Co. v. J.A. Wood Co., 26 Agric. Dec. 583, 4 U.C.C. Rep. Serv. 483 (1967); U.C.C. § 2-615, Comment 9.

16 U.C.C. § 2-615, Comment 9.

17 Bunge Corp. v. Recker, 519 F.2d 449 (8th Cir. 1975); Ralston Purina Co. v. McNabb, 381 F. Supp. 181 (W.D. Tenn. 1974); Bliss Produce Co. v. A.E. Albert & Sons, Inc., 35 Agric. Dec. 742, 20 U.C.C. Rep. Serv. 917 (1976); Holly Hill Fruit Prods. Co. v. Bob Staton, Inc., 275 So.2d 583 (Fla. Dist. Ct. App. 1973); Dunavant Enterprises, Inc. v. Ford, 294 So.2d 788 (Miss. 1974); Semo Grain Co. v. Oliver Farms, Inc., 530 S.W.2d 256 (Mo. Ct. App. 1975). *See generally* Comment, *Crop Failures and Section 2-615 of the Uniform Commercial Code,* 22 S.D. L. Rev. 529 (1977).

18 *See* text accompanying notes 43-45 *infra.*

19 Campbell v. Hostetter Farms, Inc., 251 Pa. Super. Ct. 232, 380 A.2d 463 (1977); Colley v. Bi-State, Inc., 21 Wash. App. 769, 586 P.2d 908 (1978).

ment the written contract.[20] The reported cases indicate that the relevant usage of the trade varies from place to place. In some locales, the usage of the trade does support the conclusion that the crops were to come from the grower's own fields. In others it does not, primarily because such a usage of trade would jeopardize the buyer's ability to meet his own resale contracts.

It is also possible that the grower could establish an oral agreement which limits his obligation to his own production, although the written contract is silent about this limitation. In order to get the oral agreement introduced, the grower will have to avoid the parol evidence rule. If the written agreement appears complete, or contains a merger clause, the grower's chances for success are not good.[21]

Section 2-614 is another excuse provision dealing with specific excuse situations. This section provides:

> Substituted Performance
>
> (1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.
>
> (2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

Several cases have been decided involving the commercially reasonable substitute manner of delivery requirement of section 2-614(1). *Jon-T Farms, Inc. v. Goodpasture, Inc.*[22] involved a contract for the sale of grain. The contract provided an "F.O.B." delivery term,[23] which obligated the seller to pay all the expenses involved in loading the grain on rail cars at the F.O.B. location. When it became apparent that a rail car shortage would prevent the delivery of all of the grain called for by the contract, arrangements were made for the buyer to pick up some of the grain in its own trucks. The court considered this

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20 When the contract is silent about the source of the crop, the usage of trade does not run afoul of either the parol evidence rule of U.C.C. § 2-202, which permits the introduction of usages of trade to "supplement" any written agreement, or of U.C.C. § 1-205(4), which requires that the usage of trade be consistent with the express language of the written contract.

21 If the contract mentions some geographical source of the crop, any attempt to change the source would involve a prohibited "contradiction" of the written contract under the parol evidence rule. Bunge Corp. v. Recker, 519 F.2d 449 (8th Cir. 1975). A merger clause, providing that the written agreement is the final and complete agreement of the parties may also operate to prevent the introduction of an oral understanding about the source of the crop. *Compare* Ralston Purina Co. v. Rooker, 346 So.2d 901 (Miss. 1977) (merger clause bars oral understanding) *with* Paymaster Oil Mill Co. v. Mitchell, 319 So.2d 652 (Miss. 1975) (contract providing "as per our conversation" opens the door to the introduction of an oral understanding).

22 21 U.C.C. REP. SERV. 1309 (Tex. Civ. App. 1977). *See also* Caruso-Rinella-Battaglia Co. v. Delano Corp. of America, 25 Agric. Dec. 1028, 3 U.C.C. REP. SERV. 863 (1966).

23 U.C.C. § 2-319.

a type of substitute performance contemplated by section 2-614(1). The court noted that the statute does not allocate the added expenses that a substitute manner of delivery may entail, and concluded that the seller should bear the added expenses under section 2-614.

One of the few cases involving section 2-614(2) is *United Equities Co. v. First National City Bank.*[24] The parties were currency traders, and the defendant had agreed to deliver Japanese yen to the plaintiff in the future. Following the devaluation of the U.S. dollar, the Japanese government imposed currency restrictions which prevented the defendant from delivering yen to the plaintiff in the United States. The defendant then offered the plaintiff a series of alternatives, none of which appealed to the plaintiff. The defendant then sold the yen held for the plaintiff, and credited the profits made by the plaintiff to his account in dollars. The court held that this was a commercially reasonable substitute for the failure to deliver yen to the plaintiff.

The most important of the Code's excuse provisions is section 2-615, which 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.

This section contains both a specific excuse provision, and a rule of general application. The specific excuse provision is aimed at governmental regulations which prevent the seller from performing his obligations under the contract. This rule goes beyond pre-Code excuse provisions by extending the rule to foreign as well as domestic rules and regulations.[25] As comment 10 to the section makes clear, no distinction is drawn between laws, on the one hand,

24 52 App. Div. 2d 154, 383 N.Y.S.2d 6 (1976).
25 Hurst, *supra* note 1, at 558-59.

and regulations, orders or similar restrictions. Nor is the ultimate legality of the restriction relevant to the seller's ability to claim the protection of the provision.[26]

The general excuse provision uses novel language to describe the conditions for claiming excuse. Performance is excused "if performance as agreed has been made impractical by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made."[27]

The decision to be general, rather than specific, about the circumstances in which excuse would be available and the choice of language were both deliberate. The Code draftsmen wanted to give the courts some flexibility in using the excuse doctrine, and they chose the word "impracticable" to suggest that neither impossibility nor frustration was required before relief would be available.[28] Most of the authorities believe that section 2-615 was intended to liberalize the law on excuse,[29] although as the subsequent discussion will show, section 2-615 has not been interpreted this way by the courts. Prior to a survey of the development of the law of excuse under section 2-615, we ought to consider two preliminary questions: (1) what is the role of fault in excuse cases? and (2) is section 2-615 available to buyers as well as sellers?

A. *The Absence of Fault Requirement*

Unlike sections 2-613 and 2-614, which begin with an expression of the requirement that neither party be at fault, the text of section 2-615 does not mention "fault." The absence of fault requirement is nevertheless just as much a part of section 2-615 as it is of sections 2-613 and 2-614. Comment 5 to section 2-615 denies the excuse defense "unless the seller has employed all due measures to assure himself that his source will not fail" if the contract in question involves an exclusive source of supply. The comment cites *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*,[30] as authority for this absence of fault requirement, and it remains the leading American case on this point. The defendant was a middleman who had agreed to deliver molasses from a certain refinery to the plaintiff buyer. When the defendant failed to deliver over two-thirds of the molasses called for by the contract, the buyer brought suit for damages. The defendant's defense was that the refinery had reduced production and that he had delivered all the molasses he could get from the refinery. The court would not accept the middleman's defense, when he had not even bothered to obtain a contract from the refinery to cover his obligations to the buyer. The court said:

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26 U.C.C. § 2-615, Comment 10, provides, in part: "Nor does [this section] make the present action of the seller depend upon the eventual judicial determination of the legality of the particular government action. The seller's good faith belief in the validity of the regulation is the test under this Article . . . ."

27 U.C.C. § 2-615(a).

28 *Id.* § 2-615, Comments 2 and 3.

29 Nora Springs Coop. Co. v. Brandau, 247 N.W.2d 744 (Iowa 1976); Hurst, *supra* note 1, at 555; Comment, *supra* note 1, at 533; RESTATEMENT (SECOND) OF CONTRACTS § 281 (Tent. Draft 1974).

30 258 N.Y. 194, 179 N.E. 383 (1932). *See also* Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D. Ill. 1974); Deardorff-Jackson Co. v. National Produce Distrib., Inc., 26 Agric. Dec. 1309, 4 U.C.C. REP. SERV. 1164 (1967).

> The defendant asks us to assume that a manufacturer, having made a contract with a middleman for a stock of molasses to be procured from a particular refinery would expect the contract to lapse whenever the refiner chose to diminish his production, and this in the face of the middleman's omission to do anything to charge the refiner with a duty to continue. Business could not be transacted with security or smoothness if a presumption so unreasonable were at the root of its engagements. There is nothing to show that the defendant would have been unable by a timely contract with the refinery to have assured itself of a supply sufficient for its needs. There is nothing to show that the plaintiff in giving the order for the molasses, was informed by the defendant that such a contract had not been made, or that performance would be contingent upon obtaining one thereafter. If the plaintiff had been so informed, it would very likely have preferred to deal with the refinery directly, instead of dealing with a middleman. The defendant does not even show that it tried to get a contract from the refinery during the months that intervened between the acceptance of the plaintiff's order and the time when shipments were begun. It has wholly failed to relieve itself of the imputation of contributory fault.[31]

Fault, preventing reliance on the excuse defense, can take many forms. In *Jennie-O Foods, Inc. v. United States,*[32] fault took the form of a supplier's failure to seek alternative sources of supply. His producer experienced disease problems with his turkey flock, which prevented the producer from delivering enough turkeys to the supplier so that the supplier could fulfill his contract with the United States. In *Gulf Oil Corp. v. Federal Power Commission,*[33] fault involved Gulf's overestimate of the natural gas reserves that were present in a natural gas field. These cases illustrate the many forms fault can take. This is by no means an exhaustive list of fault situations, and these cases show that the faultlessness requirement can be a significant barrier to the successful assertion of the excuse defense.

B. *Buyer's Ability to Claim Excuse Under Section 2-615*

The text of section 2-615 refers only to sellers. The omission of buyers may have been deliberate. If buyers are not entitled to rely on section 2-615, the probable result is to relegate buyers to the common law of excuse, which is available to them as a supplemental principle of law or equity under section 1-103 of the Code.[34]

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31 258 N.Y. at 199, 179 N.E. at 384. *See also* Luria Bros. & Co. v. Pielet Bros. Scrap Iron & Metal, Inc., 600 F.2d 103 (7th Cir. 1979); Deardorff-Jackson Co. v. National Produce Distrib., Inc., 26 Agric. Dec. 1309, 4 U.C.C. Rep. Serv. 1164 (1967); Swift Textiles, Inc. v. Lawson, 135 Ga. App. 799, 219 S.E.2d 167 (1975); Center Garment Co. v. United Refrigerator Co., 369 Mass. 633, 341 N.E.2d 669 (1976).

32 580 F.2d 400 (Ct. Cl. 1978).

33 563 F.2d 588 (3d Cir. 1977). *See also* Lowenschuss v. Kane, 520 F.2d 255 (2d Cir. 1975); Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974); City of Albertville, Ala. v. United States Fidelity & Guar. Co., 272 F.2d 594 (5th Cir. 1960); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D. Ill. 1974); Heat Exchangers, Inc. v. Map Constr. Corp., 34 Md. App. 679, 368 A.2d 1088 (1977).

34 U.C.C. § 1-103 provides:

> Supplementary General Principles of Law Applicable
>
> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

There are several reasons for believing section 2-615 to be equally applicable to buyers and sellers. First, the comments to section 2-615 do refer to buyers.[35] In addition, a careful study of the pre-Code law of excuse and the evolution of section 2-615 has concluded that the Code draftsmen intended to make section 2-615 available to buyers.[36] Finally, the only case to have considered the question has concluded that section 2-615 is available to buyers. In *Nora Springs Cooperative Co. v. Brandau,*[37] a buyer claimed that the inability to obtain railroad boxcars excused its delay in accepting deliveries of corn from a farmer. The court relied on comment 9's reference to buyers in concluding that section 2-615's "provisions should also be equally applicable to buyers."[38]

IV. Judicial Applications of the "Commercially Impracticable" Standard

The earliest Code decision to give serious consideration to section 2-615 was *Transatlantic Financing Corp. v. United States,*[39] decided in 1966. Shortly after the government of Egypt nationalized the Suez Canal in 1956, the plaintiff agreed to transport a cargo of wheat to Iran. Two days after the cargo left Galveston, Texas, for Iran, Israel invaded Egypt, and a few days later Egypt blocked the Suez Canal with sunken ships. The plaintiff rerouted its ship around the Cape of Good Hope, and then sought to recover its additional expenses. The plaintiff claimed that the closing of the Canal made performance by the expected route impossible, and that when it performed by a more expensive route, it was entitled to compensation. In rejecting this claim, the court said:

> The [impossibility] 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 outweighted by the commercial senselessness of requiring performance. When the issue is raised, the court is asked to construct a condition of performance based on the changed circumstances, a process which involves at least three reasonably definable steps. First, a contingency—something unexpected—must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially

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35 U.C.C. § 2-615, Comment 9, provides, in part:

> Exemption of the buyer in the case of a "requirements" contract is covered by the "Output and Requirements" section both as to assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raw material makes no specific reference to a particular venture and no such reference may be drawn from the circumstances, commercial understanding views it as a general deal in the general market and not conditioned on any assumption of the continuing operation of the buyer's plant. Even when notice is given by the buyer that the supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see such a supply contract as conditioned on the continuance of the buyer's further contract for outlet. On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

36 Comment, *supra* note 1.

37 247 N.W.2d 744 (Iowa 1976).

38 *Id.* at 748.

39 363 F.2d 312 (D.C. Cir. 1966). *See also* American Trading & Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939 (2d Cir. 1972).

> impracticable. Unless the courts find these three requirements satisfied, the plea of impossibility must fail.[40]

Although the court believed that the plaintiff had satisfied the first two requirements, it did not believe the plaintiff had satisfied the third. The additional costs of $43,000 were approximately 15% of the contract rate of $305,000. The court concluded:

> 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.[41]

The care with which this opinion examined two of the critical elements involved in commercial impracticability cases has helped insure its place as a significant precedent in this area. The first element is the question of risk allocation, which invariably involves a consideration of the related concepts of assumption of the risk and foreseeability. To the extent that a judge believes a contingency was foreseeable, the failure to provide that its occurrence would excuse performance suggests that the risk of its occurrence was assumed. The *Transatlantic Financing* opinion took a rather sophisticated view of the weight to be given to foreseeability in determining if the risk was allocated between the parties. The court suggested that foreseeability is only a factor probative of the assumption of the risk, but not dispositive. As the court stated:

> Foreseeability or even recognition of a risk does not necessarily prove its allocation. 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 probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs. In this case, for example, nationalization by Egypt of the Canal Corporation and formation of the Suez Users Group did not necessarily indicate that the Canal would be blocked even if a confrontation resulted.[42]

The second critical element is the degee or percentage of increase in cost, which the *Transatlantic Financing* opinion suggested had to be significant. The interaction of these two elements has provided the basis on which almost all subsequent section 2-615 cases have been decided.

A. *Risk Allocation, Assumption of the Risk, and Foreseeability*

As the *Transatlantic Financing* opinion so aptly points out, foreseeability is a less than perfect basis for determining whether a risk has been allocated. Even

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40 363 F.2d at 315-16.

41 *Id.* at 319.

42 *Id.* at 318 (citations omitted). *Accord,* RESTATEMENT (SECOND) OF CONTRACTS § 281, Comment 5 a. & c. (Tent. Draft 1974).

foreseeable contingencies may not have been allocated because of an inability to agree on the allocation, or because the parties were too pressed for time to consider it. Furthermore, foreseeability involves hindsight, and in retrospect many things appear foreseeable which it would be unrealistic to believe were foreseeable by the persons who signed the contracts. Certainly, many of the reported cases involve combinations of circumstances which it would be difficult to believe were foreseen by the parties, or which could fairly be labeled foreseeable at the time the contract was formed. *Publicker Industries Inc. v. Union Carbide Corp.*[43] involved a three-year contract for the supply of ethanol, a natural gas derivative. The contract contained an escalator clause allowing for modest price increases. When the market price of the raw materials which the supplier needed to produce the ethanol doubled, the supplier sought to avoid its obligations on a commercial impracticability theory. Union Carbide, the supplier, presented evidence to show the connection between oil prices and natural gas prices. Union Carbide also offered expert testimony to establish that it was unforeseeable that OPEC would double its prices following the 1973 embargo. The buyer countered, in effect, that OPEC's 25% price increase in 1971, the year before the contract was executed, was fair warning that further price increases of any size were possible. The court agreed with the buyer that the consequences of the Middle East oil situation were foreseeable.

In *Maple Farms, Inc. v. City School District,*[44] a milk supplier sought relief from a contract to supply milk to a school district when the market price rose 23% above the contract price. The court found that this increase was foreseeable. The price of milk had fluctuated within a 12% range in the three years preceding the execution of the contract, with a maximum change in any one year of 4.5%. The supplier claimed the sudden and significant increase in milk prices was due to the Russian grain sale and unexpected crop failures. The court, however, felt the price increases were foreseeable, because the price of milk had risen almost 10% between sometime in 1972 when milk was at its low for the year, and June, 1973, when the contract was signed. In addition, the seller should have been aware of the general inflation in this country in the years immediately before the contract was signed.

As these two opinions demonstrate, judges expect the parties to a contract to be seers. And to the extent the contingency, whether it be inflation, oil embargos, shortages or whatever, appears foreseeable, it is difficult to avoid the conclusion that if the contingency "was foreseeable there should have been provision for it in the contract, and the absence of such provision gives rise to the inference that the risk was assumed."[45]

B. *Impracticability as a Matter of Degree*

The impracticability cases decided subsequent to *Transatlantic Financing*

43 17 U.C.C. REP. SERV. 989 (E.D. Pa. 1975).
44 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974).
45 Lloyd v. Murphy, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1974). *See also* Nora Springs Coop. Co. v. Brandau, 247 N.W.2d 744 (Iowa 1976); Heat Exchangers, Inc. v. Map Constr. Corp., 34 Md. App. 679, 368 A.2d 1088 (1977); Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc., —— Minn. ——, 265 N.W.2d 655 (1978); Portland Section of Council of Jewish Women v. Sisters of Charity, 266 Or. 448, 513 P.2d 1183 (1973); Robberson Steel, Inc. v. J.D. Abrams, Inc., 582 S.W.2d 558 (Tex. Civ. App. 1979).

came closer to following its guidelines on the percentage of increase required before performance will be considered impracticable than to the reality and role of foreseeability in the impracticability area. The *Restatement of Contracts* requires an "extreme and unreasonable" increase,[46] illustrated by a 1000% increase in price.[47] The Code avoids dealing with percentages, and may even suggest that simple percentage increases, unrelated to any unforeseen and external contingency, are irrelevant. Comment 4 to section 2-615 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 the 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.

A simple rise or collapse of the market, the comment suggests, is a risk that business contracts were designed to cover. Only when the rise or fall in prices is tied directly to an unforeseen contingency does the price change become relevant. And even then, the price change must be dramatic before relief will be granted. The degree of required change has been described in a variety of ways. Typical statements include suggestions that "commercial impracticability" results only when requiring performance would be "economically unrealistic,"[48] would involve "commercial senselessness,"[49] would involve "extreme economic hardship,"[50] or be "so excessive and unreasonable that [it] would result in grave injustice,"[51] or be "especially severe and unreasonable."[52] The judicial attitude toward the degree of impracticability required before price increases will excuse performance has been neatly summarized in *Eastern Air Lines, Inc. v. Gulf Oil Corp.*,[53] in which the court said:

> The modern U.C.C. § 2-615 doctrine of commercial impracticability has its roots in the common law doctrine of frustration or impossibility and finds

46 RESTATEMENT OF CONTRACTS § 454 (1932).

47 RESTATEMENT OF CONTRACTS § 460, Illustration 2 (1932). The *Restatement (Second) of Contracts* adopts the following standard:

> "[I]mpracticability" means more than "impracticality." A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover.

RESTATEMENT (SECOND) OF CONTRACTS § 281, Comment d (Tent. Draft 1974). The illustrations giving percentage increases have all been dropped and no examples are given of increases "well beyond the normal range."

48 Natus Corp. v. United States, 371 F.2d 450, 457 (Ct. Cl. 1967).

49 Jennie-O Foods, Inc. v. United States, 580 F.2d 400, 409 (Ct. Cl. 1978).

50 Gulf Oil Corp. v. FPC, 563 F.2d 588, 599 (3d Cir. 1977).

51 *Id.*

52 *Id.* at 600.

53 415 F. Supp. 429 (S.D. Fla. 1975). *See also* Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974); Foster Wheeler Corp. v. United States, 513 F.2d 588 (Ct. Cl. 1975); Northern Corp. v. Chugach Elec. Ass'n, 518 P.2d 76 (Alaska 1974); Portland Section of the Council of Jewish Women v. Sisters of Charity, 266 Or. 448, 513 P.2d 1183 (1973).

its most recognized illustrations in the so-called "Suez Cases," arising out of the various closings of the Suez Canal and the consequent increases in shipping costs around the Cape of Good Hope. Those cases offered little encouragement to those who would wield the sword of commercial impracticability. As a leading British case arising out of the 1957 Suez closure declared, the unforeseen cost increase that would excuse performance "must be more than merely onerous or expensive. It must be positively unjust to hold the parties bound." *Ocean Tramp Tankers v. V/O Sovfracht (The Eugenia),* 2 Q.B. 226, 239 (1964). To the same effect are *Tsakiroglou and Co. Ltd. v. Noblee Thore G.m.b.H.,* 2 Q.B. 348 (1960), *aff'd,* A.C. 93 (1962), and *Caparanoyoti & Co., Ltd. v. E. T. Green, Ltd.,* 1 Q.B. 131, 148 (1959). These British precedents were followed by the District of Columbia Circuit, which gave specific consideration to U.C.C. 2-615, Comment 4, in *Transatlantic Financing Corp. v. United States,* 124 U.S.App.D.C. 183, 363 F.2d 312, 319 (1966).[54]

When these statements are converted to percentages of increase,[55] a study of the cases using percentages, and most do, indicate that when prices only double, relief is unavailable.[56] When prices increase tenfold, relief is available.[57] The range between 200% increases and 1000% increases remains untested under the Code. There has been experience, however, both domestic and foreign, with serious inflation and its potential impact on the enforceability of private contracts.

This country has experienced inflationary periods in the past, most noticeably during and after each major war—the Revolutionary War, the Civil War, and the World Wars. The judicial and legislative reactions to these periods can be valuable in attempting to assess the future of excuse claims based on inflation. In the mid-1930's, Professor Dawson published a series of articles explaining the impact of inflation on the enforceability of private contracts in post-World War I Germany, and the post-Civil War North and South.[58] The inflation rates, spread over the duration of the war in the North in the Civil War, and in the United States during World War I, did not exceed 100%. In neither case were the courts or the legislatures receptive to excuse claims based on inflation. The inflation rates in the South during the Civil War, and in post-World War I Germany were much higher, and ultimately the courts felt compelled to find some method of adjusting the rights of the parties to private contracts to take these exceptional inflation risks into account.

Professor Dawson attempted to forecast the impact inflation might have in

54 415 F. Supp. at 438.

55 A drop in the market price, in the rare case where one occurs, is not treated any differently than a rise in the market price. Hancock Paper Co. v. Champion Int'l Corp., 424 F. Supp. 285 (E.D. Pa. 1976).

56 American Trading and Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939 (2d Cir. 1972) (less than one-third); Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (14%); Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978) (50-58%); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (40%); Publicker Indus. Inc. v. Union Carbide Corp., 17 U.C.C. Rep. Serv. 989 (E.D. Pa. 1975) (less than 100%); Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974) (23%); Portland Section of Council of Jewish Women v. Sisters of Charity, 266 Or. 448, 513 P.2d 1183 (1973); Schafer v. Sunset Packing Co., 256 Or. 539, 474 P.2d 529 (1970) (100%). *See also* Note, *supra* note 1.

57 The only cases which clearly illustrate this premise are Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916), discussed in text accompanying notes 10-11 *supra,* and City of Vernon v. City of Los Angeles, 45 Cal. 2d 710, 290 P.2d 841 (1955). *See also* Restatement of Contracts § 460 (1932).

58 Dawson, *Effects of Inflation on Private Contracts: Germany, 1914-1924,* 33 Mich. L. Rev. 171 (1934); Dawson & Cooper, *The Effect of Inflation on Private Contracts: United States, 1861-1879,* 33 Mich. L. Rev. 706, 852 (1935).

future periods in the United States. His conclusion, viewed in the light of the recent Code cases, seems unquestionably accurate:

> For inflation to be recognized in law actions as a "change of conditions" discharging a contract, it will presumably have to exceed, by a considerable margin, the degree of depreciation [in the value of the dollar] experienced during the Civil War and again during the Great War.[59]

Apparently there are no reported decisions involving price increases that fall within this area of extreme inflation. There is, however, a case about to be decided which may be held to fall within this range. The case involves the Westinghouse Electric Company, which entered into long-term supply contracts for uranium as part of the promotion of and sale of nuclear reactors to a number of public utilities. Depending on whose version of the facts is adopted, the price increase is between 250 and 500%.

This case will thus be the first to consider the possible excuse effects of a price increase of this magnitude. The size of the price increases, along with the significant amount of money at stake, promises that this case will ultimately join with *Transatlantic Financing* as the landmark cases in the area of excuse under the Code.

C. *Commercial Impracticability—the "Phantom" Defense*

The discussion thus far should create the definite impression that the commercial impracticability defense is difficult, if not impossible, to establish. A variety of factors account for this phenomenon. While the courts have not indicated any desire to expand the availability of the doctrine beyond the situations recognized by the common law of excuse, despite any desire of the draftsmen of the Code to effect a change in judicial attitudes, the judicial reluctance to expand the defense is not simply based on history. The well-entrenched belief in the sanctity of contracts is certainly a significant factor in this judicial attitude toward the commercial impracticability defense. Another significant factor is the uncertainty that application of the doctrine to any significant number of cases would produce between the parties to other contracts, and the even more uncertain effect that decisions favorable to excuse claims would have on the economy as a whole. Judges are not anxious to put themselves in the position of having to decide when the degree of price increase has reached a level of "harshness" necessary to justify relief, especially when the economists persist in telling judges that they are not competent to make these types of decisions. Admittedly, these decisions would not be easy to make, especially if judges were to take into account the relative financial situations of the parties, or their ability to spread or pass on the losses occasioned by recognition of the excuse defense.

A party seeking relief on the theory of excuse must overcome more than just judicial reluctance to grant relief. Additional hurdles are presented by the requirement of an absence of fault, and the doctrines of foreseeability and

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59 Dawson & Cooper, *supra* note 58, at 895. *See also* Hurst, *supra* note 1, at 565-66.

assumption of the risk. Every case raises these issues and every case will involve some type of fault, to some degree, and some foreseeable causes of price increase. The foreseeability issue can be especially complicated because certain causes of a price increase will be considered foreseeable, at least to some degree, while other causes will be considered the very type of risk a party assumes, and are irrelevant in calculating the "harshness" of a rise in prices. Recent experience with double digit inflation almost certainly means that an inflation rate of fifteen percent, or even more, will be considered foreseeable, and only an inflation rate in excess of the foreseeable rate of inflation will be considered. Changes in demand which drive prices up even beyond the rate of inflation are probably irrelevant to the calculation since the allocation of even unknown and unforeseeable changes in market conditions is considered one of the primary functions of the law of contracts. Since the party claiming excuse has the burden of establishing the defense, he must be in a position to isolate the causes of the price increase, and then demonstrate the relative impact each cause had on the price increase.[60] After isolating the causes and showing their respective impact on the price increase, the party claiming excuse must also convince the court or the jury that at least some part of each cause of the price increase was not foreseeable, and was not attributable to his own fault.

A total absence of fault may also be almost impossible to establish. Where some degree of fault appears to be present, at least that part of the price increase due to the fault-related cause will become irrelevant. It is even possible that this entire contributing cause will be ignored because of the great importance attributed to the absence of fault requirement. A simple example might help demonstrate the difficult position the party claiming excuse is in. A mink rancher agrees to supply 10,000 mink pelts to a fur manufacturer in March, 1979, at a price of $30 per pelt. When March, 1979, arrives, the rancher claims excuse. He only has 8,000 pelts from his own production. He can demonstrate that adverse weather conditions and higher-than-normal disease rates caused this lower-than-normal production.

A court is unlikely to excuse the rancher from his obligation to deliver the 8,000 pelts he has, even if the market price of mink has gone to $75 or $100 a pelt. What are the rancher's chances of avoiding a breach of contract judgment for the 2,000 pelts he does not have? In the abstract, they may appear good, because the rancher has an argument that the pelts covered by the contract were expected to come from his own production. A sympathetic court might be willing to accept this argument even if the contract is silent about the source of the pelts, especially if the market price has gone to $100 a pelt. But this sympathy is likely to evaporate when the buyer points out that the rancher had to see his production problems developing long before the delivery date, and that the rancher could have purchased enough pelts to cover any deficit in his own production at $35 or $40 a pelt, which was the market price when the rancher should have become aware of his own likely production shortfall. Now the price increase has been converted from more than 300% to only a 33% increase, simply by finding some type of fault. It is unlikely that many parties claiming

60 Dawson & Cooper, *supra* note 58, at 868-73; Schwartz, *Sales Law and Inflations,* 50 S. CAL. L. REV. 1, 16-19 (1976).

excuse will be able to avoid the attribution of fault which hindsight can show would have avoided or limited the ultimately disastrous degree of price increase in question.

The Code excuse cases are just beginning to explore these issues of isolation, causation and fault, including passive as well as active fault. The most helpful is a recent uranium supply contract case in which the commercial impracticability defense was unsuccessfully raised. In *Iowa Electric Light & Power Co. v. Atlas Corp.,*[61] the defendant, a uranium producer, pointed to an almost sevenfold increase in the market price of uranium to justify its excuse claim under a four-year contract entered into in 1973. The uranium producer claimed that the Arab oil embargo and OPEC cartel, unexpected federal safety regulations, wage and equipment cost increases and "certain uranium market conditions (mainly the announcement that Westinghouse could not fulfill its contractual commitments to supply about 70 million pounds of yellowcake)"[62] were the source of this dramatic price increase. But the court concentrated, not on the market price of uranium, but on the defendant's costs of production. And while the costs of production had increased, part of the increase was due to a conscious decision to use lower-grade ores and different production methods which were cost-justified by the producer's later contracts with others at higher contract prices.

The court said:

> There is no doubt that Atlas suffered burdensome increases in production costs. There is no doubt that many of those costs were not foreseen or considered likely to occur or to be so substantial. But Atlas has failed to bear its burden on the counterclaim to prove which and how much of the increases were reasonably unforeseen and not, in part, a function of its own actions. A contract is not a sacred document. But the stability and efficiency of economic life is [*sic*] said to be closely linked to the integrity of these commercial agreements.
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> . . . .
>
> . . . While some of [the causes of the increased costs] may have been unforeseen, and certainly the total impact was not contemplated by either party during contract negotiations, the evidence in this case shows that prior to the contract being signed there was good reason to anticipate rising costs and drastically increased expenditures for environmental and safety equipment and procedures. . . .
>
> It would be unfair to expect Atlas to have prophesied the magnitude of the increases complained of, but it is not clear that it was not in a position to protect itself contractually from some of the risks which would drive the price of yellowcake up and consequently affect the cost of production.
>
> . . . .

61 467 F. Supp. 129 (N.D. Iowa 1978). Another opinion, significant for its discussion of the difficult problems of proof, is Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 440-41 (S.D. Fla. 1975).
62 467 F. Supp. at 134.

> Where the occurrences complained of are in some degree foreseeable and capable of being protected against contractually, where the burdensome production cost increase complained of is to some extent a function of internal corporate decisions, and where it is impossible to determine what share of the increase is attributable to unforeseen conditions not assignable to the party seeking discharge or adjustment, it becomes unnecessary to reach the question of how much increase constitutes impracticability. . . .[63]

In a second opinion, the court gave the producer a chance to show, on the basis of evidence already in the record, the extent to which cost increases "were not attributable to its own profit-maximizing decisions or contingencies which it could have foreseen and protected against."[64] Although the exact method by which the court calculated these relevant increased costs is not clear, the court found only a 52.2% increase in these relevant costs. The court concluded that an increase of only this magnitude did not justify relief, especially since the producer was effectively able to spread its losses on this contract among other buyers on later contracts.

D. *Force Majeure Clauses*

Section 2-615, as well as the other excuse provisions of the Code, is designed to provide a defense where the parties have not themselves incorporated a different standard for excuse. Buyers and sellers often incorporate force majeure clauses in their contracts which provide for adjustments to the contract, or total relief from the contract, upon the occurrence of certain described events. These clauses can be extremely useful, if they are valid, because they can expand the availability of the excuse defense beyond the restrictive bounds of the common law and section 2-615.

Until recently, there was concern about the legality of force majeure clauses under contracts governed by the Code because of the introductory language to section 2-615, which provides "except insofar as a seller may have assumed a greater obligation." This language led some to suspect that the Code was drafted to eliminate the possibility of the parties providing for a lesser obligation than that called for by the Code section itself. In a carefully prepared study of this problem, Professor William D. Hawkland concluded that the draftsmen had no such intent in adopting this introductory language to section 2-615.[65]

Professor Hawkland's study includes a review of the unpublished notes of Professor Karl Llewellyn, the principal Code draftsman, who wrote section 2-615 and its comments. Professor Llewellyn's notes indicate that the purpose of section 2-615 was to provide a statutory basis for a claim of relief from burdensome contracts, where the burden did not rise to the level traditionally called for under impossibility standards, and where the parties had not thought to provide their own force majeure clause.

Professor Llewellyn's draft of section 2-615 began with the introductory

63 *Id.* at 132-135.
64 *Id.* at 138.
65 Hawkland, *supra* note 12.

phrase "[b]etween merchants unless otherwise agreed." This language was dropped in 1949, and the present language was substituted in its place. The introductory language was changed, not to restrict the ability to widen excuse beyond that permitted under section 2-615, but to attempt to make the language of the section conform to the opinion of the Court of Appeals for the Second Circuit in a then recent opinion. As Professor Hawkland explained:

> When this draft and comment 8 were discussed at the American Law Institute meeting in May 1949, it was argued that the holding of the *Madeirense Do Brasil, S.A. v. Stulman-Emrick Lumber Co.*, cited in comment 8, had been distorted by the comment and in the prefatory language of section 2-615 and that a "slight" amendment was needed to correct this sitution. The *Madeirense* case, it was pointed out, did not involve a situation in which the parties had made an express agreement as to exemptions or nonexemptions from performance. In that case the seller sought to excuse its failure to perform by claiming that it could not deliver the goods as required, because no ships were available. No provision in the contract addressed this matter. The court denied the excuse on the ground that the seller (plaintiff) has assumed the risk of finding ships . . . .
>
> The argument was made that proposed section 2-615 would reverse this case because, in the absence of an express agreement between the parties with respect to exemptions, the frustration rules of the section would be available to give the seller relief even though the circumstances surrounding the case showed that he had assumed the risk involved. Therefore a proposal was made that section 2-615 be amended to reconcile itself with *Madeirense* by deleting the language "unless otherwise agreed" and substituting in its stead the words, "Except so far as a seller may have assumed a greater obligation. . . ." This would make it clear, it was suggested, that the seller could surrender his right to claim excuse on force majeure grounds not only by express agreement but by otherwise "assuming a greater obligation."
>
> The proposal to amend section 2-615 carried with it a danger that was not appreciated at the time it was made, namely that the deletion of the "unless-otherwise-agreed" language could result in the section being construed to mean that the parties had no competence to write force majeure terms into their sales contracts. Simply put, this construction would mean that the seller got only the force majeure protection of section 2-615 with no power to enlarge it by contract.[66]

As Professor Hawkland has concluded, then, the Code does not restrict the ability to use a force majeure clause. It does, however, establish minimum conditions for the clause which are in fact a continuation of the pre-Code standards by which such clauses were judged. The clause must be specific in its description of the subsequent event which later occurs and forms the basis for the claim of excuse, and the described cause must be the actual cause of the promisor's inability to perform.[67]

Professor Hawkland's view on the availability of force majeure clauses under the Code has been confirmed in a recent case which considered this problem. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*,[68] involved an excuse

66 *Id.* at 78.
67 *Id.* at 76-77.
68 532 F.2d 957 (5th Cir. 1976).

defense raised by an aircraft manufacturer who had delivered ninety of the ninety-nine aircraft ordered by the plaintiff an average of eighty days late. The essence of the manufacturer's defense was that the delays were caused by its acquiescence to government insistence that priority be given to the manufacture of military aircraft needed to support the war effort in Vietnam. The manufacturer placed its principal reliance on the following force majeure clause which was found in each contract it had entered with the buyer:

> EXCUSABLE DELAY
>
> Seller shall not be responsible nor deemed to be in default on account of delays in performance of this Agreement due to causes beyond Seller's control and not occasioned by its fault or negligence, including but not being limited to civil war, insurrections, strikes, riots, fires, floods, explosions, earthquakes, serious accidents, any act of government, governmental priorities, allocation regulations or orders affecting materials, equipment, facilities or completed aircraft, failure to obtain Federal Aviation Agency Airworthiness and Type Certificate or Certificates, acts of God or the public enemy, failure of transportation, epidemics, quarantine restrictions, failure of vendors (due to causes similar to those within the scope of this clause) to perform their contracts or labor troubles causing cessation, slowdown, or interruption of work, provided such cause is beyond Seller's control.[69]

The trial court had ruled that this clause excused only the delays resulting from one of the listed causes, or one similar to those listed, and that the delay had to result from events which were not reasonably foreseeable at the time the contract was entered. These rulings had the effect of seriously restricting the manufacturer's potential excuse defense. In reversing the trial court opinion, the court of appeals established a set of ground rules for interpreting and applying a force majeure clause, which can be summarized as follows:

(1) Clauses which establish a general standard for excuse, followed by specific examples, are not subject to the *ejusdem generis* canon of construction, which limits general language following a list of specific provisions to related or similar kinds of circumstances. Thus, the cause of the delays in this case did not have to be caused by events similar to those specifically described, so long as the events were "due to causes beyond Seller's control and not occasioned by its fault or negligence."

(2) Force majeure clauses can expand the basis for excuse beyond that created by the Code provisions themselves. When, however, the claimed basis for excuse is found only in the general language of an excuse clause, rather than in specific language, the assumption is that the language of the excuse clause only duplicates the standards found in section 2-615 itself, since this seems to reflect current and prevailing commercial practices. This assumption of duplication of the Code standards is not absolute. The Code does not require that the excusing contingency be stated with specificity. Even in the absence of detailed wording, trade usage or the surrounding circumstances may indicate an intent to grant the seller a broader exemption than that provided by the Code. To this limited degree, the court disagreed with Professor Hawkland, who had

69 *Id.* at 963-64 n.6.

concluded that specificity in describing the excusing contingency was always required.

(3) Where specifically described contingencies form the basis for the excuse claim, the contingency need not have been unforeseen and unforeseeable. When the seller "has anticipated a particular event by specifically providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable." Where, however, the contingency is covered only by the general language of a force majeure clause, the contingency must have been unforeseeable, for foreseeable risks are invariably deemed to have been assumed where no specific provision is made for them.[70]

The court concluded that the government's informal demands for priority for military projects were an "act of government" specifically covered by the force majeure clause. This meant the defense was available, even if the government intervention was foreseeable at the time the contracts were executed.

E. *Post-Excuse Concerns*

A party intending to rely on excuse under any of the Code's excuse provisions would seem to have an obligation to notify immediately the other party of the circumstances leading to the claimed excuse, and what the consequences of the claimed excuse are believed to be. The consequences could simply involve a delay in performance, a complete or partial inability to perform, or perhaps a combination of delay and some degree of non-performance. Strangely, only section 2-615 clearly imposes a prompt notification obligation.[71]

In those situations where the excusing event does not totally prevent performance, the buyer is, in effect, given the choice of either insisting on performance under the contract terms to the extent this is possible, or of cancelling the contract.[72] When a number of potential buyers are affected by a seller's claim of partial excuse, the seller must also allocate his remaining supplies. The Code requires that the notice claiming excuse also estimate the buyer's quota under the allocation scheme adopted by the seller.[73] The Code does not suggest how the seller is to allocate among his customers, other than to provide that the allocation plan must be "fair and reasonable," and may include regular customers not holding contracts at the time excuse is claimed, and the seller's own needs, in addition to the quantities covered by existing contracts.

The fairness and reasonableness of allocation plans adopted by sellers have been challenged in a number of recent cases. In *Terry v. Atlantic Richfield Co.*,[74] a gas station operator challenged an allocation plan which gave each customer a fixed percentage of the gasoline the customer had purchased in the same month a year earlier. The plaintiff challenged the allocation plan because

70 *Id.* at 988-92. *See also* Intermar, Inc. v. Atlantic Richfield Co., 364 F. Supp. 82, 99 (E.D. Pa. 1973); Olsen v. Spitzer, —— S.D. ——, 257 N.W.2d 459 (1977).

71 U.C.C. § 2-615(c) provides: "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 for the buyer."

72 U.C.C. §§ 2-613(b), 2-616(1).

73 *Id.* § 2-615(b).

74 72 Cal. App. 3d 962, 140 Cal. Rptr. 510 (1977).

various circumstances had conspired to keep its allocation period purchases low, and the plaintiff believed it was not getting a fair share of the seller's available gasoline supply. In discussing the "fair and reasonable" requirement, the court said:

> The statutory demand for a "fair and reasonable" allocation of short supplies denotes a collective quality characterizing the supplier's treatment of his customers as a group. An individualized approach, geared solely to the needs of particular customers, may provide adequacy to some, insufficiency to others. A fair and reasonable allocation distributes benefit and hardship equably. Decisional law preceding the California Uniform Commercial Code obligated the seller to adopt a proration plan applicable to the entire group of customers. The official comment appended to section [2-615] demonstrates perpetuation of this decisional concept. Comment 11 declares: ". . . [I]f the situation is such that [the seller's] customers are generally affected he must take account of all in supplying one . . . [I]n case of doubt his contract customers should be favored and supplies prorated evenly among them regardless of price."
>
> Plaintiffs' demand for treatment shaped to their unique circumstances runs counter to statutory insistence upon collective fairness. . . . The fact that some other formula might have increased plaintiffs' allocation does not require rejection of the formula actually adopted.[75]

Apparently only one decision has addressed the question of the consequences of a failure to notify, to allocate to all customers then under contract, or to allocate on a "fair and reasonable" basis. In *Bunge Corp. v. Miller,*[76] the court concluded that a failure to give prompt notice prevented the party asserting excuse from relying on the defense. This view is supported by the language of section 2-615, which uses the word "must" in referring to the notice and allocation requirements, and by the language of section 2-615(a). The choice of the word "must" suggests that satisfaction of these requirements is a condition precedent to a successful claim of excuse. On the other hand, making these requirements mandatory also makes them potentially punitive in nature. There is little reason to believe that the recovery of ordinary contract damages which result from the excused party's failure to comply with these post-excuse requirements will not adequately protect the other parties involved, and that nothing is to be gained by treating these requirements as absolute conditions which must be satisfied before a claim of excuse will be recognized.

V. The Consequences of Excuse

The application of the doctrine of excuse has consequences beyond the determination of whether a promisor's future obligations need to be fulfilled. If a court accepts the defense, this question has been answered for the parties.

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75 *Id.* at 968-69, 140 Cal. Rptr. at 513. *See also* Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245, 257 (N.D. Ill. 1974); Intermar, Inc. v. Atlantic Richfield Co., 364 F. Supp. 82, 98 (E.D. Pa. 1973); Mansfield Propane Gas Co., Inc. v. Folger Gas Co., 231 Ga. 868, 204 S.E.2d 625 (1974).

76 381 F. Supp. 176 (W.D. Tenn. 1974).

Other questions also need to be answered, especially when the contract is no longer totally executory on both sides. There are essentially four kinds of losses which need to be considered. These are (1) expectation interests, which include lost profit claims; (2) reliance interests, or the direct and indirect expenditures incurred in performance of the contract; (3) the value of the subject matter of the contract, if it has been destroyed; and (4) down payments.

Expectation interests have never been protected, nor has their loss ever been shared. A grain dealer who contracts to buy a farmer's crop has no claim for any profit he might have earned on the resale of the grain if the farmer is excused from performance by the crop's destruction by flood. And if the dealer has already resold the grain before it was destroyed, the dealer may be held liable to his buyer for breach of contract. The farmer's excuse is not necessarily also the dealer's excuse. But this much is clear—neither the farmer's expected profit nor the dealer's expected profit is recoverable, in whole or in part, from the other party to the contract.[77]

The treatment of down payments is also relatively clear. The early English cases took the position that down payments made before the excusing contingency occurred could not be recovered. In fact, these cases drew a line at the time the excusing contingency occurred. Obligations due before the event were enforceable, those due after it were excused. In *Chandler v. Webster,*[78] a coronation case similar to *Krell v. Henry,* the court ruled that a down payment made before the king's coronation was cancelled could not be recovered and that money due before that date, but not paid, could be recovered. The rule was admitted to be an arbitrary one. However, since the courts had to assign the losses involved in the transaction to one of the two parties, both of whom were innocent and without fault, it was just as easy to leave the losses where they were on the date the excusing event occurred. Depending on the circumstances of the particular case, this result was often no more, or less, arbitrary than any other result. The American cases have not followed the English precedents on this question of the treatment of down payments. Down payments are recoverable.[79]

Reliance expenditures, in the nature of part performance, have enjoyed an interesting and not completely uniform treatment. Cases involving the repair or improvement of real estate provide an illuminating place to start. The typical case involves an agreement to add to or remodel an existing building. After the work is partially completed, the building is completely destroyed, and with it, the partially completed improvement. Some cases deny the contractor any recovery for his work. Somewhat surprisingly, a majority of the cases do allow recovery, generally on the theory that the owner is obliged on a restitutionary theory to pay for benefits conferred prior to the catastrophe, although

77 Comment, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution,* 69 YALE L.J. 1054, 1059-60 (1950).

78 [1904] 1 K.B. 493 (C.A.). *See also* Birmingham, *A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory,* 20 HASTINGS L.J. 1393 (1969).

79 Comment, *Quasi-Contract—Impossibility of Performance—Restitution of Money Paid or Benefits Conferred Where Further Performance Has Been Excused,* 46 MICH. L. REV. 401, 415 (1948); Comment, *supra* note 77, at 1061; RESTATEMENT OF CONTRACTS § 468 (1932).

the benefit conferred is largely illusory once the building has been destroyed.[80]

In pure contracts for the sale of goods, the split of authority found in the contractor cases does not exist. In sales of goods cases, restitution based on part performance apparently has no application to the potential recovery of expenditures made in performing the contract up to the date of the excusing event. In these cases, the losses resulting from the destruction of the subject matter are assigned on the basis of the risk of loss rules.

The common law assigned the risk of loss under a title theory. The classic illustration is *Tarling v. Baxter,*[81] which involved the sale of a haystack. The haystack remained in the seller's possession, but the court held that title had passed to the buyer. When the haystack was destroyed by fire before the buyer had taken possession, the court ruled that the buyer bore the risk of the loss of the goods. The Code has abandoned the common law rule assigning risk of loss on the basis of title concepts. The rule of general application under the Code is that risk of loss passes to the buyer on delivery if the seller is a merchant, or upon tender, if the seller is not a merchant.[82] A merchant seller bears the risk of the entire loss of the value of the subject matter of the contract even if the goods have been completely manufactured and even if they have been identified to the contract. It would follow from this rule that if the seller of goods has partially completed the manufacturing or procurement process, he cannot recover the value of that part performance on either a restitution or a reliance theory. To allow recovery would be to subvert the Code's risk of loss rules.[83]

Commercial impracticability cases may be entitled, at least theoretically, to a different and special treatment under the Code. Comment 6 to section 2-615 provides:

> 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.

The intended impact of the comment is unclear in several respects. It may be limited to commercial impracticability cases under section 2-615, or it may

80 Comment, *supra* note 77, at 1061-66; Annot., 28 A.L.R.3d 788 (1969). There is some authority for splitting losses on government contracts where it ultimately turns out the product cannot be produced because the specifications call for performance beyond the state of the art.

If neither party is at fault for producing a contract which cannot be completed, the costs will be split between them under a "mutual mistake" theory. The leading case is National Presto Indus., Inc. v. United States, 338 F.2d 99 (Ct. Cl. 1964), *cert. denied,* 380 U.S. 962 (1965). *See also* Dynalectron Corp. (Pac. Div.) v. United States, 518 F.2d 594 (Ct. Cl. 1975).

81 6 B. & C. 360, 13 Eng. Rep. 169 (K.B. 1827).

82 U.C.C. §§ 2-509, 2-510.

83 The *Restatement (Second) of Contracts* suggests that restitution measured by the value of any benefit conferred is an appropriate remedy when impossibility excuses performance. RESTATEMENT (SECOND) OF CONTRACTS § 391 (Tent. Draft 1979).

The *Restatement* recognizes that if a sale of goods is involved, the seller would not be entitled to restitution if the goods have not been delivered because no benefit has been conferred. RESTATEMENT (SECOND) OF CONTRACTS § 384, Comment a (Tent. Draft 1979). The *Restatement* then suggests that the seller may have a reliance claim under *Restatement (Second) of Contracts* § 363 (Tent. Draft 1979), but § 363 does not offer an illustration involving a sale of goods transaction, or even anything analogous to it.

affect the other excuse provisions as well. It might be considered an especially attractive approach for section 2-614(1) cases, where the allocation of the increased costs of substitute methods of delivery seems to fall entirely on the seller. The word "adjustment" is also somewhat ambiguous. It seems likely that almost any term of the contract could be adjusted—including time of delivery and time and manner of payment. The principal form of adjustment the draftsmen must have had in mind is in the price.

Over the years, the concept of allocating the losses incurred in excuse cases to split the risk between the parties has been suggested a number of times.[84] England has now done so by statute. The English Law Reform (Frustrated Contracts) Act[85] allows for the recovery of down payments, and gives the English courts the power to apportion losses between the parties.

Those who have suggested that American law be modified to divide the various kinds of losses involved in excuse cases have not dealt with the kinds of losses comment 6 to section 2-615 is really aimed at. These authorities have concentrated on situations where death or destruction prevents the completion of the promised performance. The authority for allowing partial recovery in these situations could be extended to sale of goods transactions, although this does seem to conflict, as discussed earlier, with the result intended by the risk of loss rules.

In the commercial impracticability cases, the situation is radically different, because the goods have not been destroyed and part performance, the usual basis for awarding restitutionary relief, is not even involved. Using a seller as an example, the seller can fully perform, and the buyer wants him to. In the kinds of cases that can be expected to arise, the seller will want the losses caused by significant changes in price to be split. This is a very different situation from those which have been explored and commented on by others in the past. A simple case would involve a contract for sale at $10 a unit, where the costs of manufacturing have risen from $8 a unit at the time the contract was signed to $80 a unit at the time for delivery. If performance is not excused, the seller will have a $72 per unit loss. If performance is excused, the buyer will lose the benefit of his bargain, and have to pay the new market price of $80 in order to get the goods. This can be unfair to the buyer for many reasons, including his reliance on the contract in not buying elsewhere while the price was still lower than the current market price of $80. Comment 6 suggests that the court can fix a fair price at which the contract will be enforced, which for purposes of illustration can be set at $40 per unit. This splits the risk of the unexpected price increase between the parties.

Thus far comment 6 has not been used to adjust the rights of the parties to any contract in cases involving claims of excuse under the Code. Successful excuse defenses have been rare. This has left very few cases in which the adjustment argument would appear to apply because the assumption thus far seems

84 Fuller & Perdue, *The Reliance Interest in Contract Damages: 2,* 46 YALE L.J. 373, 379-82 (1937); Mueller, *Contract Remedies: Business Fact and Legal Fantasy,* 1967 WIS. L. REV. 833, 836-37; Comment, *Loss Splitting in Contract Litigation,* 18 U. CHI. L. REV. 153, 154-56 (1950); Comment, *supra* note 77.
85 1943, 6 & 7 Geo. 6, c. 40.

to be that the party claiming excuse first has to meet the traditional standards of an excuse defense. Only then is adjustment available as a possible remedy.[86]

This assumption is not necessarily well-founded. The adjustment possibility creates room for an additional argument that the standards for excuse should be more relaxed under the Code than they were under the common law. This would not only conform to the draftsmen's apparent intent, but the adjustment possibility, by splitting the losses, takes at least some of the sting out of the conclusion that excuse should be recognized. Since the losses will not all fall entirely on one party or the other, the courts should be willing to recognize excuse defenses more often, and then use the "adjustment" approach to apportion the losses.

As an abstract proposition, this sounds very appealing. It is very unlikely that it will ever happen. Reducing the traditional standards applied by the courts for excuse has proved largely impossible. Breaking the habit of the traditional judicial solution of "all-or-nothing" in any formal way seems a truly insurmountable task. In addition to getting the judge to break with the past, the adjustment proponent must also convince the judge to adopt a standard for making the adjustments. This is a task that judges will understandably be very reluctant to undertake. Arriving at a fair and equitable adjustment will be a time-consuming and difficult task no one will want to be the first to attempt. If price adjustments are to be made, they will almost certainly have to continue to be made informally, via a settlement route. Judges may be willing to pressure the parties to create their own adjustments through settlement but they are unlikely to be willing to attempt it for parties who are unable to reach a settlement on their own.[87]

VI. Conclusion

The Uniform Commercial Code's attempt to liberalize the availability of commercial impracticability as a contract defense has failed. This attempt to liberalize the law has been frustrated by a continued adherence by the courts to the common law standards of excuse, including the concept of foreseeability and the requirement of an absence of fault. The recognition of a new type of fault has added to this frustration. The courts have examined whether the party claiming excuse has taken affirmative steps following the formation of the contract but prior to the time of performance to reduce the impact of new occurrences. Furthermore, the party claiming excuse has been required to identify each of the various causes of the claimed commercial impracticability and then to demonstrate the extent to which each cause was not foreseeable or avoidable.

86 Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978), is the only reported Code case discussing the adjustment possibility. The court applied the traditional excuse standards, refused to excuse performance, and never got deeply into the adjustment possibility. *Id.* at 139. *See also* Comment, *Commercial Impracticability and Intent in UCC Section 2-615: A Reconciliation,* 9 CONN. L. REV. 266, 273-77 (1977).

87 In Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. at 136, the court said: "The court takes note of the number of voluntary price adjustments entered into by other suppliers and buyers of [uranium] yellowcake. Voluntary attempts at reaching equitable agreements and foregoing expensive litigation should be encouraged."

Only those factors which were neither foreseeable nor avoidable are considered relevant in determining whether the circumstances have changed sufficiently to excuse performance under the contract.