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APPLICATION OF THE DOCTRINE OF COMMERCIAL IMPRACTICABILITY: SEARCHING FOR "THE WISDOM OF SOLOMON"

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I. INTRODUCTION

Important shifts in contract doctrine may be traced to certain decisions. Judge Traynor's opinion in *Drennan v. Star Paving Co.*¹ gave new, different, and permanent life to the principle of reliance as a formative device. Judge Cardozo's words in *Wood v. Lucy, Lady Duff-Gordon*² have indelibly colored application of judicial interpolation of good faith obligations into contractual relationships. These, and other such opinions, were the means by which the law of contracts expanded. They were not necessarily "right" compared to the possible doctrinal alternatives,³ but they moved the law to new and perhaps higher ground.

Similarly, in *Aluminum Company of America v. Essex Group, Inc.* ("ALCOA"),⁴ Judge Teitelbaum attempted to fashion a new, expansive approach to the doctrine of "excuse"⁵ to determine whether

¹ 51 Cal. 2d 409, 333 P.2d 757 (1958).

² 222 N.Y. 88, 118 N.E. 214 (1917).

³ In this regard, it should be remembered that Judge Cardozo spoke for a four-to-three majority reversing the decision of a unanimous five judge lower appellate court, which itself reversed the decision of a trial judge.

⁴ 499 F. Supp. 53 (W.D. Pa. 1980) [hereinafter ALCOA].

⁵ Commentators theretofore had urged such expansion. See, e.g., Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75 (1974) (arguing that under U.C.C. § 2-615, contracting parties are competent to write force majeure clauses into contracts); Jennings, *Commercial Impracticability—Does it Really Exist?*, 2 WHITTIER L. REV. 241 (1979); Speidel, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management*, 32 S.C.L. REV. 241, 248 (1980) (discussing the "birth of a more liberal excuse doctrine").

certain supervening events⁶ relieved Alcoa from performing its contractual obligations.⁷ The exercise, a determination whether the events fit under the "traditional" excuse rubrics of mistake, impossibility, impracticability, or frustration of purpose was not a novel one. Courts had resolved such questions on a case-by-case basis long before *ALCOA*. What was different in *ALCOA* was Judge Teitelbaum's readiness, with little, if any, supporting authority, to take an expansive view of these rubrics in finding that Alcoa was entitled to relief.

Had Judge Teitelbaum confined his analysis to broadening the traditional excuse doctrine, *ALCOA* might have served as the cornerstone of a more expansive, or at least more fully integrated, doctrine of excuse that avoids the anomaly of a doctrine that is hardly ever applied.⁸ Even a concerted effort to reconcile or reverse his untraditional findings of mistake, impracticability, and frustration might have produced a unitary approach to excuse built around the single concept of fundamental fairness.

Judge Teitelbaum, however, was not content to stop with an expanded concept of relief-supporting events. He took the more radical step of holding that the supervening events served not to provide an "excuse" relieving performance, but rather to justify modification of the performance obligation through the imposition of loss- and risk-sharing: the judicial interpolation of new pricing terms to ameliorate the perceived hardship caused by the putatively excusing events.⁹ Here was

⁶ The supervening events at issue in *ALCOA* primarily involved the great escalation in the world-wide cost of petroleum-based products that followed from the OPEC oil crisis in the mid-1970's.

⁷ Alcoa sought relief from its long-term (fifteen-year) contractual obligation to process aluminum ore under an aluminum toll conversion contract. The contract fixing the price to be paid by Essex to Alcoa provided, among other adjustments, for price adjustment based upon the Wholesale Price Index—Industrial Commodities (WPI). See *ALCOA*, 499 F. Supp. at 56. In consequence of sharply increased fuel costs resulting from the OPEC embargo, Alcoa's actual cost of production, of which the principal element was the generation and consumption of electricity, increased far more sharply than did the WPI. Although the contract was highly profitable to Alcoa between 1968 and 1974, Alcoa began to sustain losses and projected that if the contract continued until the expiration of its term in 1983 it would have sustained further losses in excess of \$75 million. See *id.* at 58-59.

⁸ See *McGinnis v. Clayton*, 312 S.E.2d 765, 775 (W. Va. 1984) (Harshbarger, J., concurring) ("[T]he commercial impracticability doctrine is recognized, but rarely allowed as an excuse for nonperformance.").

⁹ See *ALCOA*, 499 F. Supp. at 78-80. Judge Teitelbaum essentially treated the matter as one of partial pregnancy—putatively excusing events occur, but do not serve to excuse. Rather, they serve to justify modification of the performance obligation through the device of judicial reformation of the express contract. Such reformation leaves the parties perhaps somewhat less "mistaken," performance not so impracticable, and the result a bit less frustrating. It was this use of judicial power to implement concepts of loss-sharing that ultimately engendered both the praise and the scorn lav-

a radical departure that overshadowed the more subtle, but no less radical departure embodied in the underlying determination that Alcoa was not to be held strictly to its voluntarily-assumed contractual obligations.

Although Judge Teitelbaum's loss-sharing methodology evoked a flurry¹⁰ of both positive¹¹ and negative¹² commentary, it is perhaps also responsible for the fact that, in the seven years since the case was decided, *ALCOA* has had little impact on judicial thought. The judicial sands seem to have shifted more to cover over the decision than to expand upon it.¹³ One might then wonder why a decision apparently as

ished upon the decision.

¹⁰ See, e.g., Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1, 28 (1984) (discussing *ALCOA* within the context of court-ordered adjustment to contracts); Goldberg, *Price Adjustment in Long-Term Contracts*, 1985 WIS. L. REV. 527; Palay, *A Contract Does Not a Contract Make*, 1985 WIS. L. REV. 561; Sirianni, *The Developing Law of Contractual Impracticability and Impossibility: Part I*, 14 U.C.C. L.J. 30 (1981); Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193 (1982) [hereinafter *New Spirit*]; Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U.L. REV. 369 (1981) [hereinafter *Price Adjustments*]; Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471 (1985); Comment, *Court-Imposed Modifications: Supplementing the All-or-Nothing Approach to Discharge Cases*, 44 OHIO ST. L.J. 1079 (1983).

¹¹ Some hailed the decision as the harbinger of the "new spirit" of the law of contracts. See, e.g., Black, *Sales Contracts and Impracticability in a Changing World*, 13 ST. MARY'S L.J. 247 (1981); *New Spirit*, *supra* note 10; Comment, *Equitable Reformation of Long-Term Contracts—The "New Spirit" of Alcoa*, 1982 UTAH L. REV. 985; see also, Trakman, *supra* note 10, at 471 (finding *ALCOA* indicative of a movement of the doctrine of impracticability from "a rare all-or-nothing remedy to . . . an embryonic loss-sharing doctrine").

¹² Others condemned the decision. See, e.g., Dawson, *supra* note 10, at 26, 35 (describing *ALCOA* as "grotesque," "a lonely monument on a bleak landscape," and "the frustrated venture of a single trial judge whose fancy was unusually free"); cf. Sirianni, *supra* note 10, at 55 ("If other courts adopt the *ALCOA* test, contracts—especially long-term ones—will become markedly less secure. And there will be little basis upon which parties might ascertain in advance which contracts are vulnerable to reformation or avoidance.").

¹³ See, e.g., *Printing Indus. Ass'n v. Graphic Arts Int'l Union, Local 546*, 628 F. Supp. 1103 (N.D. Ohio 1985); *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 597 F. Supp. 1456 (E.D. Va. 1984) [hereinafter *Westinghouse II*]; *Printing Indus. Ass'n v. International Printing & Graphic Communications Union, Local 56*, 584 F. Supp. 990 (N.D. Ohio 1984); *Freidco, Ltd. v. Farmers' Bank*, 529 F. Supp. 822 (D. Del. 1981); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440 (E.D. Va. 1981) [hereinafter *Westinghouse I*]; *Louisiana Power & Light v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319 (E.D. La. 1981); *Wabash, Inc. v. Avnet, Inc.*, 516 F. Supp. 995 (N.D. Ill. 1981); *Wooldridge v. Exxon Corp.*, 39 Conn. Supp. 190, 473 A.2d 1254 (Conn. Super. Ct. 1984); see also *McGinnis v. Cayton*, 312 S.E.2d 765, 780 (W.Va. 1984) (Harshbarger, J., concurring) ("*ALCOA* has not been cited as precedent for what it did . . .").

The most recent cases simply ignore the *ALCOA* decision. See, e.g., *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986); *Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781 (7th Cir. 1985); *International Miner-*

portentous as *ALCOA* has virtually faded into obscurity. The answer lies in an analysis of both the doctrine of excuse¹⁴ and the often unarticulated relationship between that doctrine and more fundamental contract doctrine.

It has been suggested that "[i]mpossibility cases are a special breed of contract law."¹⁵ I believe, however, that the judicial approach to impossibility is consistent with the development of contract law and not significantly different from the general approach to matters of interpretation and inference in the context of a contractual omission.¹⁶ The fictions that the courts employ and the reliance on presumptions of intent are essentially the same tools that are applied to other questions of contract interpretation and enforcement.¹⁷ For example, the contractual fiction of presumed intent allows one to assume that the excuse arises from the terms of the contract itself rather than from extrinsic standards.¹⁸ Adorned with the talisman of intent, the contract is subject to

als & Chem. Corp. v. Llano, Inc., 770 F.2d 879 (10th Cir. 1985), cert. denied, 106 S. Ct. 1196 (1986); Valencia Center, Inc. v. Publix Super Mkts., Inc., 464 So. 2d 1267 (Fla. Dist. Ct. App. 1985); Public Util. Dist. No. 1 v. Washington Pub. Power Supply Sys., 104 Wash. 2d 353, 705 P.2d 1195 (1985).

Indeed, notwithstanding Judge Teitelbaum's herculean efforts to present his theories of mistake, impracticability, and frustration for review and acceptance by the Third Circuit Court of Appeals, that court urged the parties to settle rather than press their respective appeals, and the case was settled shortly before it was to be heard. See Macaulay, *An Empirical View of Contract*, 1985 Wis. L. REV. 465, 476 (discussing the proceedings). Perhaps, as has been suggested, the real value of *ALCOA* lies in its role as a coercive force for a mutually agreed upon settlement:

The District Judge's opinion and the uncertain result of the appeal changed the balance of bargaining power, but it did not impose a final result on the parties. The decision plus the appellate process worked as a form of coercive mediation. Faced with the situation, the parties worked out their own solution.

Id.

¹⁴ Assuming contractual silence, the issue is one of allocating the risk and consequences of loss flowing from what has been called a "contractual accident." C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 65 (1981). Professor Farnsworth refers to the situation as one of *casus omissus*, the omitted case. Farnsworth, *Disputes over Omission in Contracts*, 68 COLUM. L. REV. 860, 860 (1968) ("Sometimes . . . the parties will disagree over what they did not say, over the effect of their contract on a situation for which they have failed to provide. These disagreements [are] . . . disputes over omission. They may reflect an *understatement of expectation* . . . [or] an *absence of expectation* . . .").

¹⁵ Speziale, *The Turn of the Twentieth Century as the Dawn of Contract "Interpretation": Reflections in Theories of Impossibility*, 17 DUQ. L. REV. 555, 557 (1978).

¹⁶ See Farnsworth, *supra* note 14, at 881 ("The first step is to determine by the process of interpretation whether the parties provided for the situation. If they did not, then the second step is to resolve the *casus omissus* by the process of inference.").

¹⁷ Of course, these fictions carry into the excuse context the same strengths and weaknesses evident in their more general usage.

¹⁸ Cf. C. FRIED, *supra* note 14, at 61 (noting that judicial determination and presumed intent itself involve application of "other substantive standards" such as fair-

judicial interpretation rather than judicial legislation,¹⁹ and the search for objective, presumed intent, instead of subjective, actual intent. Absent an express indication, the fiction creates the presumption that the parties intended what they *reasonably* would have articulated expressly had they been required to deal with the matter at the time of contracting.²⁰ Whatever its failings, judicial implication tends toward the fostering of justice and fairness, even if at the expense of the application of firm rules. It is perhaps the special genius of the law to temper the absolute with reasoned flexibility, even if application is difficult. As Judge Cardozo stated: "Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred."²¹

The relationship between the doctrine of excuse and contract doctrine works at an even more fundamental level. The "excuse" issue arises only if there is preceding consensus that contractual obligations are to be performed, that non-performance will give rise to the law's enforcement or remedial sanctions.²² Under an approach to contract focusing on the centrality of the norm of enforcement of the parties' express agreements, one seeking discharge from a contractual undertaking must demonstrate either (1) that the promise, by its very terms or from the circumstances of its making, is excepted from the norm, or (2) that circumstances exist that give rise to another, excusing norm. Excuse becomes a stark "either/or" issue that precludes the middle ground of

ness). The fiction, thus, is "that the courts were merely bowing to the 'intention' of the parties, even where there were no relevant expectations . . . [and] that the expectations of the parties were cast in the form of contract terms." Farnsworth, *supra* note 14, at 865.

¹⁹ As one court phrased the issue:

When we turn to the precedents we are met at once with the confusion of statement whether a covenant can be implied only if it was clearly "intended" by the parties, or whether such a covenant can rest on principles of equity. . . . One may . . . conclude that in large measure this confusion arises out of the reluctance of the courts to admit that they were to a considerable extent "remaking" a contract in situations where it seemed necessary and appropriate so to do. "Intention of the parties" is a good formula by which to square doctrine with result. That this is true has long been an open secret.

Parev Prods. Co. v. I. Rokeach & Sons, 124 F.2d 147, 149 (2d Cir. 1941).

²⁰ See, e.g., *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 243-44, 129 N.E. 889, 891 (1921) (asserting that an immaterial breach will not serve to discharge the non-breaching party and using the judicial "fiction" of intent to avoid the imputation of dependency).

²¹ *Id.* at 242-43, 129 N.E. 889, 891.

²² This is so whether or not one accepts the centrality of "promise" to contract.

contract modification:²³ either the defense is allowed and performance is discharged, or the defense is disallowed and performance is directed or performance damages are awarded.

If, however, one is more concerned with the relationship that the contract has established, one might easily define the primary role of contract doctrine in terms of nurturing, fostering, and perpetuating that relationship.²⁴ The parties themselves should cope with disruptive events not expressly provided for in the contract while they go about the rest of their business together.²⁵ The contract is a skeleton-like structure upon which the relationship is built, designed to do little more than describe the general policy governing the relationship.²⁶ Under this view, when a supervening event renders a party's performance impracticable, fairness within the context of the relationship may require a sharing of the consequential losses between the parties.²⁷ It is not unreasonable to posit an unarticulated "duty to adjust," an obligation on the part of one party not only to act in good faith, but also to agree to an adjustment of the contract terms in order to avoid any fortuitous advantage at the expense of the other party.²⁸

Inevitably, then, to define a doctrine of excuse is to define a doc-

²³ *But cf.* Farnsworth, *supra* note 14, at 884 (suggesting that "where there is a *casus omissus* the court is never limited to . . . polar alternatives and there is always the opportunity for appropriate compromise").

²⁴ See Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 *Nw. U.L. REV.* 854 (1978); see also Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 *MINN. L. REV.* 521 (1985) (discussing, although not accepting, the relational model); Harrison, *A Case for Loss Sharing*, 56 *S. CAL. L. REV.* 573, 586-88, 592-95 (1983) (envisioning a "contractual entity," based upon "mutual reliance and consensual reciprocity inherent in contract," and positing the existence of "contractual cotenancy" analogous to partnership); Macaulay, *supra* note 13, at 467 (discussing the effect of continuing relationships and interdependence on contracting parties).

²⁵ See Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 *WISC. L. REV.* 565, 569.

²⁶ See Palay, *supra* note 10, at 562. Comparative reference has been made to the Japanese model where the "parties do not contemplate the regulation of the relationship . . . by formal legal standards, but rather seek a pattern of continuing association in which adjustment will be responsive to considerations the law ignores." von Mehren, *Some Reflections on Japanese Law*, 71 *HARV. L. REV.* 1486, 1494 (1958), *discussed in Birmingham, A Second Look at the Suez Canal Cases: Excuse for Non Performance of Contractual Obligations in the Light of Economic Theory*, 20 *HASTINGS L.J.* 1393, 1394 (1969).

²⁷ See *New Spirit*, *supra* note 10, at 208-09; *Price Adjustments*, *supra* note 10, at 420-21; *Speidel*, *supra* note 5, at 273-74; *Trakman*, *supra* note 10, at 518-19.

²⁸ See *Price Adjustments*, *supra* note 10, at 395-405. This follows from a view of contract that equates a serious contractual undertaking with the formation of a joint venture or partnership, carrying with it a mantle of fiduciary, rather than promissory, obligation. See Harrison, *supra* note 24, at 592-95 (analogizing contract to partnership).

trine of contract.²⁹ Any examination of the doctrine of excuse must consider the doctrine as it has evolved, always understanding that it is a manifestation of an overall theory of contract. Radical departure from the way in which the doctrine of excuse is articulated and applied can be meaningful only if there is consensus for a radical departure from the way in which we look at contractual relationships. To the extent that change is advocated in the doctrine of excuse, it must be recognized that change can follow meaningfully only from more fundamental change in the reality of contract. It is this reality, as we understand it through the assimilation of experience, that must inform doctrine. Ultimately, the *ALCOA* decision has been ineffectual in the development of a modern approach to excuse because there is no consensus about contract doctrine that can serve as the basis for Judge Teitelbaum's vision.

What follows is an attempt to examine the excuse of commercial impracticability³⁰ in terms of what parties to agreements need and what kind of "glue"³¹ contracts can provide for complex relationships.³² What is ultimately required is a base from which to look at future events that provides some certainty in planning. A cohesive understanding of the major contractual disruptions of the recent past from which such a base can emerge has not yet developed. What is needed for the present are flexible and workable tools rather than all-embracing theories, and a continuing effort to keep emerging doctrine consonant with commercial reality.

²⁹ It is not the purpose of this Article to attempt such a sweeping definition or to add to the current proliferation of all-embracing contract theories. Indeed, with respect to excuse, sweeping doctrinal generalization poses a danger to coherent thought; there has been too much contradictory judicial and scholarly activity and too little assimilation of the enormous disruptive events that began in the middle of this century. Contract theory, in seeking neat categorization, all too often misses contract complexity. See C. FRIED, *supra* note 14, at 60-69 (noting that many who, like the author, subscribe to the centrality of promise to contract, nevertheless too readily simplify that doctrine and force it into tortuous paths in an attempt to make it applicable to sophisticated issues of impracticability). The literature tends to confuse theories of how contracting parties *ought* to behave with actual behavior, leading to the assumption that what *ought to be* is.

³⁰ The related doctrine of mistake, which consumed a substantial part of the *ALCOA* opinion, is not within the scope of this Article.

³¹ See Kidwell, *A Caveat*, 1985 WIS. L. REV. 615, 616.

³² In light of my comments above, I should add that such an examination should not require that one be either a relational contract partisan or a classical or neoclassical individualistic advocate. These are unnecessary doctrinal barriers to a dispassionate examination of the problems created by disruptive events. See Goldberg, *supra* note 10, at 542 ("[A]ny conclusion [about *ALCOA*] would be premature—there has been very little analysis of why and how business firms deal with price adjustment problems. . . . [W]e will make more progress in understanding the economics of contracts if we do not insist upon drawing policy conclusions.").

II. COMPLICATIONS IN THE DOCTRINE OF IMPRACTICABILITY: METAMORPHOSIS OF A SIMPLE DOCTRINE IN A COMPLEX WORLD

A. *Origins: From the Impossible to the Impracticable*

The doctrine of excusing performance in consequence of certain disruptive events³³ arose from the problem presented by the physical, objective impossibility of contractual performance.³⁴ Into contractual silence, courts interpolated a presumed intent³⁵ of the parties to condition performance of a party's obligations upon the continuing physical viability of that performance. Thus, under the traditional doctrine of physical impossibility, relief from contractual performance follows from the twin factual determinations that (1) performance was indeed not possible,³⁶ and (2) that the promisor had not expressly assumed the risk of the event causing the impossibility.³⁷ The issue is not one of discovering

³³ The evolution of the various forms of excuse arising from a presumptively unanticipated event not directly within the control of either party has been thoroughly examined elsewhere. See, e.g., Farnsworth, *supra* note 14, at 862-68; Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419, 419-38 (1969); Sirianni, *supra* note 10 at 32-42; Speziale, *supra* note 15, at 574-82; Stroh, *The Failure of the Doctrine of Impracticability*, 5 CORP. L. REV. 195, 196-204 (1982); Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 NOTRE DAME LAW. 203, 204-07 (1979).

³⁴ The case of *Taylor v. Caldwell*, decided by the Court of Queens Bench in 1863, is generally considered the source of the doctrine of excuse for physical impossibility. 122 Eng. Rep. 309 (Q.B. 1863). See, e.g., C. FRIED, *supra* note 14, at 58 (citing *Taylor* as the paradigmatic case linking excuse to physical impossibility). In *Taylor*, performers had contracted to rent a music hall, which was destroyed by fire shortly before their scheduled performance. The court held that the performers were without remedy against the owner of the destroyed premises. From contractual silence, the court implied the intention of both parties to condition the owner's performance upon the continued existence of the structure that was the subject of the contract. *Id.* at 312.

Thus, the origin of the doctrine of impossibility was rather simple, if not free from dispute. *Taylor* was an extension of the long-recognized excuses that had been applied when performance would directly involve violation of a supervening governmental action or when, in the case of personal services to be rendered by the promisor, the promisor died prior to the time for performance, or when the subject matter of the contract had been destroyed prior to the time for its execution.

³⁵ See C. FRIED, *supra* note 14, at 60.

³⁶ One might argue that every contract contains alternative performance criteria—literal performance of the obligations or the payment of money damages—so that there can never truly be impossibility. See Sirianni, *supra* note 10, at 32-36.

³⁷ Thus, the courts have had little difficulty with the crop failure cases: if it can be found that delivery was to come from the farmer/promisor's crops, failure of that crop will discharge the promisor. See, e.g., *Bunge Corp. v. Recker*, 519 F.2d 449, 450-51 (8th Cir. 1975); *Bunge Corp. v. Miller*, 381 F. Supp. 176, 180 (W.D. Tenn. 1974); *Ralston Purina Co. v. McNabb*, 381 F. Supp. 181, 182 (W.D. Tenn. 1974); *Semo Grain Co. v. Oliver Farms, Inc.*, 530 S.W.2d 256, 259 (Mo. App. 1975); see also *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir.

the parties' actual intent or whether or not the disrupting event was foreseeable. The event, physical impossibility of performance, is not necessarily unforeseeable; it is simply not dealt with by the parties and must be dealt with by the law. In short, with respect to physical impossibility of performance, both the historical rationale for the decisions and the issue of the wisdom³⁸ and nature of judicial interpolation and implication have become irrelevant. The fact that the determination to discharge the affected party arose from the fiction of presumed intent is merely of historical interest. In the absence of express provision to the contrary in the contract, performance rendered physically impossible or illegal by some supervening event not occasioned by the fault of the promisor is excused.³⁹

The clarity attendant to the excuse of physical impossibility might have provided the basis for extension and refinement of contract doctrine to meet the twentieth century's complex commercial needs. Modern commerce has called for a legal doctrine that deals with performance rendered effectively, but not physically, impossible. In fact, the doctrine of commercial impracticability appears to have been born in 1916, in *Mineral Park Land Co. v. Howard*,⁴⁰ as a simple extension

1986) (discussing general rule in crop failure cases); *Whitman v. Anglum*, 92 Conn. 392, 103 A. 114 (1918) (provision that buyer was to pick up milk at seller's premises did not excuse performance when seller's farm was quarantined and his cows killed); cf. Farnsworth, *supra* note 14, at 879 n.103 ("[I]t has been suggested that a 'social judgment' underlies the fact that the farmer whose crop of grain is fortuitously destroyed is more easily excused from his promise to deliver grain than is the dealer under similar circumstances."). In the crop failure cases involving a farmer-seller, excuse does not require a determination that, notwithstanding human experience, the failure of the crop was not foreseeable. Cf. *Alimenta (USA), Inc. v. Gibbs Nathaniel (Canada) Ltd.*, 802 F.2d 1362 (11th Cir. 1986) (Dealer-seller excused, but only after a finding that the drought causing the failure was not foreseeable).

Similarly, in the case of personal service obligations, the contractual omission with respect to the death of the promisor is filled with the assumption, or the presumed intent, that performance by the promisor is conditioned on survival, notwithstanding the absolute presumption of human mortality that renders death the quintessential foreseeable event.

³⁸ One might well have argued, as the law was evolving through the latter part of the nineteenth century and into the twentieth, that to import the fiction of a presumptively intended condition to performance into an otherwise unequivocal undertaking was unwise and inimical to the apparent sanctity of contract as an expression of the will of the parties. Conversely, one might just as well have argued that the very forward-looking nature of an executory contract conditioned obligation on the continued existence of the subject matter. Ultimately, the resolution of this conflict is not important today. What is important, however, is that the excuse doctrine did evolve and it is simply too late in the development of the law of contract to abandon totally the older and uniformly recognized excuses.

³⁹ See RESTATEMENT (SECOND) OF CONTRACTS §§ 261-72 (1979) [hereinafter RESTATEMENT] and U.C.C. § 2-613 (essentially codifying the common law with respect to physical impossibility).

⁴⁰ 172 Cal. 289, 156 P. 458 (1916).

of the existing and straightforward impossibility doctrine. As Judge Sloss described the connection: " 'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at excessive and unreasonable cost.' " ⁴¹ With these few simple words, physical impossibility had become commercial impracticability. ⁴² But as commercial transactions became more complex, so too did the doctrinal extension. Notwithstanding the logic and simplicity of *Mineral Park's* equation of impossibility with commercial impracticability, its application has been, at best, idiosyncratic. ⁴³ While *Mineral Park* still stands as the paradigm for application of the doctrine of commercial impracticability, ⁴⁴ it affords little guidance in the

⁴¹ *Id.* at 293, 156 P. at 460 (quoting 1 BEACH ON CONTRACTS § 216). In *Mineral Park*, the defendants had agreed to take from the plaintiff's land all the earth and gravel, approximately 114,000 cubic yards, needed for fill and cement work on a nearby bridge construction site. The defendants stopped after taking little more than 50,000 cubic yards; the rest of the earth and gravel was underwater and could be removed only "at an expense of ten or twelve times as much as the usual cost per yard." *Id.* at 291, 156 P. at 459. The court found that "the contract was entered into without any calculation on the part of either of the parties with reference to the amount of available earth and gravel on the premises." *Id.* The lower court held for the plaintiff, finding that, while difficult and expensive, removal of the underwater earth and gravel was not "impossible." Nevertheless, the California Supreme Court, with what appeared to be a minor extension of doctrine, excused the defendant. *Id.* at 293, 156 P. at 459-60 ("[I]n determining whether the earth and gravel were 'available' we must view the conditions in a practical and reasonable way. . . . To all fair intents then, it was impossible for defendants to take it. . . . [W]here the difference in cost is so great . . . and has the effect . . . of making performance impracticable, the situation is not different from that of a total absence of earth and gravel.").

⁴² It has been argued that there is and ought to be no legal distinction between the two doctrines. This simple step from physical impossibility to effective impossibility deriving from impracticability has been hailed as the expansion and creative use of impossibility to foster equity and justice. See Speziale, *supra* note 15, at 569-72. It has also been argued that "[c]ommon law impossibility, formerly a very harsh doctrine which purported to require a showing of objective or scientific impossibility, has been moderated by case law to the point where it is equivalent to impracticability under the [Uniform Commercial] Code." *Westinghouse I*, 517 F. Supp. 440, 451 (E.D. Va. 1981). It would seem to follow that a demonstration by a promisor of impracticability resulting from a disruptive event not expressly provided for in the contract or by the clear intentment of the surrounding circumstances should give rise to discharge, and that such impracticability is demonstrated by a showing that performance can be done only "at excessive and unreasonable cost." *Mineral Park*, 172 Cal. at 293, 156 P. at 460 (citation omitted).

⁴³ "[A] study of the cases using percentages, and most do, indicate [sic] that when prices only double, relief is unavailable. When prices increase tenfold, relief is available." Wallach, *supra* note 33, at 217 (citation omitted). Wallach notes, however, that the only cases cited as granting relief are *Mineral Park*, 172 Cal. 289, 156 P. 458, and *City of Vernon v. City of Los Angeles*, 45 Cal. 2d 710, 290 P.2d 841 (1955). *Id.* at 217 n.57. See also Speidel, *supra* note 5, at 267 ("To date we know what degree of loss will not excuse, but have no idea how 'drastic' a loss will make performance impracticable or how that result should be explained." (footnote omitted)).

⁴⁴ Unfortunately, it also appears to be the unique case in which the doctrine was applied as simply as it was stated—as an extension of a rather straightforward existing

face of both the increasing complexity of contractual relations and the increasing interdependence of commercial activities that became characteristic of business in the last third of the twentieth century. What began as a simple gloss on existing doctrine has become increasingly complex, leaving the appearance, if not the reality, of incoherence and a doctrine that is frequently invoked, but only rarely and erratically applied.

B. *The Quantification of Impracticability*

Equating commercial impracticability with physical impossibility gives rise to a purely quantitative analysis: how great a loss or deviation from the original contracting conditions makes performance impracticable? This arithmetic determination is an unavoidable concomitant of a doctrine requiring a finding of excessive or unreasonable cost. Even within the context of quantification dispute may still arise over how impracticability should be calculated. One could argue that the formulation should encompass only the direct performance cost increase—a determination of the scope of the loss on the contract. Alternatively, one might settle on a broader formula that considers the disruptive event in terms of the net impact on the promisor. Such a polarity is in fact exemplified by *ALCOA* on one end of the spectrum and the opinions resolving the litigation between Florida Power and Light Company and Westinghouse Electric Corporation⁴⁵ on the other.

In *ALCOA*,⁴⁶ Judge Teitelbaum took a narrow approach to the quantification issue, basing his \$75 million projection of Alcoa's losses on a determination of the dollar costs of Alcoa's continued performance,⁴⁷ rather than Alcoa's overall financial condition or other matters

doctrine.

⁴⁵ *Westinghouse II*, 597 F. Supp. 1456 (E.D. Va. 1984); *Westinghouse I*, 517 F. Supp. 440 (E.D. Va. 1981).

While we cannot escape the current polarity of approaches, it is important to understand that this divergence in opinion as to what actually constitutes impracticability need not have been the norm. If the straightforward *Mineral Park* extension of physical impossibility had become the basis for judicial thinking about impracticability, we would now have a body of case law establishing parameters of quantitative impracticability and a set of guidelines more useful than the simple statement that a doubling of cost is insufficient and a tenfold increase is sufficient. Indeed, the hope had been expressed that the complex Westinghouse uranium litigation, discussed *infra* at note 50, would afford the court a clear opportunity to set new quantification standards. Wallach, *supra* note 33, at 218. That hope was thwarted by the more prudent course of settlement.

⁴⁶ *ALCOA*, 499 F. Supp. 53 (W.D. Pa. 1980).

⁴⁷ *Id.* at 59. One might question his calculation of the magnitude of the loss, premised as it was upon the assumption that high oil prices would continue indefinitely. He recognized that he was making a projection on the assumption "that the

related either to its contract with Essex⁴⁸ or its position in the aluminum industry.⁴⁹ In contrast, in *Westinghouse I* and *Westinghouse II*, Judge Merhige sought to evaluate the overall economic consequences of performance. He consistently refused to limit his examination to the increased expense. Instead, he considered the entire context of the contract and the overall tangible and intangible benefits received by Westinghouse in reaching his conclusion that the additional performance cost to Westinghouse of \$100 million was *not* so excessive as to make performance impracticable.

Westinghouse had sold two complete nuclear generating plants to Florida Power and Light. In conjunction with the sale, the parties entered into long-term contracts whereby Westinghouse would supply fuel to the utility⁵⁰ and remove it when spent. At the inception of the

future economy will be much like the present” and noted that each party “continues to have recourse to the courts” in the event of “severe and surprising economic developments.” *Id.* at 66 & n.7. Recent events have shaken that assumption; *see, e.g.*, *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986) (one of the recent “buyer” cases, in which excuse is claimed as a result of the serious decline in fuel prices).

⁴⁸ Indeed, the apparent windfall to Essex, which made substantial profits by reselling the processed aluminum in the market rather than using it in the manufacture of aluminum wire as the parties had intended, seemed to concern Judge Teitelbaum as much as Alcoa’s costs. It is at least interesting to speculate how the case might have been decided had Judge Teitelbaum viewed the contract as a requirements contract and, under U.C.C. section 2-306(1), limited the quantity to be delivered to Essex to its actual manufacturing needs, thereby eliminating the windfall.

⁴⁹ This same approach to quantification was recognized, at least implicitly, a year later by the Court of Appeals for the Second Circuit in *Asphalt Int’l, Inc. v. Enterprise Shipping Corp.*, 667 F.2d 261 (2d Cir. 1981). In *Asphalt International*, the defendant shipowner refused to repair a vessel chartered to plaintiff after it had been severely damaged in a collision, notwithstanding defendant’s contractual duty to repair. The plaintiff sued for loss of profits to be derived from the charter. The cost of repair, \$1,500,000, was twice the fair value of the ship. The court found this cost “excessive and unreasonable,” and excused defendant’s obligation to repair. The court of appeals upheld this finding even though the damage was considered a “total” loss and defendant had received insurance proceeds of \$1,335,000 in addition to \$157,500 as scrap value. *Id.* at 263-66. The court stated:

The doctrine of commercial impracticability focuses on the reasonableness of the expenditure at issue, not upon the ability of a party to pay the commercially unreasonable expense. The existence of insurance coverage in excess of the fair market value of the ship bears no relationship to the controlling issue—the reasonableness of the requested repairs.

Id. at 266 (citations omitted). With respect to the impracticability doctrine the court applied a standard directed not so much to the cost of performance per se as to whether such excessive cost “would alter the essential nature of the contract.” *Id.* The court was also concerned about the role of business loss insurance and its availability to the plaintiff in determining whether to allocate the risk of loss to the plaintiff. *Id.*, at 266 n.5; *see also infra* notes 174-80 and accompanying text (discussing risk allocation).

⁵⁰ The efforts of Westinghouse Electric Corporation to take a leadership position in the development of private nuclear power in the mid-1960’s served as the basis for extensive litigation. As part of an effort to sell nuclear power facilities to utilities,

contract in 1965, Westinghouse had anticipated that it could reprocess the fuel, even though no reprocessing plants had been built, at an estimated profit of from \$16 million to \$19 million. Without the opportunity to reprocess the fuel, however, removal itself was a considerable financial burden.⁵¹ Ten years into the contract commercial reprocessing remained infeasible and there existed neither reprocessing facilities nor off-site storage facilities for spent nuclear fuel. As a result, Westinghouse advised that it would not remove the fuel.

Florida Power and Light countered by instituting suit.⁵² The utility sought to hold Westinghouse responsible for the approximately \$100 million cost to the utility for interim on-site spent fuel storage and ultimate removal to permanent government-operated disposal sites scheduled to be operative no sooner than 1998.⁵³ In its defense, Westinghouse claimed that the unavailability of reprocessing for spent fuel and the lack of disposal sites served to excuse the nonperformance of its contractual obligation to remove the spent fuel, on grounds of impracticability, impossibility, frustration of purpose, and mutual mistake.⁵⁴

The court found that the projected losses of \$100 million were not

Westinghouse entered into long-term contracts to provide, at a fixed price, approximately 70 million pounds of uranium to be used in the facilities. The company had not arranged matching contracts to procure the uranium and, by 1975, with significant increases in the world market price for uranium, Westinghouse announced that it faced losses of \$2 billion on its contracts and that it would not perform. It grounded its refusal on the commercial impracticability doctrine found in U.C.C. section 2-615. In response to this announcement, twenty-seven utilities brought fourteen separate actions against Westinghouse. See Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119 (1977) for a comprehensive discussion of the litigation and its context. The consolidated litigation, *In re Westinghouse Elec. Corp. Uranium Contract Litig.*, 405 F. Supp. 316 (J.P.M.D.L. 1975), was settled without a published decision on the merits, although it appears that, notwithstanding the magnitude of its losses, Westinghouse's action in entering into fixed-price contracts at a time of great uncertainty as to the future behavior of the uranium market would have precluded relief on the basis of the foreseeability of market volatility. See Dawson, *supra* note 10, at 25-26 (stating that the trial judge concluded that Westinghouse had no sufficient excuse to escape liability).

⁵¹ *Westinghouse I*, 517 F. Supp. at 446-47.

⁵² *Id.* at 443. In 1977, as a result of widespread concern over the consequences of private availability of plutonium and other by-products of reprocessing, President Carter issued an Executive Order prohibiting reprocessing. This order was rescinded by President Reagan in 1981. *Id.* at 447, 449. See *Westinghouse II*, 597 F. Supp. at 1460-61.

⁵³ Pending removal of the fuel, the utility built temporary storage pits at a cost in excess of \$9 million. See *Westinghouse I*, 517 F. Supp. at 448. When 1983 legislation authorized the Department of Energy to construct permanent disposal sites, however, the utility contracted with the Department for permanent disposal at a cost of \$70 million. The cost of further on-site storage to the utility until the scheduled 1998 operative date of the disposal site was estimated at \$12 million. See *Westinghouse II*, 597 F. Supp. at 1459-61.

⁵⁴ *Westinghouse I*, 517 F. Supp. at 450.

so excessive as to make performance impracticable. While recognizing that the substantial cost of removal without the anticipated gain from reprocessing "might be sufficient to constitute impracticability in another context,"⁵⁵ the court found that Westinghouse had not shown a loss on the entire contract.⁵⁶ The court reached this conclusion by taking an expansive view of the quantification issue: "[I]mpracticability by reason of additional expense is not to be determined by reference to the loss, or failure to profit, from one particular contract term in isolation. Rather, it is to be judged from the perspective of the entire undertaking."⁵⁷

Intuitively, Judge Merhige's holistic approach to cost is appealing.⁵⁸ Quantification predicated on the entire transactional context and all of the consequences of performance seems particularly consistent with fairness. Nevertheless, such a consequential inquiry raises serious obstacles to consistency in the application of doctrine. The search for boundaries for the quantification of impracticability is impeded by ad hoc determinations of costs and benefits beyond those directly attributable to performance. Such an undertaking would not only entail enormous process costs in litigation but also would limit the effect of each case and decision to its peculiar facts.

Although a holistic approach aids in the ultimate determination of what is "fair" or commercially reasonable, it is not appropriate if the issue is the purely quantitative one of evaluating projected losses from performance. Indeed, the limited judicial focus in *ALCOA*⁵⁹ seems necessary if we are to achieve something more than ad hoc jurisprudence. Unfortunately, there has been too little express judicial discussion of this issue and the capability of the courts to deal with it. The competing viewpoints are only rarely forthrightly presented.⁶⁰ More direct dis-

⁵⁵ *Id.* at 454.

⁵⁶ *Id.* at 453.

⁵⁷ *Id.* (citations omitted). Considering only the tangible benefits stemming from Westinghouse's contracts, Judge Merhige found that imposing the \$100 million disposal and storage obligation on Westinghouse would not result in an unacceptable loss. Indeed, its losses would be "just under 50% of total contract revenues." *Westinghouse II*, 597 F. Supp. at 1477.

⁵⁸ Indeed, this approach has been adopted by at least one other court. See *Louisiana Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1324 (E.D. La. 1981) (holding defendant's expected loss of \$428,500 on one particular contract due to price increases did not make performance commercially impracticable in light of the overall profitability of defendant's plant).

⁵⁹ Again, the approach in *Asphalt International*, 667 F.2d 261, is similar. See *supra* note 49.

⁶⁰ The Westinghouse cases, see *supra* text accompanying notes 55-57, and *Asphalt International*, see *supra* note 49, are rare examples of clear exposition of the competing views.

discussion in a variety of cases is needed before one can comfortably point to an optimum set of boundaries for quantifying impracticability. For now, any application of a quantitative test to determine how much cost renders performance impracticable must be narrow in scope if coherent doctrine and concomitant rational planning is to emerge.

More broadly, the entire notion of a quantitative, formulaic approach, whether narrowly or broadly applied, has been criticized as unrealistic and inappropriate.⁶¹ Nevertheless, a formidable line of cases has followed the litany of quantification, finding that increased cost alone, and particularly cost due to market fluctuations, will not provide the basis for relief without a finding that such costs are "excessive" or extraordinarily high.⁶² The quantification of impracticability is merely one step in the judicial determination of excuse. Although, as Judge Merhige observed, what is "excessive" in one context may be acceptable in another,⁶³ so long as the issue of "how much" is considered in isolation, the numbers game seems inevitable.

If, however, one abandons the bifurcation of impracticability into elements of quantifiable loss and foreseeability, one can develop a qualitative analysis predicated upon "how different" instead of "how much" is performance that can serve as an integrating factor in resolving the excuse dispute.⁶⁴ Examining how the *quality* of contractual perform-

⁶¹ See Speidel, *supra* note 5, at 267 ("The cases have been preoccupied with the arithmetic of loss . . ."); see generally Note, *U.C.C. § 2-615: Excusing the Impracticable*, 60 B.U.L. REV. 575 (1980) (arguing that courts should engage in a multifaceted examination of the parties' risk assumptions instead of simply couching findings as to the sufficiency of various cost increases in conclusory language).

⁶² See, e.g., *Bernina Distrib. Inc. v. Bernina Sewing Mach. Co.*, 646 F.2d 434, 439-40 (10th Cir. 1981); *Gulf Oil Corp. v. Federal Power Comm'n*, 563 F.2d 588, 599-600 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); *American Trading & Prod. Corp. v. Shell Int'l Marine Ltd.*, 453 F.2d 939, 942 (2d Cir. 1972); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966); *Louisiana Power & Light Co. v. Allegheny Ludlum Indus., Inc.*, 517 F. Supp. 1319, 1324 (E.D. La. 1981); *In re North Broadway Funding Corp.*, 6 Bankr. 133, 135 (Bankr. E.D.N.Y. 1980); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 132-33 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Hancock Paper Co. v. Champion Int'l Corp.*, 424 F. Supp. 285, 290-91 (E.D. Pa. 1976), *aff'd*, 565 F.2d 151 (3d Cir. 1977); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 440-41 (S.D. Fla. 1975); *Publicker Indus. Inc. v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. (Callaghan) 989, 991 (E.D. Pa. 1975); *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 805, 219 S.E.2d 167, 171 (1975); *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 748 (Iowa 1976); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 728 (Mo. Ct. App.), *cert. denied*, 444 U.S. 865 (1979); *Helms Constr. & Dev. Co. v. State*, 97 Nev. 500, 503, 634 P.2d 1224, 1225 (1981); *Maple Farms, Inc. v. City School Dist. of Elmira*, 76 Misc.2d 1080, 1085-86, 352 N.Y.S.2d 784, 790 (Sup. Ct. 1974).

⁶³ *Westinghouse I*, 517 F. Supp. at 454.

⁶⁴ See Speidel, *supra* note 5, at 266 ("[T]he emphasis should be on the degree to which performance has been made different, rather than upon the degree of financial

ance is altered by the supervening event can free the inquiry from the artificiality of measuring what is an "excessive" cost by multiples of contract revenues or other data that are divorced from the relationship of the parties. This can be accomplished without broadening the boundaries of economic analysis.⁶⁵

Such a qualitative approach is hinted at in *Asphalt International, Inc. v. Enterprise Shipping Corp.*⁶⁶ The court tried to determine whether, under the circumstances, performance would be "essentially different from that for which [the parties] contracted. . . . [or whether the event] . . . alter[ed] the essential nature of the contract."⁶⁷ It was this emphasis on the question of the change in "the essential nature" of contractual performance, rather than the magnitude of hardship or issues of foreseeability, that underlay recognition of the excuse in the 1985 decision in *International Minerals & Chemical Corp. v. Llano, Inc.*⁶⁸

An integrated and qualitatively based doctrine of impracticability can be developed as we assimilate enough litigation to produce a four-

hardship suffered.").

⁶⁵ "The rationale for the defense of commercial impracticability is that the circumstance causing the breach has rendered performance 'so vitally different from what was anticipated that the contract cannot be reasonably [sic] thought to govern.'" *Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781, 786 (7th Cir. 1985) (quoting *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991 (5th Cir. 1976)); see also *Louisiana Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1323-24 (E.D. La. 1981); U.C.C. § 2-615 comment 4 (1978) ("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.").

⁶⁶ 667 F.2d 261 (2d Cir. 1981). See *supra* note 49.

⁶⁷ *Asphalt Int'l*, 667 F.2d at 266 (citation omitted).

⁶⁸ 770 F.2d 879 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 1196 (1986). Plaintiff, the operator of a potash mine, had entered into a ten-year contract to buy natural gas from defendant. The contract contained industry-standard "take or pay" provisions: plaintiff was obligated to pay for an established minimum usage, whether or not it actually took that amount of gas, with such minimum being subject to downward adjustment if plaintiff was "unable" to take the minimum. *Id.* at 881-82. To comply with proposed, and ultimately enacted, state pollution control regulations, plaintiff radically changed its processing procedures. Consequently, plaintiff's need for natural gas was cut in half. Plaintiff sought a declaratory judgment relieving it of its minimum "take or pay" obligation by an amount attributable to unneeded gas—approximately \$3.5 million. *Id.* at 881. The court of appeals, reversing a judgment for defendant, found that plaintiff was effectively "unable" to take the gas and, therefore, could avail itself of the adjustment provisions, because of the nature of the alteration of its performance obligation. *Id.* at 887. The court did not attempt to determine if the costs involved were "excessive." Instead, it seems to have decided on the basis of the significant "difference" in the nature of performance attributable to the changed circumstances. Indeed, the plaintiff "was unable, for reasons beyond its reasonable control, to receive its minimum purchase obligation . . ." *Id.* Given the court's approach, it appears likely that relief would have been afforded even if no provision existed for adjustment in the event of "inability" to take.

dition. As experience and the accommodation to environmental changes enable us to characterize the nature of the disrupted performance in terms of conceptual, rather than monetary or percentage, boundaries, we will be able to focus on how performance is changed rather than by how much.

C. *The Centrality of Intent*

1. Objectified Intent: "Foreseeability"

The primary issue involved in constructing a complete doctrine of excuse is the allocation of the risk of the consequences of a serious disruptive event in the context of contractual silence. The most obvious resolution to the risk allocation question is a demonstration of the actual intent of the parties to use contractual silence to allocate the risk to one of them.⁶⁹ However, it is unlikely that it would be generally possible directly, or even circumstantially, to demonstrate the actual intent of contracting parties regarding contractual silence. If intent is to be the relevant consideration in allocating risk, it will have to be constructed by the use of one or more contractual fictions. Courts did exactly this when developing the excuse of physical impossibility. While espousing the need for a doctrine of excuse predicated on the mutual intent of the parties, the courts replaced a finding of actual intent with the fiction of a presumed intent to condition performance.

In time, doctrine itself served to allocate the risk of physical impossibility without reference to its implicit fiction. In expanding excuse to commercial impracticability the implicit fiction of presumed intent was useless. If excuse required a predicate of intent, some other more explicit indication of intent was needed. This need to base doctrine on intent led the courts to focus on the fiction of foreseeability; what has resulted is a doctrine of commercial impracticability that combines the quantification of impracticability with the judicially imposed standard of foreseeability⁷⁰ as a mirror of intent. It is these two themes—the

⁶⁹ *But see* Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 636 (1983) (suggesting that "the prospect of severe harm" may justify some risk-sharing "[e]ven when risk allocation is clear . . .").

⁷⁰ The ambiguity here is deliberate: the question may be the foreseeability of the event itself or the foreseeability of the consequences flowing from the event.

A compromise is struck . . . when abnormal risks are foreseen at the time of contracting, but the occurrence of the particular event or its magnitude is unanticipated. Rather than holding that the failure to provide explicitly means that the seller assumed the risks, a few decisions suggest that the seller should be held to a stricter standard in establishing that performance "as agreed" is impracticable. Although the opinions are frequently muddled, the compromise shows some sensitivity to the reality of uncertainty.

foreseeability of the disruptive event and the magnitude of the loss—that dominate the great bulk of judicial opinion with respect to the impact of disruptive events upon performance obligations in the absence of express contractual allocation of risk. Indeed, these two themes are better seen as components of the overall theme of the search for indicia of intent, as resolution of each appears to depend upon resolution of the other.⁷¹

Initially, the concept of foreseeability was imported only as a factor in the ultimate determination of whether an excuse from performance was justified. For example, the issue in *American Trading & Products Corp. v. Shell International Marine Ltd.*⁷² was whether the closing of the Suez Canal, prompted by the upheavals in the Middle East, excused performance under shipping and charter agreements which had become more expensive with the unavailability of the Canal route.⁷³ The two principal cases in the United States, consistently with the English decisions, denied relief to the promisor.⁷⁴ For these courts, which attempted to balance the factors involved,⁷⁵ the determinant was the magnitude of the loss; the losses were simply not so great as to

Speidel, *supra* note 5, at 262-63 (citations omitted). See, e.g., *ALCOA*, 499 F. Supp. at 67-70; *Westinghouse II*, 597 F. Supp. at 1474-75. But see Stroh, *supra* note 33, at 215 ("Foreseeability, as an approach to solving the problem of impracticability, focuses entirely on the question of the occurrence of the event which caused the impracticability. It does not admit of consideration of the effect of the occurrence of the event even if it had been foreseen.").

⁷¹ See *infra* notes 101-24 and accompanying text (discussing the judiciary's integrated and recursive use of the factors of foreseeability and magnitude of loss when addressing the impracticability issue). As one commentator notes:

The cases . . . have suggested that sellers who have accepted some "abnormal risk," without assuming the risk that the contingency will occur, may have to prove an even greater loss to be excused. . . .

. . . [I]n fact, the courts appear to be using the amount of financial loss as a factor in deciding whether the parties assumed that the contingency would occur.

Speidel, *supra* note 5, at 267-68.

⁷² 453 F.2d 939 (2d Cir. 1972).

⁷³ See *id.* at 940-41. This same issue was addressed in *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966). The Suez litigation, in Great Britain and in the United States, has been the subject of extensive and thorough commentary. See, e.g., Birmingham, *supra* note 26; Schlegel, *supra* note 33, at 429-38; Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1420-27 (1963); see also Trakman, *supra* note 10, at 476 n.16.

⁷⁴ See *American Trading*, 453 F.2d at 942; *Transatlantic Fin.*, 363 F.2d at 319-20. An earlier American case, *Glidden Co. v. Hellenic Lines, Ltd.*, 275 F.2d 253, 257 (2d Cir. 1960), found risk allocation from the parties' negotiations; see also Farnsworth, *supra* note 14, at 888.

⁷⁵ *Transatlantic Fin.*, 363 F.2d at 315 ("[T]he community's interest in having contracts enforced . . . is outweighed by the commercial senselessness of requiring performance." (citation omitted)).

render performance "impracticable."⁷⁶ The courts here did not depart significantly from the simpler equation of *Mineral Park*: they could not find that the amounts involved served to make performance functionally "impossible" and therefore it was not "commercially impracticable" in the excusing sense. The question of the foreseeability of the Canal closing was viewed as a factor, but not necessarily the determinative factor, in reaching a decision whether the parties had inferentially allocated the risk attendant to such closing.⁷⁷

As the context shifted to the more complex problems presented by nuclear technology and long-term contractual relationships, the balancing evident in the Suez Canal cases—the emphasis upon a demonstration of impracticability in fact as an approximation of impossibility—also changed and the primacy of the foreseeability indication of intent seemed to be established.⁷⁸ A 1985 decision⁷⁹ demonstrates the now central importance of foreseeability:

Because the purpose of a contract is to place the reasonable risk of performance upon the promisor . . . it is presumed to have agreed to bear any loss occasioned by an event that was foreseeable at the time of contracting.

The applicability of the defense of commercial impracticability, then, turns largely on foreseeability. The relevant inquiry is whether the risk of the occurrence of the contingency was so unusual or unforeseen and the consequences of

⁷⁶ The "losses" involved the extra cost entailed in using the alternative of the Cape of Good Hope. The availability (the contract did not limit performance to the Suez Canal route), if not the desirability, of that alternative precluded a finding of "impracticability" unless the cost of the alternative was of such magnitude as to render it the economic equivalent of impossibility. See *American Trading*, 453 F.2d at 942 ("There is no extreme or unreasonable difficulty apparent here. The alternate route taken was well recognized. And there is no claim that the vessel or the crew or the nature of the cargo made the route actually taken unreasonably difficult, dangerous or onerous."); *Transatlantic Fin.*, 363 F.2d at 318-20 (finding that the promisor was both able and in the best position to provide for the contingency of the Canal closing).

⁷⁷ As one court explained:

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.

Transatlantic Fin., 363 F.2d at 318 (citation omitted).

⁷⁸ See Stroh, *supra* note 33, at 213-16 (discussing the centrality of foreseeability in the decisions); Comment, *The Role of Foreseeability in Allocation of Risk Under UCC 2-615, Excuse by Failure of Presupposed Conditions*, 21 S. TEX. L.J. 441 (1981).

⁷⁹ *Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781 (7th Cir. 1985).

the occurrence of the contingency so severe that to require performance is to grant the buyer an advantage he did not bargain for in the contract.⁸⁰

Although the court in passing asks whether the occurrence was "unforeseen," it quickly shifts from that subjective, factual inquiry, to the objective inquiry of whether it was "unforeseeable."⁸¹ The centrality of intent, particularly the judicial focus on foreseeability in impracticability doctrine, has produced scholarly and some judicial concern and dissatisfaction. It is argued that the consequence of the foreseeability test has been a highly restrictive attitude toward the impracticability excuse,⁸² thus hindering what is believed to be the necessary expansion of the doctrine of impracticability to meet modern commercial necessity.⁸³

⁸⁰ *Id.*, at 786 (citations omitted). The court continued:

If the risk of the occurrence of the contingency was unforeseeable, the seller cannot be said to have assumed that risk. If the risk . . . was foreseeable, that risk is tacitly assigned to the seller. . . . [I]f a contingency is foreseeable, the [impracticability] defense is unavailable because the party disadvantaged by the fruition of the contingency might have contractually protected itself.

Id.

⁸¹ The courts' bypassing of a subjective inquiry in favor of an objective one is discussed in greater detail below. *See infra* notes 101-24 and accompanying text.

⁸² *See, e.g.*, Trakman, *supra* note 10, at 477 ("Although frequently discussed by judges, these imaginative rationales have usually not induced courts to grant excuses from performance."). As one commentator notes:

In general, there is grudging judicial agreement with the proposition . . . that a seller may be excused from performance of his obligation by the occasion of a fortuitous event which renders his contemplated performance physically impossible by destruction of the specific thing which was the subject of the contract. Once, however, an attempt is made to expand the scope of this judicial agreement . . . that agreement is not altogether clear.

Stroh, *supra* note 33, at 210 (footnotes omitted).

⁸³ One commentator claims: "The problem with 'foreseeability' is not so much that it asks the wrong questions, which it does; it lies in the fact that, with respect to most contracts, it provides the right answer even though asking the wrong question because it ignores the 'how' and 'why' businessmen contract." Stroh, *supra* note 33, at 216. *See* Sirianni, *supra* note 10, at 57 ("[T]he foreseeability inquiry can shed very little light on the intentions of the parties. This is because of its inevitable ambiguity and lack of relation to the way contracts are actually made."); Wallach, *supra* note 33, at 214-15 (arguing that foreseeability is a less than perfect basis for determining whether risk allocation has occurred). Another commentator adds:

The unusual quality of the frustrating event may be combined with assumption of risk in the sometimes articulated supposition that the risk of a known contingency, however unusual, is more likely to have been allocated by agreement than an unknown or unexpected event. Elevating this assumption to a requirement for frustration, however, is an unwarranted concession to a questionable need for legal certainty.

Schlegel, *supra* note 33, at 441 (footnote omitted). *See also*, Hawkland, *supra* note 5, at 80 (quoting the English case of *Ocean Tramp Tankers Corp. v. V/O Sovfracht*, [1964] 2 Q.B. 226 (C.A. 1963), which emphasizes that just because a risk is foreseen

The objective search for intent fails, it is urged, because the foreseeability of a contingency is not necessarily determinative of intent: there are myriad reasons why parties may choose to remain silent and it is unrealistic to presume that, if an event is foreseeable, silence is equivalent to an intention to leave the risk with the promisor.⁸⁴ Certainly, as has been suggested, the foreseeability principle "has a curious ring of seventeenth-century literalism; it is based on the ill-conceived premise that a party can be expected to deal in appropriate language with all situations he can foresee."⁸⁵ Ultimately, these commentators lament the anomalous result that "the commercial impracticability doctrine is recognized, but rarely allowed as an excuse."⁸⁶

yet not dealt with in a contract, does not necessarily mean that one of the parties should be prevented from using a defense based on frustration of contract); Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under UCC Section 2-615*, 54 N.C.L. REV. 545, 567-70 (1976) (discussing the manner in which courts have used the factor of foreseeability when applying the impracticability doctrine); Tannenbaum, *Commercial Impracticability Under the Uniform Commercial Code: Natural Gas Distributors' Vehicle for Excusing Long-Term Requirements Contracts?*, 20 Hous. L. REV. 771, 785-91 (1983) (commenting on the roles that risk allocation in general and foreseeability in particular play in U.C.C. § 2-615); Comment, *Contractual Excuse Based on a Failure of Presupposed Conditions*, 14 Duq. L. REV. 235, 237-38, 244-51 (1976) (discussing the role of foreseeability with regard to both U.C.C. § 2-615 and the case law).

⁸⁴ Professor Farnsworth has commented that "the principle of foreseeability has no merit as a general rule and should be discarded." Farnsworth, *supra* note 14, at 887; see also Gillette, *supra* note 24; Hillman, *supra* note 69, at 625 ("To some extent all commercial contingencies are foreseeable. The question is better put in terms of *how* foreseeable the occurrence was. Determining the extent of foreseeability, however, necessitates difficult line-drawing, and other unrelated factors often can control the determination."); Sirianni, *supra* note 10, at 65 ("To foresee a risk is not to allocate it."); Wallach, *supra* note 33, at 214-15 ("Even 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.").

⁸⁵ Farnsworth, *supra* note 14, at 885 (footnote omitted); see *id.* at 871 ("Fate may outstrip even the most sybilline draftsman, with a probability that increases with the life of the contract.").

⁸⁶ *McGinnis v. Cayton*, 312 S.E.2d 765, 775 (W. Va. 1984) (Harshbarger, J., concurring) (citations omitted). Indeed, *ALCOA* is cited as the exceptional case granting relief. *Id.* The few recent cases have granted relief while simply ignoring *ALCOA*. See *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 1196 (1986); *Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781 (7th Cir. 1985). One is inevitably left with the impression that:

Excuse [for impracticability] is a game with a predictable outcome—the buyer wins. The courts consistently have found that the occurrence of the contingency was assumed or that the occurrence failed to make performance "as agreed" impracticable. . . . The results . . . are compatible with some traditional views about the nature and purpose of contract law, namely, that an "objective" theory of contracts which tightly controls both the creation of contract liability and the grounds for excuse through standards of reasonableness is desirable. When this is combined with the natural tendency to leave the loss on the maker of an unconditional promise, the results are not surprising.

I would argue, however, that the reluctance to treat commercial impracticability with the doctrinal simplicity accorded its impossibility forbear is consistent with the development of judicial sophistication and with the complexity of commercial reality. The cases that have truly served to test the doctrine of impracticability have arisen only within the past twenty years. The courts have attempted to make sensible application of the doctrine to a confused and complex commercial world in which contractual relations were formed in a context, if not of war, then of the rumors of war, embargo, shortages, and inflation. The Suez Canal closings,⁸⁷ the uncertainty surrounding the growth and development of private nuclear power in the late 1960's and early 1970's,⁸⁸ the sharp increase in fuel costs because of the OPEC embargo in the 1970's⁸⁹ and the recent sharp decline in these costs,⁹⁰ have provided the dramatic setting for the troubled and, to many, troubling, judicial treatment of impracticability. As Judge Mulligan observed in *American Trading*:⁹¹ "Matters involving impossibility or impracticability of performance . . . are concededly vexing and difficult. One is even urged on the allocation of such risks to pray for the 'wisdom of Solomon' [and decision is based on] the facts, the pertinent authority and a . . . belief in the efficacy of prayer."⁹² While we assimilate our experiences in an effort to form a more coherent doctrine, the unrealistic allocation tool of foreseeability, if applied with care and sophistication, may be more useful in aiding allocation decisions and balancing the competing considerations of predictability and fairness than our presently available alternatives.

Speidel, *supra* note 5, at 271-72 (footnotes omitted). See Stroh, *supra* note 33, at 210-13 (examining the extent of the judiciary's failure to grant relief to sellers based on the impracticability doctrine).

⁸⁷ See, e.g., *American Trading*, 453 F.2d 939; *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966); *Glidden Co. v. Hellenic Lines, Ltd.*, 275 F.2d 253 (2d Cir. 1960).

⁸⁸ See, e.g., *Westinghouse II*, 597 F. Supp. 1456; *Westinghouse I*, 517 F. Supp. 440; *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 137 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979); *In re Westinghouse Elec. Corp. Uranium Contract Litig.*, 405 F. Supp. 316 (J.P.M.D.L. 1975).

⁸⁹ See, e.g., *ALCOA*, 499 F. Supp. 53; *Eastern Air Lines v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975); *Publicker Indus., Inc. v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975); see also *Louisiana Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319 (E.D. La. 1981).

⁹⁰ See, e.g., *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986); *International Minerals*, 770 F.2d 879; *Sharon Steel Corp. v. Jewell Coal & Coke Co.*, 735 F.2d 775 (3d Cir. 1984).

⁹¹ 453 F.2d 939 (2d Cir. 1972).

⁹² *Id.* at 944 (citation omitted); see 6 A. CORBIN, CORBIN ON CONTRACTS § 1333, at 371-72 (1962) ("Where neither custom nor agreement determines the allocation of a risk, the court must exercise its equity powers and pray for the wisdom of Solomon.").

2. *The Code*

Although the search for the actual intent of the parties to allocate risks of disruptive events seems unlikely to yield a generally applicable test, the Uniform Commercial Code⁹³ posits just such a subjective approach.⁹⁴ Commercial impracticability is codified, with respect to the sale of goods, in section 2-615 of the Code:

Except so far as a seller may have assumed a greater obligation . . .

(a) Delay in delivery or non-delivery in whole or in part . . . is not a breach of . . . 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 made⁹⁵

The Code requires that the non-occurrence of the disruptive event be a "basic assumption" shared by the parties. The "basic assumption" test has been seen as a departure from the fiction of imputed or presumed intent and as a way to set the doctrine of impracticability apart from the more general rules of contract interpretation or its "impossibility" antecedent.⁹⁶ As such, the Code inquiry represents a shift from an ob-

⁹³ U.C.C. § 2-615 (1978). The same type of test is set out in section 261 of the *Restatement*, which takes its language from the Code. *RESTATEMENT*, *supra* note 39, § 261 comment d. The traditional "impossibility" situations are covered in *Restatement* §§ 262-264.

⁹⁴ In fact, judicial insistence on the mechanism of objective foreseeability as the indicator of a presumed intent has also been seen as a refusal to adapt to the specific language of the Uniform Commercial Code. *See infra* note 105.

⁹⁵ U.C.C. § 2-615(a) (1978). The form of the codification itself is not substantially different from that set out in *Mineral Park* and has been called a "new synthesis . . . [that] candidly recognizes that the judicial function is to determine whether, in the light of exceptional circumstances, justice requires a departure from the general rule that a promisor bears the risk of increased difficulty of performance." E. FARNSWORTH, *CONTRACTS*, 677-78 (1982).

By its terms, section 2-615 creates the defense of impracticability only for the seller and question has been raised whether a buyer, may avail itself of the defense. *See Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 277 (7th Cir. 1986) ("Rarely is it impracticable or impossible for the payor to pay; but if something has happened to make the performance for which he would be paying worthless to him, an excuse for not paying, analogous to impracticability or impossibility, may be proper."); *International Minerals*, 770 F.2d 879 (granting to I.M.C., the buyer, the defense of impracticability of fulfillment of its contractual obligation); *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 748 (Iowa 1976) ("While [Iowa's version of the U.C.C.] expressly mentions *sellers*, the explanations . . . make it evident the provisions should also be equally applicable to buyers."). *See infra* note 165.

⁹⁶ *See, e.g.*, Black, *supra* note 11, at 249 ("[T]he term 'impractical' was intended to loosen the rigidity of the common law requirement of impossibility of performance."); Schmitt & Wollschlager, *Section 2-615 "Commercial Impracticability": Mak-*

jective inquiry into what might "reasonably" have been intended by the parties, to an apparently subjective search for the shared basic assumption. The Code's shift, at least theoretically, also results in the "abandonment of old fictions."⁹⁷ The concept of "foreseeability" would give way to a new behavioral analysis with the inquiry focused on what the parties actually contemplated.⁹⁸ In this context, foreseeability is a helpful, but not a decisive, indicator of the "basic assumption."⁹⁹

Using the Code formulation, "excuse" of a promisor who is not somehow at fault with respect to the occurrence of the disruptive event theoretically requires independent determinations that the event has rendered performance "impracticable;" that nonoccurrence of the event was a "basic assumption on which the contract was made;" and that risk of the occurrence was not allocated to the promisor by the terms of the agreement or by the fair intendment of the surrounding circum-

ing the *Impracticable Practicable*, 81 COM. L.J. 9, 9 (1976) (Section 2-615 provides "needed protective flexibility and basic stability . . ."); Wallach, *supra* note 33, at 229 (The UCC was intended "to liberalize the availability of commercial impracticability as a contract defense . . .").

⁹⁷ Jacobs, *Legal Realism or Legal Fiction? Impracticability Under the Restatement (Second) of Contracts*, 87 COM. L.J. 289, 291-92 (1982) ("[I]ntroduction of basic assumption language replaces an inflexible objective test with a new subjective inquiry into the rationale of the parties."). As one commentator states:

[Implication] masks the real issues by encouraging courts to rationalize their treatment of *casus omissi* by means of a fictitious intention. [E]ven where there are expectations, it distorts them by casting them in the form of contract terms. . . . The implied term may once have been a useful fiction, but it has served its purpose and should be discarded in favor of a more realistic analysis.

Farnsworth, *supra* note 14, at 867-68.

⁹⁸ See, e.g., U.C.C. § 2-615 comment 4 (1978) ("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."); see also Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 NW. U.L. REV. 1032, 1040 (1978) (suggesting that there are a multitude of reasons for parties' behavior in providing or not providing for all contractual contingencies).

⁹⁹ The *Restatement* directs that:

In making [the "basic assumption"] determinations, a court will look at all circumstances, including the terms of the contract. The fact that the event was unforeseeable is significant as suggesting that its non-occurrence was a basic assumption. However, the fact that it was foreseeable, or even foreseen, does not, of itself, argue for a contrary conclusion, since the parties may not have thought it sufficiently important a risk to have made it a subject of their bargaining.

RESTATEMENT, *supra* note 39, ch. 11, at 311 (introductory note). See Farnsworth, *supra* note 14, at 868-71; *cf. id.* at 882-83 (commenting that the language in the 1946 version of the *Restatement* worked such that: "In the hard cases, in which it is not clear whether the parties simply had no expectation with respect to the situation, or had one but did not express it, it is a sterile exercise for a court to attempt to determine whether the assumption that the situation would not arise 'forms the basis' of the agreement.").

stances.¹⁰⁰ "Impracticability" must be quantified independently—how serious is the disruption? Concurrently, a subjective or objective test of "foreseeability" resolves the question of the "basic assumption" and the circumstantial allocation of risk.

Notwithstanding the Code's language, and to the chagrin of those who saw the Code's approach as a departure from the common law, the Code's apparently *subjective* search for actual intent has not in fact displaced the centrality of *objective* foreseeability.¹⁰¹ Judge Merhige makes abundantly clear in *Westinghouse I*¹⁰² and *Westinghouse II*,¹⁰³ with support from cases dealing with the matter,¹⁰⁴ that the determination whether the non-occurrence of a particular disruptive event was a basic assumption of the parties depends not upon a factual finding of what the parties assumed but upon a judicial determination of whether the event was "foreseeable." The issue, then, is not whether the disruption was *foreseen*, but whether *it might reasonably have been foreseen* under the circumstances.¹⁰⁵ Further, instead of independently quanti-

¹⁰⁰ U.C.C. § 2-615 (1978); E. FARNSWORTH, *supra* note 95, at 678.

¹⁰¹ See Black, *supra* note 11, at 249-50 ("The inescapable impression gained from reading cases construing section 2-615 . . . is that the courts have not fulfilled the expectations of the Code drafters, but have tended instead to retain the rigidity of the pre-Code law."). Commentators have noted that:

[T]he cases . . . show not only a strong judicial resistance to a liberal adaptation of the section into sales contract law, but also that as §2-615 is applied to each new problem area, the courts, by following restrictive precedents, are judicially legislating the Code section to equate with common law contract principles.

Schmitt & Wollschlager, *supra* note 96, at 13; Wallach, *supra* note 33, at 203 ("[T]he courts have adhered to the common law standards for excuse and have ignored the [UCC] draftsmen's intent to liberalize those standards."); *id.* at 207 ("In general, there has been a tradition of judicial hostility to the [frustration and impracticability] categories of excuse."). It has been observed that:

[Although § 2-615 is supposed to provide a] 'flexible adjustment machinery' . . . to have the community's interest in enforcing contracts according to their terms balanced against the commercial senselessness of requiring performance . . . the potential usefulness . . . is threatened by confusion [growing out of] a stubborn reluctance to strike two common law concepts from the methodology of section 2-615: the impossibility doctrine and its handmaiden, the foreseeability test.

Comment, *supra* note 98, at 1032-33.

¹⁰² 517 F. Supp. 440.

¹⁰³ 597 F. Supp. 1456.

¹⁰⁴ See *Westinghouse I*, 517 F. Supp. at 454-55; see also Sirianni, *supra* note 10, at 55-65; Stroh, *supra* note 33, at 213-16 (describing the case law in the area).

¹⁰⁵ Judicial insistence on the mechanism of objective foreseeability as the indicator of a presumed intent has in fact been seen as a conscious refusal to adapt to the specific language of the Uniform Commercial Code. See Black, *supra* note 11, at 248-51; Schmitt & Wollschlager, *supra* note 96, at 13; Wallach, *supra* note 33, at 229; Comment, *supra* note 98, at 1033; Note, *UCC § 2-615: Defining Impracticability Due to Increased Expense*, 32 U. FLA. L. REV. 516, 534-35 (1980).

ying impracticability and then applying the foreseeability test, the courts apply the criteria recursively, in a kind of judicial infinite regression, to allocate risk. Again, Judge Merhige in *Westinghouse I* is particularly instructive as he candidly recognized the interdependence of these apparently separate factors while keeping sight of the fact that the inquiry is directed toward the overall question of risk allocation.¹⁰⁶

To Judge Merhige, the issue of impracticability under section 2-615 of the Code and the cases involved four interrelated questions:

(1) Was performance as agreed rendered impracticable? (2) Did the claimed impracticability arise from an unforeseen contingency? (3) Was the non-occurrence of the contingency a basic assumption on which the contract was made? (4) Did the parties, explicitly or implicitly, allocate the risk that the contingency would occur?

. . . .

It is further to be noted that the issues . . . are interrelated: the "answer" to each depends in part on the "answers" to the other three.¹⁰⁷

Judge Merhige's serious doubt that the cost of performance was so excessive as to amount to "impracticability"¹⁰⁸ fortified him as he considered the question of foreseeability. Summarizing the general tenor of authority, he noted:

[W]here the contingency may reasonably be said to have been foreseeable, courts have generally taken the view that the promisor should not be released from his obligation. This rule is based on the notion that where the parties can reasonably anticipate events that may affect performance, the prudent course is to provide for such eventualities in their

¹⁰⁶ Such allocation is to be "determined by the totality of the circumstances, including the comparative abilities of the parties to make informed judgments as to the extent of the risk; each party's interest in avoiding the risk; and the extent to which that interest was a factor in the negotiation of the contract." *Westinghouse I*, 517 F. Supp. at 456.

¹⁰⁷ *Westinghouse I*, 517 F. Supp. at 451. Judge Merhige also noted in passing the origins of the U.C.C. test:

The commercial impracticability provisions of the U.C.C. merely codify the pre-code common law of impossibility of performance

. . . Common law impossibility, formerly a very harsh doctrine which purported to require a showing of objective or scientific impossibility, has been moderated by case law to the point where it is equivalent to impracticability under the Code.

Id. at 450-51.

¹⁰⁸ See *supra* notes 50-57 and accompanying text.

contract.¹⁰⁹

Unanticipated expenses, even approaching \$100 million, cannot obviate the foreseeability problem because a reasonable actor would take care to “recognize and appreciate” the potential events that might affect the contract.¹¹⁰ Using objective standards of reasonableness and foreseeability, the court found the parties intended to keep the risk of the disruption on the promisor as Westinghouse knew of its uncertain capability to perform its reprocessing obligation.¹¹¹ Ultimately, Judge Merhige in *Westinghouse I* asked the parties and their experts to help the court arrive at a settlement or to fashion appropriate relief: “The Court . . . fervently hopes that it will not be called upon to draft a decree, not because it would be difficult, but rather because the Court is convinced that the parties themselves are in a far better position to find an equita-

¹⁰⁹ 517 F. Supp. at 454. Judge Merhige went on to criticize a subjective approach to the search for intent:

Because the future is by definition unknowable, a rule holding the obligor to performance only where he foresees, but fails to guard against, the *precise* event that renders performance more difficult, would be meaningless. . . . [I]t may be enough that he is (or should be) aware of a certain trend, or that a given state of affairs is in flux, or that an assumption is more than usually uncertain.

. . . .
 . . . [T]he foreseeability of the risk alone may well be sufficient for it to be regarded as implicitly assumed by the promisor.

Id. at 454-56. Oddly, Judge Merhige here referred to the crop failure cases as paradigmatic of unforeseeable events supporting the excuse. See *supra* note 37.

¹¹⁰ As the court described:

While this expense is high, it is not beyond the normal range of risk that a promisor signing a fixed-price contract in a new high-risk field could have expected. A loss alone is not sufficient to show commercial impracticability. . . .

If Westinghouse had conducted any investigation whatsoever [at the time the contract was made] . . . it would have been aware that the expense might be great. . . . An argument to the effect that any such potential costs were either unknown or incapable of ascertainment simply strengthens the Court’s conclusion that a reasonable company in the nuclear business would have recognized and appreciated the potentially high cost.

Westinghouse II, 597 F. Supp. at 1477-78.

¹¹¹ The court was unequivocal on this point:

Knowing full well Florida’s requirements, and knowing that reprocessing, not being available even then as a practical matter, was highly uncertain, Westinghouse agreed to a contract term which in plain, unequivocal, unqualified language, required it to remove the spent fuel from Florida’s plants. If this is not assumption of risk, the Court confesses itself unable to discern what would be.

Westinghouse I, 517 F. Supp. at 457.

ble solution."¹¹² The inability of the parties to reach such agreement after three years necessitated the *Westinghouse II* opinion.¹¹³

Faced with the need to fashion relief in *Westinghouse II*, Judge Merhige reexamined the question of foreseeability. He found that although it was "foreseeable" to Westinghouse that there could be problems, and considerable expense, attendant to removal and reprocessing of spent nuclear fuel, it was *not* foreseeable that the United States government would fall twenty-five years behind schedule in fulfilling a commitment to industry to create disposal facilities.¹¹⁴ Accordingly, although the unavailability of reprocessing did not excuse Westinghouse's refusal to remove the spent fuel, there was some degree of excusing impracticability relating to the cost of providing long-term on-site storage in the absence of any usable off-site disposal facilities.¹¹⁵ Utilizing "its own sense of fairness"¹¹⁶ and recognizing that there is "no precise means for isolating the costs attributable to the unforeseeable de-

¹¹² 517 F. Supp. at 461. The judge continued:

[I]t is clear that, under the law, Westinghouse is liable to Florida for its breach of contract. It must pay damages, or perform, or some combination thereof, whether by agreement of the parties or by order of the court. The former is . . . far preferable in light of the parties' greater ability to discern the best interests of both Florida's ratepayers and Westinghouse's shareholders, and their greater experience in solving complex practical problems.

Id. The court then referred to the good faith and diligence of Westinghouse in settling the consolidated uranium litigation and offering to meet with counsel to aid in settlement and to get expert advice. *Id.* at 461-62.

¹¹³ 597 F. Supp. 1456.

¹¹⁴ *Id.* at 1469-72.

¹¹⁵ The court's words are enlightening:

[The] failing on the part of the Government [to act in a timely fashion] was an unforeseeable contingency the non-occurrence of which was a basic assumption of the contract and which has rendered performance of Westinghouse's implicit timeliness obligation to Florida impossible. No one could have anticipated the poor planning, delays, and policy reversals that have added up to more than twenty years of delay, after the outlook for commercial reprocessing became clouded, before the Government will be providing any alternative. Both Florida and Westinghouse were aware that reprocessing might not be available, but neither of them anticipated that no alternative means of removal would be available until 1998 or after. . . .

. . . The failing in the Government's policies was that a permanent means of disposal was not available in time to avoid *unnecessary* costs for interim storage [T]he Court is satisfied that at least some of the interim storage costs must be attributed solely to unnecessary delays in the fulfillment of the Government's implied commitments. Westinghouse cannot fairly be held liable for the full amount of these unnecessary costs.

Consequently, the Court has determined that an equitable allocation of the interim storage costs is in order.

Id. at 1478.

¹¹⁶ *Id.*

lays,"¹¹⁷ the court refused to hold Westinghouse responsible for the costs of additional on-site storage.¹¹⁸

The *Westinghouse* litigation exemplifies a flexible and integrative approach to the complex problem of commercial impracticability within the inherent limitations of existing judicial doctrine and capability. Certainly Judge Merhige, in his concern for foreseeability, and notwithstanding U.C.C. section 2-615, is consistent with the great bulk of impracticability decisions.¹¹⁹ The sophistication with which he treats the interrelated issues of the quantification of "impracticability" and intention-indicative "foreseeability" may represent the farthest reach of presently applied doctrine. His express recognition of the interrelatedness of the various components of "impracticability" and his recognition of the complexity of a "foreseeability" determination are an attempt to make doctrine parallel the complexity and sophistication of the commercial transaction involved.

It may be that, even with the effort expended, the focus on factors indicative of some kind of presumed intent necessarily results in a rather simple judicial reality: an event whose consequences are seriously disruptive but not catastrophic will almost always be deemed to have been foreseeable, and the promisor will be held to the promise even if the event was not in fact foreseen or contemplated by the parties.¹²⁰

In positing a test of "foreseeability" the courts have attempted to find a practical solution to the conundrum of fashioning doctrine with respect to which parties may realistically plan within the context of complicated and highly discrete litigation. That a test based on the fiction of "foreseeability" is in many respects artificial and unrealistic is beyond dispute. The issue, however, is whether such an "objective" test, applied in a recursive fashion as part of an intention-based allocation effort is more workable than either the apparently subjective test called for by the Code or another alternative.

The Code may have intended the abandonment of the "old fiction" of an objectively presumed intent, but has it not then substituted for it

¹¹⁷ *Id.*

¹¹⁸ The credit to Westinghouse for this re-racking operation amounted to approximately \$12.7 million, the amount it would have cost the utility to perform the work, even though Westinghouse had already undertaken to do it for \$6 million. *Id.* at 1479.

¹¹⁹ See *Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781 (7th Cir. 1985); see also *supra* notes 87-90.

¹²⁰ See Hillman, *supra* note 69, at 652 ("[W]hen losses to the promisor would be moderate courts will not excuse performance, but when losses would be extreme and the promisor has acted reasonably courts will excuse performance." (footnotes omitted)).

another kind of fiction?¹²¹ Is not the "fiction," new or old, that embodied in the idea of "basic assumption" itself, that one can indeed find unexpressed negative assumptions specifically referable to the disruptive event?¹²² The courts use, and presumably will continue to use, with varying degrees of sophistication, an apparently objective and extensible search for intent, the much-criticized foreseeability talisman. As a matter of judicial capability, it appears to be more workable than an attempt to reconstruct the parties' bargain and determine what each actually contemplated or to decide what they would have done had they thought about the matter.¹²³

The "foreseeability/foreseen" problem, however, focuses on the wrong question. The use of the intent-indicative criterion of foresee-

¹²¹ See Trakman, *supra* note 10, at 477 ("Both the [Restatement] and the Uniform Commercial Code maintain the earlier practice of creating doctrine by way of fiction.").

¹²² "The code thus perpetuates the fiction that underlying each contract is a 'basic assumption' that the court is able to identify by ex post facto inquiry and that a judicial finding of 'commercial impracticability' reflects what the parties would themselves have decided had they anticipated the intervening disruption." *Id.* at 477-78 (footnotes omitted).

Under the subjective theory, the implied term follows the intention of the parties. . . . In its objective form, the theory maintains that the implied term is that term which reasonable men would have included in the contract to cover the situation if they had considered the matter. This . . . is problematic because it clearly exposes the fictional nature of the implied term and the theory's lack of fidelity to the idea that the parties, and not the courts, make the contract, for the court's judgment is clearly all that can be meant by the reasonable man standard.

. . . It is desirable . . . that some of these assumptions [which parties make about the present and anticipated physical world] be taken into consideration in determining to what point a contract should be treated as binding. . . . The real problem with the implied term theory is that it gives no clues by which to determine which assumptions should be considered in any situation, except in the force of the adjective—"basic" or "fundamental"—used to describe the assumption.

Schlegel, *supra* note 33, at 443-44 (footnotes omitted); see also Stroh, *supra* note 33, at 219 ("[T]here is also no direction given to the court with respect to the manner in which risks are to be allocated other than by determining the basic assumptions of the parties.").

¹²³ It has been argued that:

At its best, the formula is contrived. It is no simple matter for a court to surmise whether the situation was foreseen by either or both parties, and then to divine what either party would have done had he foreseen the situation. Furthermore, where the court concludes that the parties would have included a term, the plausibility of the exercise in composition that it must undertake diminishes as the foreseeability of the *casus omissus* decreases, until finally the court finds itself in the uncomfortable position of composing a term for a virtually unforeseeable situation.

Farnsworth, *supra* note 14, at 879-80 (footnotes omitted).

ability¹²⁴ is an attempt to keep the doctrine of excuse within the confines of a determination of the "will" of the parties.¹²⁵ If we dislike the concept of foreseeability, we might better ask whether intent, subjectively or objectively determined, is an appropriate or even relevant consideration in allocating the risks of seriously disruptive events and whether there are any workable alternatives.

III. A SEARCH FOR SYNTHESIS

A. ALCOA: "*Hardship*" and the Abandonment of Intent

In *ALCOA*, Judge Teitelbaum constructed an approach to impracticability that turned on a determination of the hardship of continued performance in the face of a supervening event, specifically, Alcoa's projected losses of more than \$75 million: "The focus of the doctrines of impracticability and of frustration is distinctly on hardship. . . . Performance may be impracticable because *extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved.*"¹²⁶ Looking at the massive losses projected by Alcoa, he found each of the traditional impracticability authorities¹²⁷ "distinguishable . . . in the absolute extent of the loss and in the proportion of loss involved."¹²⁸ The loss ostensibly to be visited upon Alcoa made performance impracticable in much the same sense as the court in *Mineral Park v. Howard* found performance impracticable: performance was "commercially" impossible.

¹²⁴ Of course, the foreseeability inquiry is multi-functional. In Judge Merhige's analysis of Westinghouse's conduct it is also used as an indicator of fault; *i.e.*, Westinghouse, acting in the face of "foreseeable" problems, albeit nonquantifiable ones, was essentially either negligent or consciously taking a gamble. See *Westinghouse II*, 597 F. Supp. 1456, 1475-76 (E.D. Va. 1984).

¹²⁵ Cf. Gillette, *supra* note 24, at 524 (arguing that a contract is a "mechanism for individual expression by commercial actors capable of considering and bearing the consequences of reasoned choice").

¹²⁶ 499 F. Supp. 53, 72 (W.D. Pa. 1980) (emphasis in original). Judge Teitelbaum initially justified relief on grounds of "mistake" with respect to the efficiency of the index as a risk limiting device. *Id.* at 60-70. His approach to the mistake doctrine, itself an apparently extreme departure from tradition not generally followed, is outside the scope of this article. See, e.g., *Westinghouse I*, 517 F. Supp. 440, 458 (E.D. Va. 1981) (Judge Merhige holding that he "has, most respectfully, some difficulty with the holding in *ALCOA*").

¹²⁷ *ALCOA*, 499 F. Supp. at 74 (citing *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966)); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Publicker Indus., Inc. v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975); *Maple Farms, Inc. v. City School Dist.*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974)).

¹²⁸ *ALCOA*, 499 F. Supp. at 74.

In taking this hardship-based approach, Judge Teitelbaum went beyond simply distinguishing the strong body of contrary authority. He essentially rejected the judicial past,¹²⁹ discarding the intent-driven fiction of foreseeability: "If it were important to the decision of this case, the Court would hold that the foreseeability of a variation between the [Wholesale Price Index for Industrial Commodities] and Alcoa's costs would not preclude relief under the doctrine of impracticability."¹³⁰ In fact, he ignored the centrality of the concept of intent itself, opting instead for an analytic framework with a base far broader than that of the presumed intent of the parties:

The [Uniform Commercial] Code seeks . . . to accommodate the law to sound commercial sense and practice. Courts must decide the point at which the community's interest in predictable contract enforcement shall yield to the fact that enforcement of a particular contract would be commercially senseless and unjust. The spirit of the Code is that such decisions cannot justly derive from legal abstractions. They must derive from courts sensitive to the mores, practices and habits of thought in the respectable commercial world.¹³¹

In this passage, Judge Teitelbaum takes the position that "hardship in various garbs provides a justification for the court to police the transaction in the interest of fairness."¹³²

There is much to be said for a coherent doctrine that is not dependent on the search for intent.¹³³ It has been suggested that "[t]he ques-

¹²⁹ He does, however, lean heavily on qualifying dicta in *Transatlantic Financing*, 363 F.2d at 318. See *ALCOA*, 499 F. Supp. at 76.

¹³⁰ *ALCOA*, 499 F. Supp. at 76. Strictly speaking, of course, this is dicta since he finds some degree of unforeseeability. His statement rejecting foreseeability is, however, significantly stronger than that of Judge Wright in *Transatlantic Financing*, 363 F.2d 312.

¹³¹ *ALCOA*, 499 F. Supp. at 76. Aluminum ore processing requires large expenditures of electrical energy. That aluminum processing is extraordinarily dependent upon the generation of electricity and the concomitant supply of fuel to provide such generation suggests that Alcoa should have been peculiarly aware of matters relating to energy production and the possibility of severe disruption in the fuel market. An argument might well be made that Alcoa, with respect to the uncertainty of the international petroleum situation, was situated similarly to Westinghouse with respect to the uncertainties of the disposal and reprocessing of spent nuclear fuel. To the extent that Westinghouse was somehow "at fault" or indifferent to its own risks, so too was Alcoa. Judge Teitelbaum's eliding of this issue by emphasizing Alcoa's attempt to limit risk through the WPI indexing hardly seems satisfactory. See *id.* at 68-70.

¹³² *New Spirit*, *supra* note 10, at 201 (suggesting that the *ALCOA* case is indicative of a growing recognition of this position).

¹³³ As was observed more than forty-five years ago:

"Intention of the parties" is a good formula by which to square doctrine with result. That this is true has long been an open secret. Of course,

tion . . . is not what the parties intended but rather, how the losses should be allocated. . . . The judicial function becomes one of weighing equities and balancing interests”¹³⁴ Moreover, some scholars suggest that resolution devices based upon intent are not appropriate for solving problems caused by a “failure in the agreement”.¹³⁵

As the parties cannot agree, the court can only look to extrinsic standards of fairness for a solution. . . . It would be irrational not to recognize contractual accidents and to refuse to make adjustments when they occur. The gaps cannot be filled, the adjustments cannot be governed, by the promise principle.¹³⁶

There are too many reasons why parties might simply have had no intention or expectation with respect to some conjectural matter ancillary to their contractual concerns or why matters contemplated by one or both of them are omitted from their contract.¹³⁷

The concept of “hardship,” however, provides no firmer basis for shifting the risk from the promisor to the promisee than the imperfect “foreseeability” doctrine. We may quarrel with the centrality accorded foreseeability, but we have not reached a sound, unified consensus as to

where intent, though obscure, is nevertheless discernible, it must be followed; but a certain sophistication must be recognized—if we are to approach the matter frankly—where we are dealing with changed circumstances . . . with respect to a contract which does not touch this exact point and which has at most only points of departure for more or less pressing analogies.

Parev Prods. Co. v. I. Rokeach & Sons, 124 F.2d 147, 149 (2d Cir. 1941). One commentator has gone so far as to say that: “If the goal of impracticability analysis remains effectuation of party intent, impracticability analysis will remain largely incoherent.” Sirianni, *supra* note 10, at 83.

¹³⁴ Speziale, *supra* note 15, at 588.

¹³⁵ C. FRIED, *supra* note 14, at 61-63, 69.

¹³⁶ *Id.* at 63, 69; cf. Farnsworth, *supra* note 14, at 875 (suggesting that the contract does not have a “gap” to be filled but is simply not applicable: “Their language, properly interpreted, simply did not apply to the situation at all; it was not one of the significant situations for which the language was intended. . . . To establish a *casus omisus* it is enough that neither party intended the language to cover the case . . .”).

¹³⁷ As Farnsworth observed:

In contrast to the . . . fiction, which assumes that the parties have expectations concerning all possible situations, is the likelihood that they give their “limited attention” only to a limited number of situations which they choose by some initial process of selection. . . .

. . . [Secondly, i]nstead of attempting to reduce all of their expectations to contract language, the parties again confine their “limited attention” to a limited number of expectations selected as particularly suitable for inclusion in the contract.

what constitutes "hardship"¹³⁸ or what is in fact "commercially senseless" to make these concepts the basis of a modern doctrine of excuse.¹³⁹ Neither of these concepts supplies the luxury of the stark either/or inquiry possible in cases of physical impossibility that allows one to develop and apply excuse doctrine without an intent-based analysis. From the perspective of doctrinal formation, the issues are too new, the events too fresh, for the articulation of deductive doctrine. In light of recent experience with disruptive events, the boundaries for determinations of "hardship" and "senselessness" cannot yet be drawn with bright lines: gray predominates. Ultimately, then, it is not so much the abandonment of intent as it is the lack of articulation of a standard less ephemeral than "hardship" that has prevented *ALCOA* from serving as the basis for a new doctrine of excuse. The result for *ALCOA*, at least with respect to the determination of the existence of an "excuse," is the same as that for *Mineral Park*: the case, for the purposes of developing a doctrine of excuse, cannot take us beyond its own facts.¹⁴⁰

B. Efficiency

1. Efficiency as a Criterion for a Coherent Doctrine of Excuse

It has been urged that the principal purpose of contract is the promotion of efficiency in exchange: "If the purpose of the law of contracts is to effectuate the desires of the contracting parties, then the proper criterion for evaluating the rules of contract law is surely that of economic efficiency. . . . A law of contract not based on efficiency considerations will . . . be largely futile."¹⁴¹ Accepting the efficiency purpose,

¹³⁸ Traditionally, hardship has been the foundation for quantifying impracticability and the preoccupation "with the arithmetic of loss." Speidel, *supra* note 5, at 267.

¹³⁹ See Schwartz, *Sales Law and Inflation*, 50 S. CAL. L. REV. 1, 11 (1976) (discussing the unsatisfactory and arbitrary nature of tests based on "harshness" or "desert" which require, ultimately, that courts "make factual findings and economic judgments of such complexity that the parties would often be unable to predict judicial outcomes").

¹⁴⁰ The controversy generated by *ALCOA* has been concerned more with Judge Teitelbaum's decision to have the risk shared, allocated between the parties instead of left with one of them, than with his remarkable and precedent-breaking determinations of impracticability and frustration. The lack of impact of these doctrinal determinations stems largely from their ipse dixit nature and consequential limited extensibility. Although his opinion elaborates and extends the boundaries of "mutual mistake," *ALCOA*, 499 F. Supp. 53, 60-70 (E.D. Pa. 1980), Judge Teitelbaum provides no conceptual framework for extending his determination of impracticability and frustration beyond the case itself.

¹⁴¹ Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 89 (1977). See Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEGAL STUD. 311, 321 (1982) ("[T]he overriding, economic function of contract law is the attainment of efficiency in ex-

it is possible to construct a doctrine of excuse that abandons the foreseeability-based approach to presumed intent, yet maintains the overriding fiction of following the will of the parties. For example, those who advocate that risk be allocated on the basis of an economic determination of which party is the "superior risk bearer"¹⁴² assume that such an approach is consistent with the parties' presumed intention to contract efficiently.¹⁴³ The quarrel then with foreseeability as an index of intent is that "it fails to indicate which contracting party is the superior bearer of the foreseeable risk."¹⁴⁴ For efficiency advocates, where a question of the impracticability of performance arises in the face of contractual silence, the issue is simply one of finding the most efficient means of allocating risk.¹⁴⁵ The inquiry revolves around a determination of who is the most efficient putative insurer,¹⁴⁶ the "superior risk bearer."¹⁴⁷ Insurance, or the potential to insure, becomes the *deus ex machina* to resolve all plot complications.

An efficiency-based approach to excuse does indeed eliminate the fictions of both imputed intent and basic assumptions. If one of the parties is the "superior risk bearer," then, absent an express assumption of the risk by the other party, the "superior risk bearer" shoulders the risk. Any other result would imperil efficiency. Judge Posner suggests that the courts have, without articulation,¹⁴⁸ followed economic efficiency norms and that an efficiency analysis goes far toward rationalizing the decisions of the courts:¹⁴⁹ the party upon whom the courts

change."); Note, *The Economic Implications of the Doctrine of Impossibility*, 26 HASTINGS L.J. 1251, 1252 (1975) ("[A] contract principle is justified whenever its operation produces a more efficient distribution of resources. To say that a legal doctrine is economically efficient is to say that that doctrine makes society better off.").

¹⁴² Posner & Rosenfield, *supra* note 141, at 90.

¹⁴³ See *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986) (Posner, J.) ("[I]mpossibility and related doctrines are devices for shifting risk in accordance with the parties' presumed intentions, which are to minimize the costs of contract performance, one of which is the disutility created by risk . . .").

¹⁴⁴ Posner & Rosenfield, *supra* note 141, at 100.

¹⁴⁵ *Id.* at 86.

¹⁴⁶ *Id.* at 90.

¹⁴⁷ *Id.* ("From the standpoint of economics . . . discharge should be allowed where the promisee is the superior risk bearer; if the promisor is the superior risk bearer, nonperformance should be treated as a breach of contract.").

¹⁴⁸ *But see Asphalt Int'l, Inc. v. Enterprise Shipping Corp.*, 667 F.2d 261, 266 n.5 (2d Cir. 1981) ("The fundamental question involves the appropriate allocation of risk, that should be determined according to which party was in the better position to insure against the various losses occasioned by the [event]."). Of course from the bench, Judge Posner has been able to contribute explicit judicial opinion with respect to these norms. See, e.g., *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986).

¹⁴⁹ Posner & Rosenfield, *supra* note 141, at 89 ("[There] is a powerful reason for expecting that the law of contracts has, in fact, been informed by efficiency considera-

have allowed the risk of loss to rest has indeed been the "superior risk bearer." Thus, in the case of impracticability brought about by disruptive events, it is only logical that the seller/promisor is almost always held to its promise—the promisor is generally the "superior risk bearer" and, thus, should be so held.¹⁵⁰

Framed differently, the "superior risk bearer" analysis is a determination of which party is better able *to control* either the risk or its consequences.¹⁵¹ Discharge is appropriate only for a promisor who "has taken the optimal level of precautions both to ensure performance and to mitigate damages."¹⁵² Even then, discharge may not be appropriate if "the promisee has [also] mitigate[d] damages *and* . . . the costs to the promisor of obtaining insurance against the effects of non-performance are less than those to the promisee."¹⁵³ Any doubt is resolved by placing "the burden on the party best able to spread the loss or absorb it."¹⁵⁴

2. The Failure of the Efficiency-Based Model: Problems of Capacity and Values

Even if one accepts the proposition that "efficiency" is the primary goal in regulating contractual arrangements, a "control" or "superior risk bearer" approach to resolving the problem of contractual silence with respect to a disruptive event is of limited utility. It necessarily results in a narrow jurisprudence founded on hindsight and idiosyncratic factual analysis. Even the problems created by intention-based analyses pale in comparison to those posed when one must examine

tions, even if judges and lawyers have found it difficult to articulate the underlying economic premises of the law." *But cf.* Sirianni, *supra* note 10, at 69 ("Posner's claim that impracticability decisions tend to follow his analysis is at best undemonstrable.").

¹⁵⁰ *But see* Posner & Rosenfield, *supra* note 141, at 111 ("The performer is not always the superior risk bearer; otherwise there would be no place in contract law for impossibility and related doctrines. But as long as the performer is *generally* the superior risk bearer, assigning the risk to him in cases of doubt—that is, refusing discharge in those cases—can be expected to yield correct results more often than the contrary rule.").

¹⁵¹ As one commentator states:

A party assumes responsibility for that proportion of performance risks and ensuing losses that are within that party's 'control'. [Such 'control' exists when a party is better able] (1) to contemplate *both* the advent of the risk that intervened and its probable effect upon performance, and (2) to avert or mitigate the performance losses produced by that performance risk.

Trakman, *supra* note 10, at 506 n.106.

¹⁵² Bruce, *supra* note 141, at 321.

¹⁵³ *Id.* at 322.

¹⁵⁴ Speidel, *supra* note 5, at 242 n.3 (citation omitted).

each case *ex post* to make an economic determination of which party had "control" or which party might have been better able to "spread" or "bear" the consequences of the event.

The efficiency analysis, whether in terms of "superior risk bearer" or "least-cost bearer,"¹⁵⁵ or more general efficiency criteria,¹⁵⁶ is a determination as to how two supposedly risk averse parties would have allocated the risk of disruptive events had they been required specifically to do so and had their goal been an efficient, least-cost, present transaction. What is involved is a complicated set of trade-offs relating to how much each party would have been willing to pay to have the other assume the risk.¹⁵⁷ Efficient rule-making at contracting time thus requires an *ex ante* determination of the relevant factors and the appropriate and optimal balance.¹⁵⁸ When a dispute arises, however, judgments are made *ex post*. One must question whether the parties themselves, let alone the courts, are equipped to make an analysis of the efficiency-relevant circumstances as they existed at the inception of the

¹⁵⁵ Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1285 (1980) ("The least-cost bearer of any risk will presumably agree to absorb that risk in exchange for an enhanced return promise.").

¹⁵⁶ See generally Cooter & Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432 (1985).

¹⁵⁷ Thus, "[w]hen a regret contingency arises, the promisor's options are either to bear the loss attributable to performance, which now costs more than it is worth, or to breach and accept the cost of any corresponding sanction. Presumably the promisor would adopt the cheaper of these regret costs." Goetz & Scott, *supra* note 155, at 1273. Further,

[t]he risk of . . . regret contingency can be allocated several ways. On the one hand, nonenforcement of promises induces self-protective reductions in reliance by the promisee. These, in turn, may trigger reassurance reactions from the promisor. On the other hand, enforcement of promises increases promisee reliance, but also induces precautionary adjustments by the promisor. The social cost of the regret contingency is minimized when the optimal interactive adaptations are encouraged.

Id. at 1287.

¹⁵⁸ More explicitly:

If in certain transactions precautionary efforts by promisors would be more expensive than reassurance, nonenforcement enables the parties to shift the risk of regret more cheaply. Alternatively, when reassurance is more costly, fully enforcing promises induces cheaper precautionary conduct. If each type of transaction can be identified *ex ante*, specifying the cost-effective rule in advance produces the outcome that the parties would reach if they bargained over legal liability for breach.

Id. at 1293. See also Birmingham, *supra* note 26, at 1400 ("[I]n cases where frustration of contract is at issue, unnecessarily inadequate economic analysis frequently leads to inaccurate conclusions concerning the equity of possible solutions."); *id.* at 1415 ("[A] deeper probing of the economic consequences of the unexpected occurrence forming the basis of claims of frustration will frequently lead to revised calculations concerning the amount of resulting gain or loss and offer new guidelines for its distribution.").

transaction. Such an analysis would seem to amount to little more than conjecture when used to determine how the parties would have handled the risk of the disruptive event had they been aware of it.¹⁵⁹

An efficiency-based test might be workable, however, if the boundaries of the excusing circumstances are so narrowed that the test is applied only in the most exceptional cases,¹⁶⁰ or, alternatively, if every contract of any magnitude be accompanied at its inception by an "economic impact" statement. The former approach is exemplified in Judge Posner's opinion in *Northern Indiana Public Service Co. v. Carbon County Coal Co.*¹⁶¹

The plaintiff ("NIPSCO") had entered into a twenty-year contract to purchase coal from the defendant ("Carbon County"). The contract fixed both the quantity and the price to be paid, subject only to upward adjustment.¹⁶² The coal was to be used by NIPSCO to generate electricity for sale to consumers. As fuel prices began sharply to decline, NIPSCO found itself able to buy electricity from others more cheaply than it could generate its own electricity with the coal purchased from Carbon County. When the Indiana Public Service Commission ruled essentially that the additional costs involved in generation could not be passed on to NIPSCO's customers, NIPSCO stopped taking coal deliveries from Carbon County and sought a declaration that it was excused from its purchase obligations under the contract.¹⁶³ Carbon County counterclaimed for breach of contract and, after a jury trial, received judgment for \$181 million.¹⁶⁴

Judge Posner characterized commercial impracticability and frustration¹⁶⁵ as "doctrines for shifting risk to the party better able to bear

¹⁵⁹ See, e.g., Hillman, *supra* note 69, at 626 ("[E]mploying hindsight to ascertain the efficient allocation will be problematic in many instances."); see also Sirianni, *supra* note 10, at 72 ("It is not feasible [for the court] to sort through the infinite number of insurance options available to any party to determine how such party might have insured most cheaply." (citation omitted)); *Price Adjustments*, *supra* note 10, at 396-97 ("[I]t has been questioned . . . whether a court is capable of managing the complexities of a Pareto or Kaldor-Hicks efficiency analysis." (citation omitted)).

¹⁶⁰ In this formulation, the great bulk of the cases would still be decided on the basis of fixed, situational doctrine.

¹⁶¹ 799 F.2d 265 (7th Cir. 1986).

¹⁶² The contract was signed in 1978. NIPSCO obligated itself to buy 1.5 million tons each year for twenty years at an initial price of \$24 per ton, which, by virtue of the upward adjustment provisions, had escalated to \$44 per ton by 1985. *Id.* at 267.

¹⁶³ *Id.* at 267-68.

¹⁶⁴ *Id.* at 268.

¹⁶⁵ Judge Posner notes that there is some doubt whether Indiana law allows a buyer to avail itself of U.C.C. section 2-615 or recognizes the doctrine of frustration as a buyer's common law remedy analogous to Code impracticability. *Id.* at 276-78.

The cases in which it is the buyer who seeks relief are more accurately considered cases involving claims of "frustration of purpose." See, e.g., *Northern Ind.*, 799 F.2d at

it, either because he is in a better position to prevent the risk from

277; *Scullin Steel Co. v. PACCAR, Inc.*, 708 S.W.2d 756, 762 (Mo. Ct. App. 1986). *But cf.* *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 1196 (1986), *discussed supra* note 68. The doctrine of frustration arose initially as an extension of the *Taylor v. Caldwell* impossibility doctrine applied to the English Coronation cases (*Krell v. Henry*, 2 K.B. 740 (1903)). *See Anderson, Frustration of Contract—A Rejected Doctrine*, 3 DE PAUL L. REV. 1, 1 (1953); Schlegel, *supra* note 33, at 422-23.

Excuse for frustration is not limited to the buyer and it is frequently coupled with impracticability, as it was in *ALCOA*, where relief was predicated on both grounds, as well as that of "mutual mistake." 499 F. Supp. at 78 ("[T]here is no legitimate doctrinal problem which prevents relief for frustration . . . of the purpose to earn money or to avoid losses . . ."). However, such losses must be significant. *See Valencia Center v. Publix Super Mkts.*, 464 So. 2d 1267, 1270 (Fla. Dist. Ct. App. 1985) ("feelings of financial frustration do not necessarily equate to findings of frustration or impossibility under the law"); *cf.* *Printing Indus. Ass'n v. International Printing & Graphic Communications Union, Local 56*, 584 F. Supp. 990, 999-1002 (N.D. Ohio 1984) (unanticipated wage increase of 5.9% insufficient to support a claim for reformation based on frustration of purpose). As one court described the frustration cases: "[W]here a party's principle purpose is frustrated without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate to the contrary." *Scullin Steel*, 708 S.W. 2d at 762 (citing RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981)).

This language of course is similar to that used to describe impracticability. Yet, there are significant conceptual differences between impracticability and frustration. As the court noted in *Lloyd v. Murphy*, 25 Cal. 2d 48, 53, 153 P.2d 47, 50 (1944):

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 the fortuitous event, which supervenes to cause an actual but not literal failure of consideration.

Id. (citations omitted). *See also Anderson, supra*, at 4 ("[T]he concepts of frustration of contract and impossibility of performance are mutually in opposition: the situation where a defendant claims the defense of frustration is where performance by him is fully possible but the exchange has become undesirable . . ."). In fact, frustration has been invoked with even less success than impracticability. *See id.*; *Birmingham, supra* note 26, at 1396 ("The doctrine of frustration is almost unused in American law."); *see, e.g., Scullin Steel*, 708 S.W.2d at 760-64 (The existence of a "long term non-cancellable contract" fixing price and quantity precluded excuse on the basis of frustration caused by events effectively destroying the market for the goods involved.); *Valencia Center*, 464 So. 2d at 1269 (since purpose of lease was to rent property, no release for frustration where unanticipated tax increases occurred). *But cf. Chemical Bank v. Washington Pub. Power Supply Sys.*, 102 Wash. 2d 874, 897-98, 691 P.2d 524, 538 (1984) (Previous judicial decision excusing 70% of participants to a long-term contract was sufficient frustration to release remaining participants.).

Nevertheless, for purposes of dealing with "contractual accidents," the distinction need not be considered significant. In fact, it has been urged that physical impossibility, commercial impracticability, and frustration of purpose should all be considered as part of one overall category: contractual frustration. *See, e.g., Bruce, supra* note 141, at 311 n.1; *Dawson, supra* note 10, at 3-4; *Harrison, supra* note 24, at 575; *Sirianni, supra*

materializing or because he can better reduce the disutility of the risk if the risk does occur."¹⁶⁶ The excusing doctrines will not apply "when the contract explicitly assigns a particular risk to one party or the other."¹⁶⁷ Judge Posner concluded that such an explicit assignment was, in fact, inherent in a fixed-price contract:

[A] fixed-price contract is an explicit assignment of the risk of market price increases to the seller and the risk of market price decreases to the buyer If . . . the buyer forecasts the market incorrectly and therefore finds himself locked into a disadvantageous contract, he has only himself to blame and so cannot shift the risk back to the seller by invoking impossibility or related doctrines. . . . Since "the very purpose of a fixed price agreement is to place the risk of increased costs on the promisor (and the risk of decreased costs on the promisee)," the fact that costs decrease steeply . . . cannot allow the buyer to walk away from the contract.¹⁶⁸

Thus, by making an absolute doctrinal determination, the analytic problems inherent in applying efficiency analysis or a "superior risk bearer" test to this complicated situation were simply elided.

Although Judge Posner cited *Westinghouse I*, he avoided Judge

note 10, at 32. As the court in *McGinnis v. Cayton* stated: "Frustration of purpose, impossibility and commercial impracticability combine to illustrate a doctrine that protects parties from the effects of unanticipated, unallocated, supervening events. While each separate category may have its own definition, they are sufficiently similar to put in one class." 312 S.E.2d 765, 774 n.11 (W. Va. 1984) (Harshbarger, J., concurring); see also Posner & Rosenfield, *supra* note 141, at 86 ("There is . . . no functional distinction between impossibility and frustration cases on the one hand and impracticability cases on the other. In every discharge case the basic problem is the same: to decide who should bear the loss resulting from an event that has rendered performance by one party uneconomical." (citation omitted)).

¹⁶⁶ *Northern Ind.*, 799 F.2d at 278. He cites as an example the crop failure situation, analyzing it not in terms of simple impossibility doctrine, see *supra* note 37 and accompanying text, but in terms of risk absorption:

Suppose a grower agrees before the growing season to sell his crop to a grain elevator, and the crop is destroyed by blight and the grain elevator sues. Discharge is ordinarily allowed in such cases. The grower has every incentive to avoid the blight; so if it occurs, it probably could not have been prevented; and the grain elevator, which buys from a variety of growers not all of whom will be hit by blight in the same growing season, is in a better position to buffer the risk of blight than the grower is.

799 F.2d at 278 (citations omitted).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (citing *Westinghouse I*, 517 F. Supp. 440, 453 (7th Cir. 1974)). See also *Langham-Hill Petroleum Inc. v. Southern Fuels Co.*, 811 F.2d 1327, 1330 (4th Cir. 1987) ("If fixed-price contracts can be avoided due to fluctuations in price, then the entire purpose of fixed-price contracts, which is to protect both the buyer and the seller from the risks of the market, is defeated.").

Merhige's recursive analysis of the magnitude of the "loss" and foreseeability of the disruptive event.¹⁶⁹ As Judge Posner did not consider the fact that the *Northern Indiana* contract was signed at a time of continually rising fuel costs to be material, there was no need to inquire into the foreseeability of a sudden decline. While he recognized that the market had changed radically,¹⁷⁰ that change, whether or not it was foreseeable, or within NIPSCO's "control," or "insurable" by either party, could not give rise to an excuse or adjustment in the face of the existence of a fixed-price contract: "The reason why NIPSCO must pay Carbon County's loss is not that it should have continued buying coal it didn't need but that the contract assigned to NIPSCO the risk of market changes that made continued deliveries uneconomical."¹⁷¹ Thus, NIPSCO was required to pay damages of \$181 million¹⁷² notwithstanding the promotion of overall economic efficiency attendant to NIPSCO's breach.¹⁷³

It must be conceded that the absolute doctrinal determination that a fixed price contract by its nature allocates the risks of any given market change creates predictability and procedural stability,¹⁷⁴ although

¹⁶⁹ As for *ALCOA*, it is simply ignored, notwithstanding the mirror-image symmetry of that case. Where Judge Posner was impressed by the fact that the contract provided a price floor with no ceiling on upward adjustment, Judge Teitelbaum found both impracticability and frustration excusing the seller even though the contract contained a ceiling but no floor. As Judge Teitelbaum stated:

Clear hindsight suggests the flaw might have been anticipated and cured by a "floor" resembling the . . . "cap" that Essex wrote into the price formula. To the extent this possibility might be thought material to the case, the Court specifically finds that when the contract was made, even people of exceptional prudence and foresight would not have anticipated a need for this additional limitation to achieve the purpose of the parties.

ALCOA, 499 F. Supp. at 64 n.5. Compare *id. with Northern Ind.*, 799 F.2d at 278 ("[T]he assignment of the . . . risk to the buyer is even clearer where, as in this case, the contract places a floor under price but allows for escalation.").

¹⁷⁰ 799 F.2d at 279 ("With the collapse of oil prices, which has depressed the price of substitute fuels as well, this coal costs far more to get out of ground than it is worth in the market.").

¹⁷¹ *Id.*

¹⁷² *Id.* This amount is "a reasonable estimate of the present value of the difference" between the contract price and the cost of mining the coal over the remaining life of the contract. *Id.*

¹⁷³ In denying Carbon County's request for specific performance rather than damages, Judge Posner noted that "[c]ontinuing to produce [the coal] . . . would impose costs on society greater than the benefits. NIPSCO's breach . . . was an efficient breach in the sense that it brought to a halt a production process that was no longer cost-justified." *Id.*

¹⁷⁴ Goetz & Scott, *supra* note 155, at 1290 ("Clarity is enhanced by use of a substantive rule that reduces the number and complexity of facts to be determined. A clear rule, such as nonenforcement or full performance compensation, yields benefits of reduced litigation costs and increased procedural accuracy.").

not necessarily efficiency.¹⁷⁵ In view of the capability problem inherent in applying an efficiency analysis at the dispute stage to determine risk allocation, it is understandable, albeit surprising, that Judge Posner chose to apply an absolute risk allocating rule rather than to attempt to determine which of the parties was the superior or economically efficient risk bearer.

The problem of judicial capability is not the only obstacle to the use of an efficiency analysis in allocating risk. The underlying normative assumptions of the primacy of efficiency in exchange, both socially and as between the parties to a given transaction, and of the centrality of risk aversion in determining efficiency are themselves questionable:¹⁷⁶ "Economists commonly invoke risk aversion in analyzing contracts. It is an 'easy' explanation and it is tempting to end the search at that point. . . . There are . . . a lot of reasons [for long-term fixed price contracts], but risk aversion provides a convenient excuse for not bothering to look."¹⁷⁷

Efficiency analysis is a tool, in many ways an elegant¹⁷⁸ tool that has value as an ex ante planning device and an aid to inquiry. However, its utility beyond these functions is doubtful "because parties do not always allocate risks efficiently."¹⁷⁹ Where we face the problem of allocating risks not expressly allocated by the parties' agreement, too many factors are present to allow us to point to one, and only one, optimal analytic framework.¹⁸⁰

¹⁷⁵ *Id.* at 1290-91 ("The primary cost of a clear rule is that it regulates promissory conduct imprecisely. . . . [A] particular rule is efficient when both substantive and procedural components are constructed so as to provide the cost-minimizing balance between accuracy and clarity." (citation omitted)).

¹⁷⁶ See, e.g., Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 32-41 (1975) (arguing that maximizing market value measured by willingness to pay does not necessarily maximize social value); cf. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (generally criticizing the economic analysis of law model).

¹⁷⁷ Goldberg, *supra* note 10, at 529-30 (citations omitted).

¹⁷⁸ Sirianni, *supra* note 10, at 69 (stating that "Posner's theory is challenging and elegant . . . [but] its contribution is limited).

¹⁷⁹ Hillman, *supra* note 69, at 626 ("For example, a party may be willing to sacrifice gain in the short run, if it expects that immediate concessions will result in greater gain in future agreements."); see also Sirianni, *supra* note 10, at 69 ("Parties may rationally decide not to allocate relevant risks.").

¹⁸⁰ See Gillette, *supra* note 24, at 526 ("[N]o rule is necessarily advantageous in reducing transaction costs, and the gap-filling rule must serve some societal objective other than the elusive goal of efficient exchange.").

C. *The Relational Model and the Expansion of the Doctrine of Excuse*

1. Policy Concerns: Balancing Equity and Certainty

The assertion that “[t]he mere fact that a contract becomes more difficult or expensive than originally anticipated does not justify setting it aside”¹⁸¹ is self-evident. Determination of when difficulty or expense will warrant relief, and the nature of that relief, rests ultimately on public policy with respect to contractual relationships. Both the doctrinal determination that a fixed price in a long-term contract is an unequivocal statement of risk allocation¹⁸² and its judicial negation¹⁸³ presuppose one or another policy consensus. For example, the conclusive risk allocation with respect to severe disruptions affecting price provides greater predictability and ease of application than either a “foreseeability-based” search for objective, presumed intent or an evidentiary inquiry into actual intent long after the inception of the contract.¹⁸⁴ The problem, however, and the reason for the conflicting judicial attitudes, is that neither efficiency nor predictability and ease of application are the only plausible and valuable policy considerations. These varied policy considerations are dramatically evident in the West Virginia Supreme Court opinions in *McGinnis v. Cayton*.¹⁸⁵

The parties in *McGinnis* were the successors in interest under an oil and gas lease executed in 1893. The lease required the lessee to pay a percentage royalty on oil produced on the property and, if marketable gas were produced, a fixed royalty of \$100 per year so long as such production continued. No gas was produced until 1978. When production started, the lessors sought to have the lease either avoided or reformed on the grounds, essentially, that the lessee received a windfall from the fact that eighty-five years earlier no one had anticipated the profitability to be derived from natural gas production. The lessee sought summary judgment, principally on the basis of the fixed-price provision in the lease.

¹⁸¹ Public Util. Dist. No. 1 v. Washington Pub. Power Supply Sys., 104 Wash. 2d 353, 364, 705 P.2d 1195, 1204 (1985) (citations omitted), *modified*, 713 P.2d 1109 (1986).

¹⁸² See, e.g., *Northern Ind.*, 799 F.2d at 278; *Scullin Steel Co. v. PACCAR, Inc.*, 708 S.W.2d 756, 762 (Mo. Ct. App. 1986).

¹⁸³ See, e.g., *ALCOA*, 499 F. Supp. at 64 n.5; cf. *Sharon Steel Corp. v. Jewell Coal & Coke Co.*, 735 F.2d 775 (3d Cir. 1984).

¹⁸⁴ See *Northern Ind.*, 799 F.2d at 278; *Scullin Steel*, 708 S.W.2d at 762 (stating that PACCAR, as buyer, by entering into a long-term contract with a fixed price and quantity, assumed the risk of a virtual cessation of the market for its product).

¹⁸⁵ 312 S.E.2d 765 (W. Va. 1984).

A majority of the court held summary judgment inappropriate because of the possibility, however remote, that the lessor *might* have some claim based upon "mutual mistake."¹⁸⁶ Judge Harshbarger, however, in his concurring opinion,¹⁸⁷ raised troubling questions. Objecting to the majority's limited focus on mistake, he expressed concern that "[t]he opinion works an injustice 'in the name of the law,' ignores equitable principles, and hurts hundreds of West Virginia landowners."¹⁸⁸

[T]here has been a positive movement away from strict and rigid rules of law in order to accommodate long-term contracts that have become manifestly unfair: evenness and equity should prevail over form, and justice demands whatever flexibility is necessary to fill in contractual gaps and adapt to unexpected changes.

. . . .
 "Freedom of contract" means freedom to agree or assent; not freedom to be forced to agree, to be presumed to have assented, to be cornered into something that one has not remotely considered, or to be denied meaningful choice. This theoretical and philosophical argument underlies the evolution of contract law "Freedom of contract" does not vindicate tolerance of blatant inequities or unconscionable acts. Our society values fundamental fairness, equality, honesty, cooperation and ethics.¹⁸⁹

Finding that commercial impracticability alone was not a satisfactory device,¹⁹⁰ Judge Harshbarger urged that the matter be considered in terms of the "overall and gross imbalance, oppression, or unfairness"

¹⁸⁶ See *id.* at 769. The majority took pains to note that the claim, for summary judgment purposes, need only be "colorable." Indeed, it found that "[i]t is . . . arguable that the original lessor bore the risk of a rise in the value of natural gas by accepting a fixed price for the production of it on his land." *Id.* at 769. The majority also noted that, on remand, in addition to establishing the requisite mutual mistake, the lessor must meet the burden of establishing "that the contract did not allocate the risk of changed conditions." *Id.* at 770. Given the tenor of the opinion, it is likely that the burden is insurmountable.

¹⁸⁷ *Id.* at 770.

¹⁸⁸ *Id.* (Harshbarger, J., concurring).

¹⁸⁹ *Id.* at 772 (Harshbarger, J., concurring) (footnotes omitted).

¹⁹⁰ The opinion traced in detail the obstacles a party faces in pursuing the impracticability excuse in the traditional sense:

This contract-escape route requires a disadvantaged party to show that he was not at fault, that the supervening event was not reasonably foreseeable, that neither party had assumed or allocated that risk, and that the loss would be so severe and create such hardship that performance would be commercially impractical.

Id. at 775 (Harshbarger, J., concurring) (citations omitted).

constituting "substantive unconscionability" as a basis for equitable adjustment.¹⁹¹ Optimally, he sought early resolution by the parties themselves; failing settlement, judicial intervention, an adjustment of the relationship by exercise of the court's general equity powers would be appropriate.¹⁹²

Judge Harshbarger implies that an intention-based analysis has little value when the issue is the amelioration of harshness, the avoidance of opportunism, or the search for fairness.¹⁹³ It becomes necessary to develop "fairness norms" upon which decisions may be based, rather than fictions designed to aid the search for mutual intent.¹⁹⁴ Thus, it has been suggested that adjustment is appropriate both when risk allocation is unclear, and, if the hardship is severe enough, even when the intention to allocate the risk is manifest.¹⁹⁵

¹⁹¹ *Id.* at 779 (Harshbarger, J., concurring). Judge Harshbarger expressed irritation over judicial quibbling about what is or is not a "mutual mistake" and foreseeable. *Id.* at 780 ("meaningless or purely semantic distinctions to reach specified results that often [diminish] respect for the law"). He suggested that "[a]n unconscionability resolution may avoid semantic machinations while achieving the commendable goals of preserving the contract's fairness and original equitable balance." *Id.* at n.26.

¹⁹² Judge Harshbarger addressed this issue at length:

Situations arising from contracts like [that at issue] recommend solutions by interparty renegotiation. When that does not work, courts should make themselves available to provide just and equitable resolutions with the primary goal being to maintain the integrity of the long-term contractual relationship. This can be better achieved by remedies such as equitable adjustment than rescission or discharge from performance.

Long-term contract problems that arise because of fundamental shifts in the balance or equities of the original relationships are best resolved by the parties. Courts should do all they can to encourage settlement and private resolution. . . .

However, in the event that a court must intervene, it should only be limited by its perception of fairness.

Id. at 779-81 (Harshbarger, J., concurring) (citations omitted).

Judicial adjustment of the terms of the contract rather than total excuse upon a finding of impracticability or frustration, is exactly the root of the controversy over the *ALCOA* decision. Judge Harshbarger discussed *ALCOA*, both noting its lack of precedential value and implicitly criticizing the cases refusing to follow it. *Id.* at 780 (Harshbarger, J., concurring). Nevertheless, he appears to have gone his own, rather than Judge Teitelbaum's, way by predicating intervention upon broad grounds joining concepts of impracticability and frustration to those of unconscionability and fairness.

¹⁹³ See Hillman, *supra* note 69, at 625-27; *cf.* Farnsworth, *supra* note 14, at 861 n.7 ("The civil law seems . . . largely to have avoided the common law's reliance on 'intention' in disputes over omission.").

¹⁹⁴ See Hillman, *supra* note 69, at 626-27 ("When the court's view of fairness controls the decision, courts should abandon the intentions construct and articulate more precisely the bases for their decisions."). Hillman proposes a set of such norms, encompassing consideration of comparative equities, avoidance of harm, reasonableness of the conduct of the disadvantaged party and contractual reciprocity in the enjoyment of "the fruits of an exchange." *Id.* at 629-39.

¹⁹⁵ *Id.* at 636-37 ("Intervention . . . is least appropriate when the projected harm

2. The Critique of Judicial Adjustment

Adjustment based on the broad exercise of equitable powers is an intuitively appealing mechanism for dealing with the "contractual accident." Using this device, a court may "police the transaction in the interest of fairness,"¹⁹⁶ and avoid the "harsh and unjust results"¹⁹⁷ that occur when courts are forced to place the loss on one party or the other.¹⁹⁸ By substituting a "winner take some"¹⁹⁹ for the "winner take all" result inherent in the concept of "excuse," the severe consequences of an absolute decision for either party are ameliorated. Loss sharing, as was done in *ALCOA*, rather than allocating the entire burden to one party, facilitates a more expansive application of the doctrines of impracticability and frustration.²⁰⁰

Professor Dawson has strongly condemned both *ALCOA* and the advocates of adjustment intervention.²⁰¹ He objects to the "pursuit of an ephemeral equity . . . with the aim of manufacturing terms that are truly new because new circumstances would make them seem more just."²⁰² He also sharply questions the existence of either judicial capa-

. . . results from a clearly allocated risk. Even when risk allocation is clear, however, the prospect of severe harm to a party may override the justification of freedom of contract. When risk allocation is unclear, the harm-avoidance norm protects each party from inordinate loss resulting from the exchange in the absence of countervailing harm to the other party.").

¹⁹⁶ *New Spirit*, *supra* note 10, at 201. See *Price Adjustments*, *supra* note 10, at 395-419 (suggesting that courts should impose price adjustments as a manner of influencing the bargaining process).

¹⁹⁷ Comment, *supra* note 11, at 1001. See also Speidel, *supra* note 5, at 270 ("If the seller has not assumed the risk of an event that has a substantial impact upon performance, would not some important objectives of contract law be served by a decree preserving the contract under a price adjusted by the court?").

¹⁹⁸ For example, it has been suggested that:

Courts need not focus exclusively on ascertaining which party, for doctrinal, economic, or other reasons, should be held responsible for the *entire* cost of nonperformance. Past experience in both common- and civil-law jurisdictions demonstrates that the allocation of losses arising from nonperformance is a logical and equitable alternative to the imposition of the full loss upon one contracting party.

. . . Partial foresight and partial control over disruptive contingencies may justify partial relief.

Trakman, *supra* note 10, at 480-84 (emphasis in original).

¹⁹⁹ *Id.* at 471.

²⁰⁰ See Harrison, *supra* note 24, at 596-97, 601; *Price Adjustments*, *supra* note 10, at 396-404, 411-14; Trakman, *supra* note 10, at 476-506; Comment, *supra* note 10, at 1100-01.

²⁰¹ See Dawson, *supra* note 10, at 27-28.

²⁰² *Id.* at 8-9.

bility²⁰³ or power so to act.²⁰⁴ His ultimate concern, and what is probably the primary objection both to risk-sharing adjustment and to a generally expansive doctrine of excuse, is the impact upon planning and predictability. Basically, he fears "a course so disastrous for the coherence and rationality of our law of contract".²⁰⁵ "[S]urely it would make a vast difference in the reliability and usefulness of contracts in our society if our courts were to acquire a broad mandate to rewrite contract terms that had, as a result of unforeseen events, produced on one side an unexpected gain."²⁰⁶

To the detriment of clarity and doctrinal advancement, the debate is conducted with loaded words: stability and predictability pitted against fairness and flexibility. It should be evident that we need ultimately to maximize all of these values. The excuse complex requires balancing. To the extent that we view the concept of contract as grounded on the terms of the agreement, application of excuse must be limited and judicial intervention tightly circumscribed or "the coherence and rationality of our law of contract" is indeed threatened.²⁰⁷ The real issues, however, are what is "our law of contract" and to what is it referable.

²⁰³ See *id.* at 28 ("[W]hen basic provisions are revised by a judge, who knows only what he can learn from presiding at a trial, the result will probably be so unacceptable to both parties that by their own agreement they will reject the dictated terms and reassert the right that they fortunately still retain, to recover control over their own affairs.").

²⁰⁴ See *id.* at 18 ("If the contract that was previously in force has through frustration ceased to exist, how can the parties to it be compelled to accept a 'contract' that is manufactured by a court to replace it? . . . Perhaps it is because our courts in these cases have been for the most part so circumspect that when their conduct wanders off limits it can be truly bizarre.").

²⁰⁵ *Id.* at 29.

²⁰⁶ *Id.* at 31. See also Sirianni, *supra* note 10, at 55 ("If other courts adopt the *ALCOA* test, contracts—especially long-term ones—will become markedly less secure. And there will be little basis upon which parties might ascertain in advance which contracts are vulnerable to reformation or avoidance."). The fear of uncertainty in the ultimate impact of such an approach beyond simply the parties to the dispute has also been noted:

The well-entrenched belief in the sanctity of contracts is certainly a significant factor in [the restrictive] 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.

Wallach, *supra* note 33, at 218. "Breaking the habit of the traditional judicial solution of 'all-or-nothing' in any formal way seems a truly insurmountable task." *Id.* at 229.

²⁰⁷ Dawson, *supra* note 10, at 29.

3. Relational Interests: A Mirror of the Present or a Vision for the Future?

It is significant that Judge Harshbarger, in urging an expansive and adjustment-based approach to the problem of excuse, refers to the theoretical work of Macneil and the "relational" theory of contract.²⁰⁸ This concept of contract has been well summarized by Professor Robert Gordon:

In the "relational" view of Macaulay and Macneil, parties treat their contracts more like marriages than like one-night stands. Obligations grow out of the commitment that they have made to one another, and the conventions that the trading community establishes for such commitments; they are not frozen at the initial moment of commitment, but change as circumstances change; the object of contracting is not primarily to allocate risks, but to signify a commitment to cooperate. In bad times parties are expected to lend one another mutual support, rather than standing on their rights; each will treat the other's insistence on literal performance as willful obstructionism; if unexpected contingencies occur resulting in severe losses, the parties are to search for equitable ways of dividing the losses; and the sanction for egregiously bad behavior, is always, of course, refusal to deal again.²⁰⁹

Under such a view of contract, expansion of the "excuse" doctrine is not contrary either to "freedom of contract" or to the agreement of the parties. Amelioration of hardship and the avoidance of unfair advantage are not premised on an "excuse" external to the contract, but arise from the very nature of the contractual relationship. In a reprise of the fiction of "presumed intent," the parties are presumed to have intended an open-ended relationship, with the contract providing a framework within which adjustment may continually take place. The law functions as a kind of gyroscopic monitor, keeping the parties on a more or less even course. For example, it has been suggested that the "mistake" in *ALCOA* was not in the contract itself, but in the assumptions as to the

²⁰⁸ See *McGinnis*, 312 S.E.2d at 772 & n.6. (Harshbarger, J., concurring). Judge Harshbarger refers to several commentators who argue that there is a movement away from strict application of contract terms in long-term contracts when doing so would result in inequity. See, e.g., Macneil, *supra* note 24, at 865 (recognizing that long-term, interfirm contracts commonly contain "gaps" and "flexibility" to deal with long-range planning of the contractual relationship); *Price Adjustments*, *supra* note 10, at 421 (arguing that courts may impose adjustment on long-term contracts in which unanticipated changes have occurred).

²⁰⁹ Gordon, *supra* note 25, at 569.

nature of the relationship that the contract had established.²¹⁰

When the focus becomes the "contractual entity,"²¹¹ specifically, the "mutual reliance and consensual reciprocity inherent in contract,"²¹² traditional sanctions and excuse doctrines become irrelevant and inappropriate.²¹³ This is so because they "aim not at continuing the contractual relations but at picking up the pieces of broken contracts and allocating them between the parties on some basis deemed equitable."²¹⁴ A contract, particularly a long-term²¹⁵ contract, is an inherently incomplete, evolving mechanism rather than an embodiment of fully formulated intent—"[c]omplete consent is a mirage."²¹⁶

The relational model enshrines cooperation, placing specific unilateral economic needs in a subordinate position and consigning to damnation "opportunistic" advantage taking.²¹⁷ The analogue is marriage²¹⁸ or an on-going partnership²¹⁹ and primacy is accorded the goal of continuing the relationship.²²⁰ From these assumptions, both a greater receptivity to arguments of impracticability and frustration, divorced from an intent-based analysis, and some form of equitable adjustment by the court when the parties cannot agree, follow axiomatically. Only a small logical synapse need then be bridged to impose a

²¹⁰ See Palay, *supra* note 10, at 562 ("[T]he problems Alcoa faced had less to do with the failure of the initial contract terms, than with the failure of the contractual relation."); *id.* at 564 ("Alcoa's problem was not so much a 'mistake' concerning the price term, but rather a mistake about the importance that Essex would place on the preservation of the relationship.").

²¹¹ Harrison, *supra* note 24, at 586.

²¹² *Id.*

²¹³ *Id.* at 577 ("[R]eliance on the integrity or the soundness of the contract as an entity is *mutual* reliance It is this type of reliance that causes one to be uncomfortable with a remedy that forces one party to bear the entire reliance loss.").

²¹⁴ Macneil, *supra* note 24, at 875.

²¹⁵ The emphasis on "long-term" contractual relationships, by those proposing relational-based adjustment, presupposes consensus on just what is long-term. Certainly, the virtually perpetual lease arrangement in *McGinnis v. Clayton* is "long-term", the 16 year agreement in *ALCOA*, and the 20 years covered in the *Northern Indiana* agreement would generally be considered long-term. But what of the five year agreement in *Scullin Steel*? Surely the parties there also made substantial plans in reliance on that contract. Compare *Northern Ind.*, 799 F.2d at 267 and *McGinnis*, 312 S.E.2d at 767 and *ALCOA*, 499 F. Supp. at 56-67 with *Scullin Steel Co. v. PACCAR, Inc.*, 708 S.W.2d 756, 758-60 (Mo. Ct. App. 1986).

²¹⁶ *Price Adjustments*, *supra* note 10, at 375; see Macneil, *supra* note 24, at 865 ("Two common characteristics of long-term contracts are the existence of gaps in their planning and the presence of a range of processes and techniques used by contract planners to create flexibility in lieu of either leaving gaps or trying to plan rigidly.").

²¹⁷ See, e.g., *New Spirit*, *supra* note 10, at 207 (comparing the tort doctrine of duty to rescue to a contract doctrine of duty to adjust, and arguing that a duty to adjust is "necessary to avoid opportunism").

²¹⁸ See Gordon, *supra* note 25, at 569.

²¹⁹ See Harrison, *supra* note 24, at 592-95.

²²⁰ See Macneil, *supra* note 24, at 891, 893-95.

duty upon an advantaged party to accede to a reasonable proposed modification offered by the disadvantaged party.²²¹ The fact that the result of such adjustment is the creation of a compromise that neither party may have wanted becomes secondary to the goal of fairly maintaining the relationship. The new operative fiction then is that the law is doing merely what the parties would have done *in the interest of the relationship* had they been required to deal with the matter at its inception.

Just as with the "efficiency" solution, however, the relational adjustment approach to risk allocation raises serious capability problems. The specter of ad hoc jurisprudence and unpredictability and a radical tilting of the precarious balance to be maintained among the conflicting norms haunt its application.²²² Yet, the capability problem, and the balance among competing interests, could in time be ameliorated as experience accumulates. The unique power of our incremental case system, notwithstanding its toll on scholarly patience, is that coherent doctrine frequently can emerge as boundaries are adumbrated through judicial experience. Of greater significance is the conceptual problem inherent in applying a relational-based solution to situations in which the relational norms have been subordinated by the parties.

At its most fundamental level, the relational construct, with its focus on adjustment, has been criticized as antithetical to the value of contract as individual expression and responsible commercial behavior.²²³ Such criticism, however, presupposes agreement on one unitary concept of contract that is then violated by the construct. The relational model is antithetical to fundamental concepts of contract law only if we

²²¹ See *New Spirit*, *supra* note 10, at 206-08; *Price Adjustments*, *supra* note 10, at 395-404. For a highly critical reaction to Speidel's proposal, see Dawson, *supra* note 10, at 30-31. See also Gillette, *supra* note 24, at 523 (expressing "substantial doubt . . . that the imposition of a duty to adjust mirrors commercial reality, social utility, or individual right.").

²²² See, e.g., Kidwell, *supra* note 31, at 620-21 ("Doctrine that reflects a world of long-term relationships will necessarily be less formal, hence less certain, hence less communicative. . . . Similarly . . . the application of a new body of doctrine, founded in the relational perspective and requiring more sophisticated fact-finding and rule-application, would test or exceed the capability of existing legal institutions.").

²²³ See Gillette, *supra* note 24, at 571-75. Further criticism has noted that:

[T]he adjustment arguments assume a view of rational commercial behavior that understates the ability of commercial actors to engage in conduct for which they can be considered, from an ethical or behavioral perspective, responsible. . . . [We should] . . . reject recent commentary that views contract necessarily as a communitarian exercise and instead adopt a conception of contract as a mechanism for individual expression by commercial actors capable of considering and bearing the consequences of reasoned choice.

define such concepts as precluding the broader perspectives envisioned by the model. It is no more a form of contractual blasphemy than was the development of the excuse doctrines in the face of the theology of *pacta sunt servanda*. Contractual heresy, just as contractual orthodoxy, is dependent upon contractual definition. Adjustment and risk-sharing do violence only to one such definition; they are perfectly consistent with the broader relational definition of contract.

Teleological problems arise, however, when we attempt to create definition without reference to contractual reality, when we confuse what we believe ought to be with what is. The intent-based application of the excuse doctrine, whether through the presumed intent of an objective test of foreseeability or the search for actual intent, has been criticized for its tenuous connection with commercial reality. Similarly, the conceptual basis for adjustment appears to founder on the assumptions made as to the motivation and behavior of contracting parties. It is assumed that parties not only share the relational model's goals of cooperation and flexibility, but also share its priorities and order their values accordingly.²²⁴ The underlying difficulty stems from the complexity of commercial relationships and the concomitant complexity of contractual reality. Indeed, it is that very complexity that enhances the utility of relational concepts. The problem is in the one-dimensional extension of these concepts to deal with events of such magnitude as to call the relational norms into question.

The values of cooperation, flexibility, and mutual problem solving are not only socially good, they also inform and influence commercial life.²²⁵ However, they are not the only factors in that life. To analogize a contractual relationship to a marriage or a partnership is helpful in considering specific issues. To extend that analogy to the point of expanding judicial intervention or imposing correlative duties on the parties is to distort reality.

Whatever their relational motivations, if the parties to a contract

²²⁴ See Goldberg, *supra* note 10, at 531 ("Firms do not generally enter into multi-year contracts because of their concern for the future course of prices. Rather, they enter into the agreements to achieve the benefits of cooperation."); Palay, *supra* note 10, at 562 ("[P]arties who have, or anticipate, strong relational ties with their contracting opposites . . . assume that the contract will be adjusted to their mutual advantage as circumstances change. Since the costs of drafting, monitoring, and enforcing a once-and-for-all agreement outweigh the benefits, it is far more efficient to cross bridges as they are reached.").

²²⁵ In more than twenty-five years of practicing law and negotiating complex agreements, I have rarely seen a significant contractual relationship formed when the principals were not "comfortable" with each other. Similarly, parties will frequently avoid troublesome or conjectural issues, assuming instead that they will, somehow, work out their problems as they arise.

wanted a marriage or a partnership model to regulate their conduct, they would have chosen one. These are not esoteric or subtly differentiated alternatives. They represent clear choices in ordering a relationship. When sophisticated bargaining entities choose a long-term contract rather than a joint venture or partnership, they consciously choose one legal mode over another. We should not cavalierly vitiate that choice. Motivation is complex and reaction to specific disruptive events may often be quixotic. The occurrence of such events can cause the parties to reexamine the relationship itself. When the parties themselves reorder their values and question the primacy of the relationship and its maintenance, the relational norms break down. A system that would perpetuate those norms after their utility to the parties ceases is inimical to any concept of contract founded on bilateral mutuality.

In short, although the relational model offers invaluable analytic assistance to the understanding of contracts in general and to the rationalization of much contract doctrine, it becomes essentially irrelevant when the parties choose to elevate other values above the relational ones. As Professor Macaulay has recently observed:

[R]elational sanctions do not always produce cooperation or happy situations. . . . We have seen litigation prompted by major shocks to the world economic system. OPEC and the energy crises of the 1970s provoked many cases where contracts had rested on relational sanctions and assumptions about the costs of energy. Relational considerations gave way to the large amounts of money that businesses would have lost had they performed their commitments.²²⁶

IV. CONCLUSION: TIME FOR ASSIMILATION

Despite all of its intuitive appeal, adjustment through direct judicial intervention is not yet appropriate. Using this tool to rebuild a contractual relationship when the relational glue between the parties can no longer hold the relationship together requires a different environment. That adjustment for disruptive events has been legislatively or judicially sanctioned in other societies²²⁷ does not indicate a societal consensus in this country or that American judges should presume such a consensus. What Judge Teitelbaum attempted in *ALCOA* can be ac-

²²⁶ Macaulay, *supra* note 13, at 471-72.

²²⁷ See *ALCOA*, 499 F. Supp. at 93-94; see also Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 B.U.L. REV. 1039 (1983) (discussing judicial adjustment of contracts in Germany); Trakman, *supra* note 10, at 480-81 (discussing European legislation empowering courts to adjust contracts).

cepted only if there is consensus as to the hierarchy of contractual norms. It is the absence of such a consensus that makes *ALCOA* aberrational and accounts for its lack of direct impact on subsequent judicial thought. Judge Teitelbaum simply went too far, too soon, and with too little, laying no solid conceptual groundwork to support his fragile structure. Had *ALCOA* avowedly, rather than incidentally, "worked as a form of coercive mediation"²²⁸ or attempted to create the firmer foundation for intervention coupled with respect for the settlement process proposed by Judge Harshbarger in *McGinnis v. Cayton*,²²⁹ the opinion would have justified its initial reception as a reflection of a "new spirit of contract."

What does emanate from *ALCOA*'s presence in contract history, however, is a ghost image of that spirit. The seven years since *ALCOA* have witnessed several tentative departures from the previously accepted method of judicial treatment of disruptive events and risk allocation. The decisions in *Westinghouse I* and *Westinghouse II* added a higher level of sophistication and flexibility to the "traditional" intent-based approach—the quantification of impracticability and the search for intent through objective foreseeability. The recent disadvantaged buyer cases have afforded the opportunity for expanding our base of experience and testing accepted doctrine.²³⁰ On balance, then, there does appear to be a growing judicial willingness to examine more closely the facts and the relative positions of the parties in these cases.²³¹ This in itself is a perceptible expansiveness in the application

²²⁸ Macaulay, *supra* note 13, at 476.

²²⁹ 312 S.E.2d 765, 770-82 (W. Va. 1984) (Harshbarger, J., concurring). See *supra* notes 187-92 and accompanying text.

²³⁰ See *supra* note 165.

²³¹ See, e.g., *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985) (adjusting buyer's minimum purchasing requirements by relying on a contractual provision that allowed for adjustment whenever buyer was "unable" to receive purchases for reasons beyond the parties' control, where the "inability" was the buyer's radically reduced requirements), *cert. denied*, 106 S. Ct. 1196 (1986); *Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781 (7th Cir. 1985) (excusing supplier from performance under doctrine of commercial impracticability); *Sharon Steel Corp. v. Jewell Coal & Coke Co.*, 735 F.2d 775 (3rd Cir. 1984) (buyer's claim that sharp drop in the market price was within the force majeure or the impracticability clause was a plausible interpretation of the contract); *Asphalt Int'l, Inc. v. Enterprise Shipping Corp.*, 667 F.2d 261, 266 (2d Cir. 1981) ("The doctrine of commercial impracticability focuses on the reasonableness of the expenditure at issue, not upon the ability of a party to pay the commercially unreasonable expense."); *Westinghouse II*, 597 F. Supp. 1456 (E.D. Va. 1984) (government's failure to timely honor its implied commitment excused contractor from some amount of interim storage costs); *McGinnis*, 312 S.E.2d 765 (allegations as to possibility of mutual mistake raised potentially meritorious argument that precluded summary judgment); *Chemical Bank v. Washington Pub. Power Supply Sys.*, 102 Wash. 2d 874, 691 P.2d 524 (1984) (agreements held unenforceable under theories of mutual mistake, commercial frustration, and impossi-

of traditional doctrine.

Ultimately, it is not *ALCOA*, but the impact of events that seems to have moved recent judicial thinking to higher ground. In a relatively short period of time, we have witnessed sharp inflation and its equally sharp decline; a sudden and significant escalation in fuel prices that affected almost every aspect of commercial life and, again, just as sudden and just as significant a decline; and other drastic and sometimes unexpected events that have had a significant impact on the commercial world. Each such event forces us to adjust both the way in which contractual arrangements are made and the way they are interpreted and enforced. The formation of a coherent doctrine of excuse requires assimilation of this experience. The task for the lawyer negotiating and drafting agreements in this environment is immensely challenging. The challenge to our judicial machinery is formidable and can be met only with a kind of constructive patience. These complications cannot effectively be dealt with by post hoc efficiency analysis nor is a policy of relational oriented judicial loss-sharing yet appropriate. Sufficient experience with multi-motivated complex business arrangements may ultimately elevate the relational, cooperative ideals to such prominence among participants that courts would be both capable of and justified in applying them when the relationship has broken down. That time, however, has not yet come, as contracting parties and the courts are still digesting complexities that defy easy categorization.²³²

What is possible, however, is to continue to develop the sophistication of both the tools we have and their use. With all of its shortcomings, some intent-based analysis must suffice as experience is assimilated. The inquiry, however, need not be bifurcated into the quantification of impracticability and foreseeability. These analytic tools are better applied as part of an integrated analysis of the contractual prob-

bility). *But cf.* Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265 (7th Cir. 1986) (refusing to excuse contract obligations by virtue of doctrines of frustration or impracticability); Printing Indus. Ass'n v. International Printing & Graphic Communications Union, Local 56, 584 F.Supp. 990 (N.D. Ohio 1984) (refusing to reform contract under doctrines of mutual mistake or frustration of purpose); Scullin Steel Co. v. PACCAR, 708 S.W.2d 756 (Mo. Ct. App. 1986) (refusing to excuse seller's obligations under doctrine of frustration of purpose).

²³² Schlegel's observation, made almost twenty years ago, before many of our current complications began, is particularly apt:

To demand that any court determine when the obligation of a contract is changed without a guide or standard is to ask that court to pinpoint the instance when the difference in degree becomes the difference in kind. . . . Faced with the task of determining whether the obligation has changed, all that a court can do is give answers and state results . . . ; it cannot give meaningful reasons for the decisions.

Schlegel, *supra* note 33, at 439.

lem presented. The inquiry should be more openly directed to a determination of whether supervening events have destroyed the "foundation of the transaction."²³³ For the present, the context should remain one of "excuse," an all-or-nothing solution, however unsatisfying that may be.

As a doctrine of excuse, impracticability must be applied sparingly. Without an overall doctrinal consensus as to the nature of contract, excusing events must be treated exceptionally. One may chafe at the need to live with inelegant and unsatisfying doctrinal compromises and yearn for the immediate application of a comprehensive and consistent doctrinal solution. Nevertheless, expansion in application must be incremental. By growing out of the accumulation of experience and adaptation to our volatile environment, meaningful superceding doctrine can be developed in which "stability" and "fairness" can more readily coexist.

²³³ See Dawson, *supra* note 10, at 3; see also Speidel, *supra* note 5, at 271 ("The courts have failed to focus on the critical question, whether performance 'as agreed' has been made impracticable.").