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Comment

Contractual Excuse Based On a Failure of Presupposed Conditions

The issue: Under what circumstances and to what extent will a seller be excused from the performance of his contractual obligation under § 2-615 of the Uniform Commercial Code?[1]

In light of the decreasing availability of natural resources and of the increasing governmental control in all phases of industry, this issue is rapidly rising to the forefront for industrial suppliers and consumers. The variety of factual situations under which it can arise are too numerous for description;[2] however, beyond the factual distinctions lie the determinative legal concepts. The foreseeability of the contingency, the seller's fault in causing the alleged contingency, and the impracticability of performance are three concepts which are relied upon by the courts in determining excuse under § 2-615 of the Code. The use and misuse of these concepts will be the subject of discussion in part II of this comment. Part I will examine the interpretive problems created by the text of the Code. The goal of this comment is to establish a procedure for determining the validity of an alleged § 2-615 excuse.

I. The Code

Section 2-615, captioned "Excuse by Failure of Presupposed Conditions,"[3] provides the legal parameters for determining when con-

1. Hereafter referred to as the Code or the UCC.

2. The following simplistic hypotheticals are posed to add a sense of reality to the issue.

(1) Oil Supplier Corporation enters requirements contract with Consumer Corporation. Due to the actions of a foreign government, Supplier Corporation cannot fulfill its contractual obligations.

(2) Coal Supplier Corporation enters into long term supply contracts with several consumer corporations. Due to the effects of environmental controls, Supplier Corporation's production has been substantially impaired and it cannot comply with its contractual commitments.

(3) Mineral Supplier Corporation contracts to supply Manufacturing Corporation with definite quantities of minerals at specified prices. Due to new conservation regulations, Supplier Corporation's costs are dramatically increased.

3. Uniform Commercial Code § 2-615 provides as follows:

tractual performance will be excused.[4] For the purpose of analysis, this section can be divided into five parts.

A. *Preliminary Restriction*

The Code imposes a preliminary restriction upon the application of § 2-615 excuse: *Except so far as a seller may have assumed a greater obligation . . . .*[5] This phrase appears to be self explanatory; however, when read in conjunction with § 2-615(a) and Comment 8,[6] an interpretation problem is presented. Comment 8 ex-

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

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

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

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

4. The early common law did not excuse contractual performance on the basis of supervening impossibility. *See, e.g.*, Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1681). Later, the courts adopted an "implied condition" fiction to avoid unjust results in impossibility situations. *See, e.g.*, Krell v. Henry, [1903] 2 K.B. 740 (C.A.) (Coronation Cases). The UNIFORM COMMERCIAL CODE §§ 2-615, 2-616 consolidates the earlier rules set forth in the RESTATEMENT OF CONTRACTS §§ 454-69 (1932) and updates them in light of commercial standards. Because the Code is the controlling law in forty-nine states and in the District of Columbia, the scope of this comment is limited to an examination of the Code's application. For the development of the law in this area *see* Annot., 84 A.L.R.2d 12 (1962); Comment, *The Development of the Doctrine of Impossibility of Performance*, 18 MICH. L. REV. 589 (1920). *See also* Comment, *Energy Crisis and Economic Impossibility in Louisiana Fuel Requirement Contracts: A Gameplan for Reform*, 49 TUL. L. REV. 605 (1975) (impossibility concepts in civil law).

5. UNIFORM COMMERCIAL CODE § 2-615. Hereafter referred to as the preliminary restriction.

6. UNIFORM COMMERCIAL CODE § 2-615, Comment 8 provides:

The provisions of this section are made subject to assumption of greater liability by agreement and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like. Thus the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances. *See* Madeirense Do Brasil S./A. v. Stulman-Emrick Lumber Co., 147 F.2d 399 (2d Cir. 1945). The exemption otherwise present through usage of trade under the

plains[7] that the provisions of § 2-615 are subject to the assumption of greater liability by "agreement." This "agreement" can either be expressly contractual or can be implied from the circumstances surrounding the contract. Thus, the preliminary restriction includes implied assumptions of liability.

The problem with this interpretation is that it renders the preliminary restriction repetitive of and perhaps contradictory to the terms of § 2-615(a).[8] The first basis for excuse under § 2-615(a) is impracticability of performance due to the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. The concept of foreseeability is a controlling factor in the delegation of contractual risks.[9] Thus, under the first test of § 2-615(a), a foreseeable contingency would be strong evidence that the non-occurrence of the contingency was not a basic assumption upon which the contract was made. Furthermore, a foreseeable contingency is also strong evidence that the seller may have assumed an obligation to perform greater than that expressly provided by the contract.[10] Thus, in a case of a foreseeable contingency, a § 2-615 excuse would be negated both under the preliminary restriction and under the first test of § 2-615(a). In this sense, the preliminary restriction is repetitive.

The second basis for excuse under § 2-615(a) is "by compliance

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present section may also be expressly negated by the language of the agreement. Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go.

Agreement can also be made in regard to the consequences of exemption as laid down in paragraphs (b) and (c) and the next section on procedure on notice claiming excuse.

7. Although the comments to the UCC are not statutory material and therefore not legally controlling, they are essential to a proper interpretation of the Code's provisions.

8. UNIFORM COMMERCIAL CODE § 2-615(a) provides in part:

Delay in delivery or non-delivery in whole or in part . . . is not a breach . . . if performance as agreed has been made impracticable *by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable . . . governmental regulation . . . .*

Id. (emphasis added).

9. Foreseeability is one of those types of legal concepts impossible to strictly define. Therefore, it is better to view it in terms of a graphic scale with absolute foreseeability on one end and absolute unforeseeability at the other.

10. The foreseeability of the contingency is part of the commercial circumstances surrounding the transaction from which Comment 8 allows an implied assumption of greater liability to be drawn.

in good faith with any applicable governmental regulation or order . . . ." Under this test, the foreseeability of the regulation or order does not appear to be a factor. Thus, to impose an implied assumption of liability based on foreseeability could be interpreted as contradictory to the literal terms of this § 2-615(a) test. However, Comment 8 appears to subject all of the provisions of § 2-615 to both express and implied assumptions of liability. Furthermore, § 1-109 provides that section captions are part of the Code. As earlier stated, the caption to § 2-615 is "Excuse by Failure of Presupposed Conditions." This caption supports an argument that excuse, under the governmental regulation test, should be limited by implied assumptions of liability. If a governmental order was foreseeable, its nonexistence could not have been a presupposed condition. Therefore, the preliminary restriction should not be read as contradictory to the terms of § 2-615(a).[11] This result is justifiable by the Code's stress on the commercial circumstances of the transaction.[12] If the commercial circumstances, including the foreseeability of the contingency, prove an assumption of liability by the seller, there should be no excuse of performance.[13] There does not appear to be any overriding public policy interests which should change the result merely because the alleged excuse is based on a governmental order rather than some other type of contingency.

B. *Contingency - Basic Assumption - Impracticability*

Section 2-615(a) provides for contractual excuse if: *performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . . .*[14] Excuse under this clause should be found only if the following three questions can be answered affirmatively:

(1) Has a *contingency* occurred?

(2) Was its non-occurrence a *basic assumption* upon which the contract was made?

11. The fact that the preliminary restriction is repetitive should be overlooked as either a drafting error or as intentional duplicity.

12. *See, e.g.*, UNIFORM COMMERCIAL CODE § 2-615, Comment 1 ("commercially impracticable"), Comment 3 ("the commercial character of the criterion").

13. *See* UNIFORM COMMERCIAL CODE § 2-615, Comment 8.

14. UNIFORM COMMERCIAL CODE § 2-615(a).

(3) Has the contingency rendered the agreed performance *impracticable*?

Although the comments provide some guidelines for the meanings of the terms "contingency," "basic assumption," and "impracticable,"[15] their interpretation in specific situations is left to the courts. Comment 2 to § 2-615 states that the section purposely refrains from attempting an exhaustive expression of contingencies and it is to be interpreted in light of its underlying reason and purpose. Presumably, the purpose of the section is consistent with that of the entire Code, "to use equitable principles in furtherance of commercial standards and good faith."[16] Because the interpretive problems raised by § 2-615(a) are definitional ones,[17] they will be discussed later in conjunction with the relevant precedents.

C. *Governmental Regulations*

The second clause of § 2-615(a) provides for contractual excuse if performance as agreed has been made impracticable: *by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.*[18] The basic interpretive problem of this clause was raised in reference to the preliminary restriction placed on excuse. This clause, if read

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15. UNIFORM COMMERCIAL CODE § 2-615, Comment 1 states in part:

> This section excuses a seller from timely delivery of goods contracted for, where his performance has become *commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties* at the time of contracting.

Id. (emphasis added).
Comment 3 states that the Code's impracticability standard goes beyond impossibility of performance and accepts the less stringent commercial impracticability standard. Comment 4 provides as follows:

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

16. UNIFORM COMMERCIAL CODE § 2-615, Comment 6.

17. The problem of this clause being repetitive of the introductory restriction on excuse was discussed earlier. *See* text accompanying notes 7-11 *supra*.

18. UNIFORM COMMERCIAL CODE § 2-615(a).

alone, would allow excuse based on compliance with governmental regulations without an examination of the basic assumptions to the contract.[19] However, as earlier argued, this reading of the clause is inconsistent with the preliminary restriction, the comments, and the underlying purpose of the Code. If a governmental order and its effects were absolutely foreseeable at the execution of the contract, there should be no excuse under the Code.[20] First, the foreseeability of the contingency would amount to an implied assumption of an obligation to perform, regardless of the governmental order. Second, to allow excuse under these circumstances would be contrary to the Code's purpose of furthering commercial standards and good faith by the use of equitable principles.[21] The policy behind the Code would therefore appear to require an examination of foreseeability for every alleged § 2-615 excuse. The concepts of foreseeability and "a basic assumption upon which the contract was made" are closely related. Furthermore, both concepts may be equivalent to the preliminary restriction to § 2-615. Therefore, there are two methods by which a foreseeability restriction can be read into the governmental order excuse clause. Either the introductory restriction can be used to examine the foreseeability of the order as an assumption of greater liability, or the basic assumption test of the first clause of § 2-615(a) can be inferred for the second clause. Either method should produce the same result: an examination of the contracting circumstances to determine if the governmental order should justifiably excuse performance.[22]

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19. Professor James J. White concludes that this obvious reading of the clause is the correct one:

> If performance is rendered impracticable by a governmental regulation or order, seller is freed from his obligation without reference to the language concerning contingency and basic assumption.

White, *Impossibility, Impracticability, and Supervening Illegality*, 108 PRAC. L. INST. 9, 12 (Green ed. 1974).

20. UNIFORM COMMERCIAL CODE § 2-615, Comment 10. *See* note 22 *infra*. Apparently, this proposition has been accepted by some courts. *See, e.g.*, Neal-Cooper Grain Co. v. Texas Gulf Sulphur, 508 F.2d 283 (7th Cir. 1974), where the court considered the foreseeability of government regulations.

21. In good faith and equity, a seller who foresaw a governmental order and its effects should not be excused from the performance of a contract he entered into with that knowledge. Certainly he should bear the risk which he foresaw.

22. UNIFORM COMMERCIAL CODE § 2-615, Comment 10 states in part that:

> governmental interference cannot excuse [performance] unless it truly "supervenes" in such a manner as to be beyond the seller's assumption of risk. And any action by the party claiming excuse which causes or colludes in inducing the governmental

D. *Allocation Requirements*

Section 2-615(b) provides the Code's allocation requirements: *Where the causes mentioned in paragraph (a) affect only a part of seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may allocate in any manner which is fair and reasonable.*[23] Inherent in the structure of § 2-615 is the requirement of establishing a valid excuse under § 2-615(a) prior to an examination of the allocation.[24] The allocation requirement is based on two principles: (a) an excused seller must fulfill his contracts to the extent permitted by the supervening contingency; and (b) every reasonable business leeway in deciding the allocation is given to the seller.[25] The Code's directives in this area are clear. First, the seller must consider every customer when he supplies one or when he allocates production to himself. Second, regular customers, not under contract, may be supplied but with extreme caution so as not to allow price to control allocation. The major issue under this provision will be a factual one. What constitutes a "fair and reasonable" allocation? The Code provides no specific guidelines.[26]

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action preventing his performance would be in breach of good faith and would destroy his exemption.

23. UNIFORM COMMERCIAL CODE § 2-615(b).

24. *See* note 3 *supra*. *See also* text accompanying note 53 *infra*.

25. UNIFORM COMMERCIAL CODE § 2-615, Comment 11 provides:

> An excused seller must fulfill his contract to the extent which the supervening contingency permits, and if the situation is such that his customers are generally affected he must take account of all in supplying one. Subsections (a) and (b), therefore, explicitly permit in any proration a fair and reasonable attention to the needs of regular customers who are probably relying on spot orders for supplies. Customers at different stages of the manufacturing process may be fairly treated by including the seller's manufacturing requirements. A fortiori, the seller may also take account of contracts later in date than the one in question. The fact that such spot orders may be closed at an advanced price causes no difficulty, since any allocation which exceeds normal past requirements will not be reasonable. *However, good faith requires, when prices have advanced, that the seller exercise real care in making his allocation, and in case of doubt his contract customers should be favored and supplies prorated evenly among them regardless of price.* Save for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller.

Id. (emphasis added).

26. The only case in which the duty to allocate has been examined is Mansfield Propane Gas Co. v. Folger Gas Co., 231 Ga. 868, 204 S.E.2d 625 (1974). The Georgia Supreme Court held that the duty to allocate applied unless the contract affirmatively provided otherwise. Furthermore, the court held that the issue of a "fair and reasonable" allocation is a factual

However, it is suggested that the following factors should be examined in determining whether an allocation is fair and reasonable:

(1) the percentage of seller's production required by the contract prior to the contingency;
(2) the percentage of seller's production required by other contract customers prior to the contingency;
(3) the percentage of seller's production that remained for regular non-contract customers prior to the contingency;
(4) the percentage of seller's production allocated to his own use prior to the contingency; and
(5) the sale prices to both contract and non-contract customers prior to the contingency.

These percentages and prices should be compared to their post-contingency equivalents under the seller's allocation program. If the percentage of seller's production available to non-contract customers has increased, it is evidence that the seller may be taking advantage of an increase in market price by increasing sales to non-contract customers.[27] Similarly, if the seller is allocating a greater percentage of his production to other contract customers, an examination of the contract prices of the other customers will determine if the seller is using the contingency to his advantage by increasing sales to higher priced contract customers. If these factors are examined in light of the Code's good faith requirements, the purpose of § 2-615 in requiring allocation should be fulfilled.[28]

E. *Seller's Seasonable Notification & § 2-616*

The Code in § 2-615(c) provides: *The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.*[29] This section must be read in conjunction with § 2-616, captioned "Procedure on Notice Claiming Excuse."[30] Together, these sections provide certainty of result when

one. The court stated that the amount of the product allocated and the cost of the product to the seller should be the determinative factors.

27. Non-contract customers would be paying the rising market price while contract customers would have the seller "tied" to a particular contract price.

28. Although the Code does not mandate a precise pro-rata allocation based on pre-contingency distribution percentages, the comparisons of the suggested criteria will provide a basis for determining if an allocation is "fair and reasonable."

29. UNIFORM COMMERCIAL CODE § 2-615(c).

30. UNIFORM COMMERCIAL CODE § 2-616 provides as follows:

a justified excuse is claimed by the seller.[31] When a seller seasonably notifies a buyer of a *proper* § 2-615 excuse, *only* two courses of action are available to the buyer: (1) termination of the contract, affirmatively or by inaction; or (2) contract modification according to seller's allocation.[32] The Code has thus eliminated the confusion which resulted from the separate treatment of temporary and partial impossibility recognized under the Restatement of Contracts.[33] Under these separate principles of temporary and partial impossibility, it was often difficult to determine the result after a finding of excuse. In contrast, the Code provides one comprehensive test for determining the validity of the excuse and a separate section assuring the result after a finding of validity.[34] In this manner, the Code achieves its purpose of improving upon the Restatement by attaining commercial predictability.[35] If there is a valid claim of excuse

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(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may be written notification to the seller as to any delivery concened, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2-612), then also as to the whole,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

31. An interesting aside, beyond the scope of this comment, is the application of § 2-615 to a buyer. Although the Code speaks strictly in terms of excuse for the seller, Comment 9 provides that in the proper situations, "the reason of the present section may well apply and entitle the buyer to the exemption." Furthermore, if a court is not convinced of this argument, UNIFORM COMMERCIAL CODE § 1-103, captioned "Supplementary General Principles of Law Applicable," can be used to introduce the principles of § 2-615 to excuse a buyer under the proper factual situations.

32. UNIFORM COMMERCIAL CODE § 2-616; *see* 2 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-616.6 (2d ed. 1971).

33. RESTATEMENT OF CONTRACTS §§ 462-63 (1932). The difficulty created by the Restatement stemmed from the procedure which it provided. First, it attempted to categorize types of impossibility (*i.e.*, partial, temporary). Second, the result of a finding of impossibility depended upon the category of impossibility. This procedure imposed additional factual issues (the types of impossibility) which the Code eliminated.

34. The test for the validity of excuse is found at UNIFORM COMMERCIAL CODE § 2-615; the results of finding a valid excuse is codified at UNIFORM COMMERCIAL CODE § 2-616.

35. UNIFORM COMMERCIAL CODE § 2-616, Comment provides in part:

This section seeks to establish simple and workable machinery for providing certainty as to when a supervening and excusing contingency "excuses" the delay, "discharges" the contract, or may result in a waiver of the delay by the buyer.

and allocation is not applicable, the only possible result is a complete termination of the contract,[36] unless otherwise agreed by the parties.[37]

A problem created by §§ 2-615(c) and 2-616 is the Code's failure to expressly provide for the consequences of an improper claim of excuse. Professor Anderson suggests that an unjustified claim of excuse is a repudiation of the contract by the seller.[38] If this is so, a seller who claims excuse bears the risk that if his claim is found to be invalid, he will be subject to the variety of remedies provided the buyer by § 2-711 of the Code.

II. The Case Law: Seller's Contributory Fault, Foreseeability & Impracticability

One of the most vital analytical factors in determining the validity of an alleged § 2-615 excuse is not expressed by the text of the Code. Case law clearly identifies as a bar to excuse the seller's contributory fault in causing the contingency. Contributory fault includes any type of action or inaction by the seller which disables him from fulfilling the contract. There is no excusing contingency if the seller was contributorily at fault in his failure to perform. However, the Code only alludes to the concept of contributory fault in Comment 5 to § 2-615: "there is no excuse under this section, however, unless the seller has employed all due measures to assure himself that his source will not fail."[39] This comment aids in defining the type of "contingency" which will excuse performance. Read literally, the comment imposes an affirmative duty upon the seller

36. *See* Goddard v. Ishikawajima-Harima Heavy Indus. Co., 29 App. Div. 2d 754, 287 N.Y.S.2d 901 (1968). In this case defendant's factory was destroyed by fire. After the factory had been rebuilt, plaintiff demanded performance. The court held that the destruction excused performance even after the contingency's effects had been eliminated.

37. Uniform Commercial Code § 2-616(3) may provide problems for a party attempting to enforce a modification agreed to by both parties. The section states: "The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section." *Id.* However, the Comment to § 2-616 states that this restriction is aimed at denying effect to "a contract clause made in advance of trouble which would require the buyer to stand ready to take delivery whenever the seller is excused from delivery by unforeseen circumstances." Therefore, § 2-616(3) should not apply to an agreement made subsequent to the supervening event.

38. 2 R. Anderson, Uniform Commercial Code § 2-616.5 (2d ed. 1971); *see* Uniform Commercial Code § 2-610, captioned "Anticipatory Repudiation."

39. Uniform Commercial Code § 2-615, Comment 5.

to employ all due measures to assure himself that his source will not fail. In its broadest sense, this duty would severely limit the availability of excuse under § 2-615. For example, a mineral supplier whose mines have been temporarily closed due to an unforeseen contingency could be forced to purchase on the open market to fulfill his contract obligations. The comment could be interpreted in this manner despite a dramatic increase in market price which might constitute a financial threat to the existence of the supplier. However, there is a strong argument to rebut this severe application of the comment.

Comment 5 cites *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*[40] and *Washington Manufacturing Co. v. Midland Lumber Co.*[41] as examples of its application. In *Dunbar* the seller-defendant breached his contract to supply buyer-plaintiff with a fixed quantity of molasses from a specified refinery. Based upon the refinery's cutback in production, the seller attempted to raise an impossibility of performance defense. The court rejected the defense because the seller did nothing to hold the refiner to the duty of continuing production.[42] The seller had failed to relieve itself of "the imputation of contributory fault."[43] In *Midland Lumber* the defendant breached his contract to supply a specified quantity of lumber. When sued, the defendant claimed that a government lumber embargo excused performance. The court held that the seller had failed to exercise "diligence and good faith in endeavoring to obtain . . . a release . . . from the lumber embargo."[44] The seller's inaction, his failure to act in a commercially reasonable manner, contributed to the cause of the alleged contingency. Reading the restriction imposed by the comment in conjunction with the holdings of these cases, the basic principle emerges that a seller who contributes to the cause or effect of the alleged contingency by failing to use ordinary commercial measures should not be excused. It is in this sense that Comment 5 states that a seller must employ "all due measures to

40. 258 N.Y. 194, 179 N.E. 383 (1932).

41. 113 Wash. 593, 194 P. 777 (1921).

42. 258 N.Y. at 199, 179 N.E. at 384. Seller, a middleman, had contracted to deliver to the buyer without contracting with the refinery to assure its continued production.

43. *Id.*

44. 113 Wash. at 596, 194 P. at 778. The court based this conclusion on two findings of fact: first, the seller could have fulfilled the contract by properly applying for a release from the embargo; and second, other lumber producers had no trouble in obtaining such a release upon a proper application.

assure himself that his source will not fail." Thus, while requiring the seller to avoid active or passive participation in causing the contingency, the Code does not require a seller to take extraordinary measures to eliminate the effects of the contingency.[45]

The above argument can be exemplified by examining the four following cases. In *Deardorff-Jackson Co. v. National Produce Distributors, Inc.*[46] the complainant contracted to provide respondent with fifty carloads of potatoes from a specific farm. When only twenty carloads were delivered, respondent withheld payment as damages. The judicial officer rejected complainant's argument that the failure of the farm's production was a contingency which relieved him from full performance. The officer determined that complainant knew the farm could only produce a maximum of twenty-seven carloads even though it contracted to sell fifty. After paraphrasing Comment 5, the officer held that the complainant had not taken adequate steps to assure its performance. Thus, Comment 5 was employed to deny excuse in a situation where the seller contributed to the cause of the alleged contingency.

In contrast to the *Deardorff-Jackson* decision is *Low's Ezy-Fry Potato Co. v. J. A. Wood Co.*[47] Here, the seller was under contract to provide a specified type of potato from lands farmed by him. Seller's harvest, through no fault of his own, failed to yield any of the required potatoes. The judicial officer, citing § 2-615, held that the seller's performance was not excused, stating:

> The rule is that if the parties contemplate a sale . . . and by reason of . . . fortuitous event, *without fault of the seller*, the crop . . . fails or is destroyed, non-performance is to that extent excused . . . .[48]

The only distinguishing feature between *Deardorff* and *Low's* is the finding of seller's contributory fault.

Two recent cases clearly indicate that a seller's contributory fault in causing the contingency or in increasing its effects will bar excuse

45. *See* note 36 *supra*. Similarly in the hypothetical posed in the introduction to this discussion, the seller would not be forced to purchase in the rising market to assure his source of supply.

46. 26 Agri. Dec. 1309, 4 UCC Rep. Serv. 1164 (1967). The subsequent unreported district court decision was vacated and remanded for factual determinations at 447 F.2d 676 (7th Cir. 1971).

47. 26 Agri. Dec. 583, 4 UCC Rep. Serv. 483 (1967).

48. *Id.* at ___, 4 UCC Rep. Serv. at 485 (emphasis added).

under § 2-615. In *Chemetron Corp. v. McLouth Steel Corp.*,[49] the defendant producer contracted to sell plaintiff up to 1,950 tons of liquid oxygen per month. The defendant, when sued for failure to fulfill its contractual obligation, presented a § 2-615 defense, claiming that an explosion at its plant had lessened production capacity rendering performance impracticable. The court, after examining the facts surrounding the production cutback, determined that the cause was attributable to the defendant itself.[50] It appeared that the defendant had removed equipment from the production process and had diverted the remaining production for its own manufacturing uses.[51] In conclusion, the court stated: "A party may not, by its own conduct, create the event causing the impracticability of performance . . . ."[52]

Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.[53] combined the concepts of contributory fault and foreseeability in rejecting the seller's § 2-615 defense. The contract at issue provided that during a one-year period defendant was to sell plaintiff a specified amount of potash at a certain price.[54] This potash, according to seller's price

49. 381 F. Supp. 245 (N.D. Ill. 1974).

50. *Id.* at 256.

51. *Id.* at 256-57. Had McLouth Steel proven a valid excuse under § 2-615(a), it could have allocated a fair and reasonable portion of its production for its use under § 2-615(b).

52. *Id.*

53. 508 F.2d 283 (7th Cir. 1974).

54. The contract contained a clause intended to deal with the § 2-615 situation:

> The Seller shall not be liable for failure or delay in shipments or completion of a shipment . . . when such failure or delay is caused by . . . the operation of statutes or law, interference of civil or military authority or other causes of like or different kind beyond the control of the seller . . . .

508 F.2d at 293.

This type of provision, commonly known as a *force majeure* clause, is incorporated in many commercial contracts. *See* 4 R. Henson & W. Davenport, ULA, UCC Forms and Materials § 2-615 Form 1 (1968). The effects of these broadly phrased clauses are minimal. In *Texas Gulf Sulphur*, the court quoted the above clause and then ignored it. This is repeated in numerous cases. *See, e.g.*, Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245, 256 (N.D. Ill. 1974)(excuse if "circumstances beyond . . . [the] reasonable control" of the parties); Goddard v. Ishikawajima-Harima Heavy Indus. Co., 29 App. Div. 2d 754, 287 N.Y.S.2d 901 (1968)(seller bound to perform "as far as it is able"). Although unstated by the courts, the probable reason for ignoring these clauses is that their effects are inherent in the provisions of § 2-615. The broadly written clauses neither add to nor subtract from the Code's requirements. Therefore, an application of § 2-615 is equivalent to an application of the broadly written clauses. The exception to this would be a *force majeure* clause which *expressly* contains a greater obligation to perform than that required by § 2-615. This type of clause would be within the scope of the preliminary restriction to § 2-615. However, it is suggested that the extent of the obligations created by such a clause be defined in light of

list, was to be shipped from seller's Utah mine, Canadian mine, or warehouse. After execution of the contract, seller closed its Utah mine and relied almost exclusively on its Canadian mine as the source of supply. However, Canadian governmental regulations compelled Texas Gulf Sulphur to sell potash at approximately 60% more than the contract price. These regulations constituted the seller's basis for raising a § 2-615 defense when buyer sued to recover damages. Stressing the commercial circumstances of the transaction, the court held that Texas Gulf Sulphur was not excused from performance.[55] While the court did not expressly address the question of seller's contributory fault, the concept surfaced in its conclusion. The court held that it was the decision to switch to the Canadian mine, not governmental regulations, which caused the claimed price increase.[56]

As stated earlier, the foreseeability of the alleged excusing contingency is another vital analytical factor for determining the validity of the § 2-615 excuse. One of the three tests provided by § 2-615(a) is that the non-occurrence of the contingency must have been a basic assumption on which the contract was made. If a contingency was foreseeable at the execution of the contract, its non-occurrence might not have been an assumption upon which the contract was made. Furthermore, under the preliminary restriction of § 2-615 the foreseeability of the contingency is evidence that a seller assumed an obligation to perform, regardless of the contingency.[57] In *Texas Gulf Sulphur*, the court examined the foreseeability of the contingency even though the opinion did not expressly formulate a foreseeability concept. The court reasoned that impracticability alone would not excuse performance unless the contingency was one which the parties assumed would not occur.[58] Furthermore, the court con-

the provisions and purposes of § 2-615. If this approach is accepted, only an *absolute* assumption of an obligation to perform would necessitate treatment outside the parameters of § 2-615.

55. 508 F.2d at 294. The court stated that three conditions must be met before a party is excused from performance by § 2-615: "(1) a contingency must occur (2) performance must thereby be made 'impracticable' and (3) the non-occurrence of the contingency must have been a basic assumption on which the contract was made." *Id.* at 293. *See* text prior to note 15 *supra*.

56. 508 F.2d at 294.

57. *See* UNIFORM COMMERCIAL CODE § 2-615, Comment 8 and text accompanying note 5 *supra*.

58. 508 F.2d at 294.

cluded that governmental controls were discernible four years prior to the execution of the contract.[59]

In *Mishara Construction Co. v. Transit-Mixed Concrete Corp.*[60] the court upheld a § 2-615 defense based on the existence of a picket line as the excusing contingency.[61] In its analysis, the court formulated the foreseeability concept as a restriction to excuse under § 2-615.

> The question is, given the commercial circumstances in which the parties dealt: Was the contingency which developed one which the parties could reasonably be thought to have foreseen as a real possibility which could affect performance? Was it one of that variety of risks which the parties were tacitly assigning to the promisor by their failure to provide for it explicitly? . . . If it could not be so considered, performance is excused.[62]

The court's explicit statement of the foreseeability concept accurately describes the procedure to be followed.[63] Consistent with the Code, the court required an examination of the commercial circumstances of the transaction in order to determine the proper allocation of risks based on the foreseeability of the contingency.

Maple Farms, Inc. v. City School District[64] and *Transatlantic Financing Corp. v. United States*[65] exemplify a misuse of the fore-

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59. *Id.* The court's use of the word "discernible" raises the issue of whether foreseeability should be examined in a subjective or objective sense. UNIFORM COMMERCIAL CODE § 2-615, Comment 4 indicates that a subjective standard was intended: "some *unforeseen* contingency" (emphasis added). Because the Code's good faith requirements will prevent abuse of a subjective standard, *see* UNIFORM COMMERCIAL CODE §§ 1-203, 2-103(b), and because a subjective standard may relieve a court from the more difficult objective determination, this author would endorse the use of a subjective standard.

60. 310 N.E.2d 363 (Mass. 1974).

61. *Id.* at 368.

62. *Id.* at 367.

63. The only problem with the statement is the court's failure to express foreseeability in subjective terms. *See* note 54 *supra*.

64. 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974). The plaintiff, claiming impracticability of performance, brought an action for declaratory judgment seeking to terminate its contract to supply milk to the defendant. The plaintiff argued that American grain sales to the Soviet Union constituted a contingency rendering performance impracticable due to the resulting price increases.

65. 363 F.2d 312 (D.C. Cir. 1966). The plaintiff was suing in quantum meruit for additional expenses incurred in the performance of a shipping contract. The plaintiff's theory was that the closing of the Suez Canal rendered performance of the contract impossible. Therefore, he should be entitled to a quantum meruit recovery for services rendered to the defendant, including the cost of sailing around the Cape of Good Hope. Because of the court's reasoning, the opinion is valuable for purposes of evaluation even though the case was not

seeability concept. Both courts examined the foreseeability of the contingency in determining the validity of the excuse based upon an allocation of risks analysis. However, after finding that the contingencies were foreseeable, the courts neglected to ask the necessary second question: "Was it one of that variety of risks which the parties were tacitly assigning to the promisor by their failure to provide for it explicitly?"[66] Instead, both courts made substantially the same conclusion:

> [W]here the circumstances reveal a willingness on the part of the seller to accept abnormal rises in costs, the question of impracticability of performance should be judged by stricter terms than where the contingency is totally unforeseen.[67]

It is this author's contention that the foreseeability of the contingency is a separate concept, not to be confused with impracticability. Both concepts require examination according to § 2-615. However, there is no basis in the language of § 2-615 for creating a test for impracticability based on foreseeability.[68] The concept of foreseeability is based upon either the preliminary restriction in § 2-615 or upon the "basic assumption" to the contract requirement of § 2-615(a). The concept of impracticability is a separate result-oriented requirement of § 2-615(a). While both are factual determinations, the tests for the two requirements are inherently distinct. Foreseeability is determined as of the execution of the contract; impracticability is determined as of the time of the breach. If the courts in *Transatlantic* and *Maple Farms* would have denied excuse based upon the contingency being foreseeable *or* the performance not being impracticable, the results would have been acceptable.

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controlled by article 2 of the UCC. *See* UNIFORM COMMERCIAL CODE § 2-615 (excuse for a "contract for sale"); UNIFORM COMMERCIAL CODE § 2-106(1).

66. *See* note 62 and accompanying text *supra*.

67. Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 1085, 352 N.Y.S.2d 784, 790 (Sup. Ct. 1974). In Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966), the court similarly stated:

> The surrounding circumstances do indicate, however, a willingness by Transatlantic to assume abnormal risks, and this fact should legitimately cause us to judge the impracticability of performance . . . in stricter terms than we would were the contingency unforeseen.

Id. at 318-19.

68. UNIFORM COMMERCIAL CODE § 2-615(a) clearly sets forth three conditions necessary for excuse. *See* text following notes 9 & 50 *supra*. There is no language in either the Code or the comments supporting a combination of the conditions on a proportionate scale.

But to place a stricter standard on impracticability in proportion to the foreseeability of the contingency is completely inconsistent with the Code's approach.

While impracticability is an additional vital factor which a court should examine in determining the validity of a § 2-615 excuse,[69] the concept necessitates an examination independent of the other factors required by the Code.[70] Unfortunately, neither the Code nor the case law offers an adequate test for determining impracticability. However, Comment 4 provides one major restriction to a seller alleging impracticability. This comment states: "Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance."[71] It is clear that increased cost, even if it renders performance impracticable, will not constitute a valid excuse unless the increased cost is the result of some unforeseen contingency.

Inherent in the concept of impracticability is the existence of a method of performance which is in some manner more burdensome on the seller than originally contemplated. The issue that evolves is whether the alternative method renders performance under the contract practicable. *Mineral Park Land Co. v. Howard*[72] is the case most often cited for the impracticability concept. There, the California Supreme Court held that a contingency which increased the cost of performance by ten to twelve times the standard cost excused

69. If a contingency renders performance physically impossible, the issue of impracticability never arises. In those situations, the concepts of foreseeability and contributory fault will determine the validity of the excuse. *See, e.g.*, Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 258 N.Y. 194, 179 N.E. 383 (1932).

70. *See* text accompanying notes 64-68 *supra*.

71. UNIFORM COMMERCIAL CODE § 2-615, Comment 4. The comment further states: "Neither is a rise or collapse in the market *in itself* a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. *Id.* (emphasis added).

72. 172 Cal. 289, 156 P. 458 (1916). The facts of the case can be summarized as follows. Pursuant to an agreement between the defendant and a third party, an indefinite quantity of gravel and earth was required by the defendant. To supply this need, the defendant entered a second agreement with the plaintiff, which provided for the defendant to remove from plaintiff's land *all* of the gravel and earth required to fulfill the defendant's obligations under the first agreement. The gravel and earth were to be paid for at specified prices. After partial performance, it became evident that plaintiff's land contained only a portion of the necessary gravel and earth above the water level. To remove the gravel and earth from below the water level would have cost defendant ten to twelve times the contract price. The court held that the existence of the necessary gravel and earth above the land was an assumption upon which the contract was made. Therefore, the defendant was excused from performance.

the defendant's breach of contract. In its holding, the court stated that performance is impracticable when it can only be done at *excessive and unreasonable cost.*[73] The court reasoned that while merely showing that performance would inflict a loss was not a sufficient basis for excuse, a price increase as great as in this situation rendered performance impracticable.[74]

The comments to § 2-615 indicate that the excessive and unreasonable cost standard as applied in *Mineral Park* may be more strict than intended by the Code. Comment 4 to § 2-615 uses the phrase "a marked increase in cost."[75] Although there have been no cases interpreting this standard,[76] the general policy of the Code, to use equitable principles in furtherance of commercial standards,[77] should lead to a test less stringent than that used in *Mineral Park.* In *Transatlantic*, although the court improperly applied the impracticability concept,[78] it correctly stated the theory upon which the concept is based.

> The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance [or damages].[79]

Recognition of this rationale should be the first step in an analysis of impracticability. The final determination should be based on the commercial circumstances of the transaction at issue. Included in

73. *Id.* at 293, 156 P. at 460.

74. *Id.*

75. UNIFORM COMMERCIAL CODE § 2-615, Comment 4 states in part: "But a [contingency] . . . which either causes *a marked increase in cost* or altogether prevents the seller from . . . his performance, is within the contemplation of this section." *Id.* (emphasis added).
section." *Id.* (emphasis added).

76. It is difficult to isolate the impracticability aspect in any of the reported decisions under the Code. There are two basic reasons for this. First, some of the cases have confused impracticability with foreseeability. *See* text accompanying notes 58-62 *supra.* Second, the cases dealing with the issue have merely made summary conclusions without discussing the factors involved. *See, e.g.*, Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974) (23% rise in cost not impracticable).

77. UNIFORM COMMERCIAL CODE § 2-615, Comment 6.

78. *See* text accompanying notes 65-68 *supra.*

79. 363 F.2d at 315. The community's interest in contract enforcement is derived from a strong preference for commercial predictability.

the circumstances are the following factors which this author deems relevant to a finding of impracticability:

(1) the degree of harm to the buyer and the degree of harm to the seller if forced to bear the loss—the extreme example being the insolvency of one party versus a reduction in the profits of the other;
(2) the opportunity to spread the loss—the extreme example being a seller with one customer who is tied to a contract price versus a buyer with a multitude of resale customers, many not under contract;
(3) the extent, if any, of the capital investment necessary to fulfill the contract along with the availability of the capital to the seller and the opportunity to recover the capital investment in the future;
(4) the general commercial expectations of the community —for example, if the business community is generally accepting price increases due to a contingency, a lesser standard of impracticability may be applied.[80]

III. Summary & Conclusion

The goal of this comment was to establish a procedure for determining the validity of an alleged § 2-615 excuse. In light of the above analysis, the following procedure is suggested. If all of the factors are answered favorably to the seller, a valid § 2-615 excuse is established.

(1) Has the seller assumed an obligation to perform regardless of the contingency?
  (a) Examine the foreseeability of the contingency and its effects as of the execution of the contract.

(2) Has a contingency occurred?
  (a) Examine the circumstances surrounding the contingency to determine if the seller contributed to the cause or effect.

(3) Was the non-occurrence of the contingency a basic assumption on which the contract was made?

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80. These economic concepts are suggested because the doctrine of impracticability is based on the legal recognition of commercial economic practices and mores. Similar concepts have been applied in various areas of the law. *See* R. Posner, Economic Analysis of the Law (1973).

(a) Examine the foreseeability of the contingency and its effects as of the execution of the contract.

(4) Has performance been rendered impracticable by the contingency?

(a) If performance has been rendered physically impossible then it is impracticable.

(b) If an alternative method of performance is available, examine the commercial circumstances surrounding the alternative method, including the degree of harm to the parties if forced to bear the loss, the opportunity to spread the loss, the capital investment necessary to perform, and the commercial expectations of the community.

(5) If applicable, has a fair and reasonable allocation been made?

(a) Examine the allocation to the buyer compared to other customers and relative to the prices being charged.

(6) Did the seller reasonably notify the buyer of the § 2-615 excuse?

If this analysis is not favorable to the seller, he should not be excused from performance.[81] Once the excuse has been classified as valid, the buyer will only have the options available in § 2-616:

(1) terminate the contract—affirmatively by agreement or passively by inaction for thirty days; or
(2) if applicable, accept the allocation.

The result of the application of this approach will be to effectively

81. If the seller's allocation is not fair and reasonable, he has not established a valid § 2-615 excuse. A strict reading of the Code would result in holding the seller liable under the contract. However, if this is the only factor which the seller has not met, a court might more successfully further the purposes of the Code by ordering a fair and reasonable allocation or damages based thereon rather than damages based on the contract. The argument to the contrary is that the Code's requirements are specific. Furthermore, the prospect of being held for damages under the contract would act as an incentive for the seller to establish a fair and reasonable allocation. Both arguments are convincing. Perhaps a compromise based on the motives of the seller is in order. If the seller's motive in establishing an unfair and unreasonable allocation program was to maximize his profits and thus take advantage of the contingency, commercial interests would be best served by penalizing him. This type of action could be deterred by imposing damages based on the contract price. If the seller's motives were to actually establish a fair and reasonable allocation, and he failed because of poor business judgment or other commercially acceptable reasons, then he should only be liable under a fair and reasonable allocation basis and not under the contract price.

further the Code's objectives including the use of equitable principles in furtherance of commercial standards and good faith.[82]

HENRY CHAJET

82. Perhaps the most interesting and confusing aspect of UNIFORM COMMERCIAL CODE § 2-615 is the proposition set forth in Comment 6:

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

This comment indicates that a court faced with an unanswerable "excuse" or "no excuse" situation could decree a compromise solution which would be in the best interests of justice. For example, a court could order a price adjustment or an allocation without any finding of excuse. In light of independent decisions made in the commercial community regarding such compromises, this proposition is a realistic one. However, it places almost complete discretion in the courts because of the Code's lack of guidelines in the area. This provision has not, as yet, been employed in solving a § 2-615 problem.