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Force Majeure Implications of Acid Rain Legislation: The Litigation Battle of the 1990s

JOHN R. RHORER, JR.* AND PENNY R. WARREN**

INTRODUCTION

During the 1980s, utilities turned to the courts to avoid the high coal prices they agreed to pay under long-term, "base price plus escalator" contracts[1] entered into during the energy crisis of the 1970s, or shortly thereafter.[2] When spot market coal prices and energy demand fell in the early 1980s, but contract prices continued to escalate, utilities carefully evaluated their contracts to determine if there might be some excuse from performance that a regulatory body, in hindsight, could use to deny a rate increase.[3] In the words of one court, a utility "apparently searched the law books to unearth every conceivable cause of action."[4]

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[1] Base price plus escalator ("BPE") contracts typically set an initial "base" price for various components of the cost of mining coal, such as labor, materials and supplies, and profit. Over the term of the contract some or all of the component prices are escalated according to changes in government indices or actual costs. Edmund M. Carney, *Pricing Provisions in Coal Contracts*, 24 ROCKY MTN. MIN. L. INST., 197, 219-225 (1978). BPE contracts have always been popular but were strongly preferred by utilities in the heightened regulatory environment of the 1970s and 1980s. Robert H. Forry, *Coal Supply Agreements from the Public Utility's Perspective*, 7 E. MIN. L. INST. § 7.1, § 7.05[4] at 7-18 (1986); Carney, *supra*, at 204-207, 219. Based upon the authors' experience, the trend at least since the late 1980s has been to add periodic market price reopeners to BPE contracts and, in some cases, to provide for termination if no agreement is reached on the price.

[2] A number of utilities building new plants during the late 1970s anticipated a tight market for low sulfur, compliance coal under the 1977 Clean Air Act Amendments and paid a premium for long-term compliance coal contracts. Forry, *supra* note 1, at 7-9.

[3] *Id.* at 7-5 to 7-10.

[4] Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d 1465, 1469 (5th Cir. 1987).

Utilities frequently relied on the force majeure clause of the contract as one excuse.[5] The case law reflects an almost universal rejection of such claims, though, on the ground changes in market prices are foreseeable and the risk of such change is allocated between the parties by the pricing provisions of the contract.[6] Force majeure clauses were strictly construed and the risk of any foreseeable contingency was assumed to have been allocated. Courts reasoned that if parties wanted the contract price to fluctuate with the market, they should have specifically included a pure market price reopener provision in the contract, rather than choosing a base price plus escalator term.[7] Alternatively, if a gross disparity between the contract price and market price was to excuse the buyer's performance, the contract should have expressly provided for termination in this event or should have allowed the contract price to be renegotiated when the disparity reached a particular level. Absent specific language clearly authorizing an escape from the contract pricing obligations, courts held the parties were bound by the contract they made.[8]

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[5] BLACK'S LAW DICTIONARY, 645 (6th Ed. 1979) defines force majeure as a "superior or irresistible force." Historically, force majeure events which would excuse performance of a contractual obligation were "acts of God" or "nature." John S. Kirkham, *Force Majeure—Does It Really Work?* 30 ROCKY MT. MIN. L. INST. § 6-01, at 6-2 (1984). In modern times, the term has taken on a much broader meaning to include unforeseeable causes which are "'beyond the control and without the fault or negligence' of the party excused." *Id.* at 6-3, quoting United States v. Brooks-Callaway Co., 318 U.S. 120, 123-24 (1943). A "standard" force majeure clause often found in coal supply contracts includes the following list of events: "acts of God, fire, acts of civil or military authorities, acts of war, riots, insurrection, orders of court or regulatory agencies, strikes, lockouts or other industrial disturbances, breakage of or accidents to machinery, and any other cause . . . not within the control of the party claiming suspension of its obligations." Marvin O. Young, *Construction and Enforcement of Long-Term Coal Supply Agreements—Coping with Conditions Arising from Foreseeable and Unforeseeable Events—Force Majeure and Gross Inequities Clauses*, 27A ROCKY MT. MIN. L. INST. 127, 139-140 (1982).

[6] *See infra* notes 61-136 and accompanying text.

[7] As a practical matter, why would a coal operator agree to a long-term commitment to supply coal of a particular quality, with the attendant long-term obligations for labor, capital and equipment, when the operator could get the same price on the open market without the long-term obligations? Coal suppliers must be compensated for the long-term risks assumed and must have some assurance of recovering reasonable costs.

[8] *See* Frazier v. Collins, 187 S.W.2d 816, 817 (1945) in which the trial court reduced rent for a gas station from $100 to $35 per month on equitable grounds because war regulations cut sales by more than one-half. The court of appeals reversed, holding that so long as the property was possessed and could be operated as a gas station, the full rent must be paid.

This decade of force majeure litigation regarding changed market price or costs is now coming to a close as most contracts from the 1970s have been renegotiated, bought out, or expired by their own terms.[9] During the 1990s, force majeure litigation will likely focus on whether, or under what circumstances, the acid rain provisions of the 1990 Clean Air Act Amendments constitute a force majeure event excusing performance under a long-term coal contract.[10] Any analysis of this issue must con-

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[9] A significant case just decided by the Supreme Court of Kentucky is Kentucky Util. Co. v. South E. Coal Co., 39 K.L.S. 6, 28, 1992 WL 121689 (June 4, 1992), initiated in Fayette Circuit Court, Kentucky, 1984. The trial court held KU was entitled to substantial price reductions but the Court of Appeals of Kentucky ruled on February 1, 1991 that market price changes did not constitute a "material, unforeseen event," which was necessary to trigger a price review. Accordingly, South East Coal was entitled to the escalated price provided in the contract. The Supreme Court of Kentucky reversed that portion of the Court of Appeals' decision holding that market price changes did constitute a "material, unforeseen event."

Kentucky High Court Ruling Worries Coal, COAL OUTLOOK, June 15, 1992, at 6, reported the reaction to the decision as follows:

> Don Vish, a Lexington attorney who is the former associate solicitor for the U.S. Dept. of Interior, last week said he was surprised by the decision and thought it would go the other way. Although the majority opinion attempts to limit the decision to this particular case, Vish Believes it does have ramifications beyond the KU/SECO contract.
>
> Not only is the "material unforeseen events" language common to many contracts, Vish says, but courts historically have not accepted a change in market conditions as a material unforeseen event that would justify reworking a commercial contract. Because of its departure from the norm, the decision [sic] be cited in other Kentucky cases, he predicts.
>
> Although Vish does not see the decision as precedent-setting outside Kentucky, he suggests that out-of-state buyers with instate suppliers may now have a new option for litigating contract disputes. Rather than seeking to have cases heard in their own backyard, Vish says, the buyers may find it more advantageous to file in Kentucky—depending, of course, on the specific language in their contracts.
>
> Gary Conley, vice president and general counsel of Kentucky River Coal Corp., said the landholder's concerns go beyond the fact that it leases coal to SECO. "It does set a precedent," he stated.
>
> "Nobody ever contemplated a market change being a material unforeseen event," echoed a third Kentucky attorney with coal company clients. "That's the newness of what the court has done . . . . Historically, we all know the price of coal goes up and down.
>
> In the wake of the decision, buyers will be reviewing their contracts to determine if, through litigation or negotiation, they can reduce the price, the attorney continued. The decision also affects the banking industry, he said. "How do you finance the development of a coal mine to service a long-term contract if this is the state of the law?" he asked.

[10] *See e.g.*, *Georgia Power Signals Force Majeure*, COAL OUTLOOK, March 18, 1991 (letters to suppliers that force majeure may be invoked to avoid existing contracts under the Clean Air Act).

sider the judicial construction of force majeure clauses in the market price cases of the 1980s.

This article provides a brief overview of the 1990 Clean Air Act Amendments and various compliance alternatives available to utilities. Then general principles of force majeure analysis will be reviewed with reference to specific cases. Finally, several exemplary force majeure clauses will be examined in light of the courts' analysis and alternatives available to utilities to comply with the new acid rain legislation.

I. OVERVIEW OF THE 1990 CLEAN AIR ACT AMENDMENTS

The 1990 Clean Air Act Amendments[11] dramatically increased the number of regulated toxic air pollutants to 189 as compared to fewer than twenty under the 1970 law. The Environmental Protection Agency [''EPA''] is authorized to add or delete chemicals subject to regulation.[12]

The ''Acid Deposition Control'' provisions[13] (hereinafter the ''Provisions'') impose ''drastic limitations on the emissions of sulfur and nitrogen oxides from coal burning utility plants.''[14] Generally, the Provisions seek to achieve a ten million ton reduction of annual sulfur dioxide emissions from a 1980 base line and are to cap emissions at 8.9 million tons per year by the year 2000.[15] The target for reduction of nitrogen oxides is two million tons.[16]

Compliance with the Provisions is scheduled in two phases. Phase I requires 110 major coal burning utility plants with more than 100 megawatt capacity to reduce sulfur emissions to a level no greater than 2.5 lbs/mmBtu of the baseline fuel consumption by 1995.[17] These utilities must identify their selected method of compliance in a permit application to be filed by February 15, 1993.[18] While regulations governing the permitting mechanism

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[11] Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Title I, § 108(k), 104 Stat. 2468, (codified at 42 U.S.C.A. §§ 7401-7601 (1983 and supp. 1992)).

[12] Minturn T. Wright, III, *Coal Supply Agreements and the 1990 Clean Air Act Amendments*, E. MIN. L. FOUND., 8.01, 8.01 (on file at the JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW editorial office).

[13] 42 U.S.C.A. § 7651-7651(*O*) (Supp. 1992).

[14] Wright, *supra* note 12, at 8.02.

[15] 42 U.S.C.A. §§ 7651a(b), 7651b(a)(1).

[16] 42 U.S.C.A. § 7651a(b).

[17] Wright, *supra* note 12 at 8.02; S. REP. No. 228, 101st Cong., 2d Sess. 302 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3685 (codified at 42 U.S.C.A. § 7651c).

[18] 42 U.S.C.A. § 7651g(c)(1).

were to be promulgated by May 15, 1992,[19] they were still awaiting final OMB approval at the time of this writing. The statutory methods for compliance include substituting control obligations among commonly owned units,[20] installing scrubbers,[21] using energy conservation or renewable energy sources,[22] requesting alternative emission limits or emission averaging for nitrogen oxide,[23] employing clean coal technology in Phase II,[24] or opting into the allowance program.[25] If one of these statutory methods for compliance is to be used, the permit application must include a compliance plan and a description of the schedule and means to accomplish the emission limits.[26] Any unit that does not intend to rely on the statutory methods need only recite that it will meet all emission limits by the deadline.[27]

Each identified utility is granted a certain number of "allowances" which represent the right to emit one ton of sulfur dioxide per year.[28] Allowances may be freely sold or transferred.[29] Allowances may also be reassigned among units "under the control of such owner or operator" so that excess control in one unit may compensate for excess emissions in another.[30]

In Phase II, all other existing coal-burning utility plants must obtain emission allowances and a permit to operate.[31] Generally, allowances will be based on a sulfur dioxide emission standard of 1.2 lbs/mmBtu.[32] Many, if not all, of the Phase I utility plants will not be able to comply with the Phase II emission

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[19] 42 U.S.C.A. § 7651g(c)(3).

[20] 42 U.S.C.A. § 7651c(b).

[21] 42 U.S.C.A. § 7651c(c).

[22] 42 U.S.C.A. § 7651c(f).

[23] 42 U.S.C.A. § 7651f(d).

[24] 42 U.S.C.A. § 7651h.

[25] 42 U.S.C.A. § 7651i.

[26] 42 U.S.C.A. § 7651g(b).

[27] *Id.*

[28] 42 U.S.C.A. § 7651a(3). See 42 U.S.C.A. § 7651c, Table A for a list of the identified utilities.

[29] 42 U.S.C.A. § 7651b(b). TVA was reported to have purchased allowances from Wisconsin Power & Light for a per ton price of $250-$400. Matthew C. Wald, *Company News: Utility Reports Second Sale of its Pollution Allowances*, N.Y. TIMES, May 13, 1992 8D at 4; *SO2 Credit Markets First Step; TVA & Duquesne Buy from Wisc. P & L*, 18 COAL WEEK 20, May 19, 1992, at 1.

[30] 42 U.S.C.A. § 7651c(b).

[31] 42 U.S.C.A. § 7651d.

[32] 42 U.S.C.A. § 7651d(b)-(d).

standards without installing scrubbers. Permits for Phase II compliance must be obtained by 1998.[33]

After 1990, new utility plants beginning operations must obtain allowances for emissions and an operating permit.[34] Plants beginning their operations after the year 2000 must obtain all allowances needed to operate from elsewhere, and availability of allowances is expected to be limited.[35] Phase I utilities may achieve compliance by:[36]

(1) Burning cleaner coal.

(2) Installing "scrubbers" to achieve a ninety percent reduction in emissions. These units, referred to as "extension units," may be granted a two-year extension of the Phase I deadline and may receive two-for-one emission allowances as a bonus for any over-control of sulfur dioxide emissions in excess of that required for the extension unit.[37] Bonus allowances are carried forward into Phase II and rewards are provided for early installation of scrubbers and for reductions in the amount of high sulfur coal used.[38] Note, however, that EPA will grant only a limited number of extension unit proposals.

(3) Substituting control obligations among units "under the control of such owner or operator."[39] No definition is provided for the term "under the control of such owner or operator." One obvious issue is whether a parent company may substitute allowances among all of its subsidiaries or plants, or whether substitution is allowed only within a subsidiary.

(4) Obtaining sufficient "allowances" in the EPA reserve allowance auction or by purchase from other utilities with excess allowances so as to cover excess emissions.[40]

(5) Opting for energy conservation and renewable energy.[41] A utility may receive additional allowances for every ton of sulfur dioxide emissions it avoids by the use of conservation measures or renewable energy.[42] These allowances may also be

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[33] Wright, *supra* note 12, at 8.06; 42 U.S.C.A. § 7651g(f).

[34] Wright, *supra* note 12, at 8.02; 42 U.S.C.A. § 7651g(e).

[35] Wright, *supra* note 12, at 8.02-8.03; 42 U.S.C.A. § 7651b(e).

[36] Wright, *supra* note 12, at 8.03-8.05.

[37] 42 U.S.C.A. § 7651c.

[38] 42 U.S.C.A. § 7651d(a)(2).

[39] 42 U.S.C.A. § 7651c(b).

[40] 42 U.S.C.A. § 7651b(b), 7651o(b).

[41] 42 U.S.C.A. § 7651c(f).

[42] 42 U.S.C.A. § 7651c(f)(2)(A).

obtained by purchasing energy from other sources using such methods. Emission reduction must occur between January 1, 1992, and December 31, 2000.[43] The utility must also have submitted a least-cost plan to the state ratemaking authority and received approval for the use of the alternative energy source.[44] Allowances under these provisions are limited.

A limited number of bonus allowances are also available for reductions achieved prior to the 1995 deadline for utility systems which meet two criteria: (a) the utility's coal-fired generation as a percent of total system generation decreased more than twenty percent from 1980 through 1985, and (b) the capacity of all coal-fired units within the utility from 1985 through 1987 was less than fifty percent.[45] Permission from the state's governor is also required.[46] Availability of the bonuses is limited to units incorporating physical changes or changes in the method of operation after November 15, 1990, including changes in the type of fuel used. Worthy of note is § 7651c(e)(3) which states:

> In no event shall the provisions of this paragraph [apparently referring to subsection (e) which includes three paragraphs relating to the allocation of allowances during Phase I] be interpreted as an event of force majeur [sic] or a commercial impractibility [sic] or in any other way as a basis for excused nonperformance by a utility system under a coal sales contract in effect before November 15, 1990.[47]

In other words, early compliance to receive bonus allowances is not a force majeure event under preexisting contracts.

The fact utilities have a number of alternatives for achieving compliance will likely pose the greatest hurdle in any attempt to avoid performance of an existing coal supply contract. Even high sulfur coal can continue to be burned if sufficiently blended to reduce emissions, if allowances are purchased to compensate for the emissions, if scrubbers are installed, or if another workable option is chosen.

II. LEGAL EXCUSES FOR AVOIDING CONTRACT PERFORMANCE

The legal analysis under theories of impracticability, frustration of purpose, or a general force majeure clause is basically

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[43] 42 U.S.C.A. § 7651c(f)(2)(C).
[44] 42 U.S.C.A. § 7651c(f)(2)(D).
[45] 42 U.S.C.A. § 7651c(e)(1).
[46] *Id.*
[47] 42 U.S.C.A. § 7651c(e)(1).

the same as under Uniform Commercial Code ("UCC") section 2-615.[48] Common law theories, however, should be kept in mind in those situations where state law interpreting section 2-615 remains unclear or where the UCC may not apply.[49] The RESTATEMENT (SECOND) OF CONTRACTS defines impracticability as:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[50]

Impossibility of performance is not required; impracticability is sufficient.

Frustration of purpose is defined in the RESTATEMENT (SECOND) OF CONTRACTS as:

> Where, after a contract is made, a party's principal purpose is substantially 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 the contrary.[51]

While seldom relied upon, this is the logical excuse provision for coal buyers, especially where the only obligation of the buyer is to pay for the coal.[52]

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[48] *See e.g.*, Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 277-78 (7th Cir. 1986); Minturn T. Wright, III, *Drafting "Excuse" Provisions in Coal Supply Agreements*, 8 E. MIN. L. INST. Ch. 9 (Cyril A. Fox, Jr. and Patrick D. McGinley eds. 1987); Young, *supra* note 5, at 129; Edmund M. Carney, *The Nature and Extent of the Excuse Provided by a Force Majeure Event Under a Coal Supply Agreement*, 4 EASTERN MIN. L. INST. 11-1 at 11-4 to 11-9 (1983).

[49] *See e.g.*, Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 277-78 (7th Cir. 1986); Carl Wendt Equip. Co. v. International Harvester, 931 F.2d 1112 (6th Cir. 1991).

[50] RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

[51] RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

[52] To deal with the rare case where the buyer or (more broadly) the paying party might have a good excuse based on some unforeseen change in circumstances, a new rubrick was thought necessary, different from "impossibility" (the common law term) or "impracticability" (the Code term, picked up in RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981)), and it received the name "frustration." 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 (citations ommited). *See* Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 277 (7th Cir. 1986).

The formulation for excuse by failure of presupposed conditions ("commercial impracticability") under section 2-615 of the Code is stated as follows:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance: Delay in delivery or nondelivery in whole or in part by a seller . . . 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.[53]

Comment 4[54] to section 2-615 states that changes in market price or increased costs are not sufficient to excuse performance.[55] Comment 8 provides the excuse provision is not applicable "when the contingency in question is sufficiently foreshadowed at the time of contracting."[56] Comment 9 notes this section may be an excuse for buyers if a specific venture or assumption is involved.[57] Coal supply contracts are often conditioned upon the continued operation of a specific generating plant and, thus, would come within Comment nine applying this doctrine to buyers.[58] Some courts have applied section 2-615 to buyers without regard to whether a specific venture was involved.[59]

Before attempting any analysis of an excuse provision in light of section 2-615, the cautionary advice of Professors White and Summers should be carefully considered:

> The doctrines of Impossibility, Commercial Impracticability or as the Uniform Commercial Code knows it, Excuse by Failure of Presupposed Conditions, comprise unclimbed peaks of contract doctrine. Clearly, all of the famous early and mid-twen-

[53] U.C.C. § 2-615 (1977).

[54] *See generally* Ky. Rev. Stat. § 355.1-110 (permits consultation of the UCC's official comments in the construction and application of that Code).

[55] U.C.C. § 2-615 cmt. 4 (1977).

[56] U.C.C. § 2-615 cmt. 8 (1977).

[57] U.C.C. § 2-615 cmt. 9 (1977).

[58] Carney, *supra* note 48, at 11-19; Kentucky Util. v. South E. Coal Co., 39 K.L.S. 6, at 30, (June 4, 1992).

[59] *See e.g.*, Northern Illinois Gas Co. v. Energy Co-op, Inc., 461 N.E.2d 1049, 1060 (Ill. App. 1984) ("[C]omment 9 thereunder indicates that its provisions are equally applicable to buyers so long as they comply with all the statutory requirements.").

tieth century mountaineers, Corbin, Williston, Farnsworth and many lesser men have made attempts on this topic but none has succeeded in conquering the very summit. The topic inheres in section 2-615 of the UCC, in sections 261-72 of the RESTATEMENT (SECOND) OF CONTRACTS and in a series of Anglo-American cases. In spite of attempts by all of the contract buffs and even in the face of eloquent and persuasive general statements, it remains impossible to predict with accuracy how the law will apply to a variety of relatively common cases. Both the cases and the Code commentary are full of weasel words such as "severe" shortage, "marked" increase, "basic" assumptions, and "force majeure."[60]

III. HOW HAVE FORCE MAJEURE CLAUSES BEEN CONSTRUED?

A. *Strict Construction*

Generally, force majeure provisions are construed in a "strict and conservative fashion."[61] In *Vernon Lumber Corp. v. Harsen Construction Co.*,[62] for example, a lumber company claimed excuse from supplying goods under one contract because a War Production Board order allocated part of the company's production to a buyer with a higher priority rating. The lumber company claimed it was not required to perform because the first contract excused orders "subject to conditions beyond control."[63] The court rejected this argument as follows:

> "[C]onditions beyond control" is not an ambiguous term which will require resort to parole evidence to explain it. While its meaning might be doubtful if this were the first time it had been employed in a contract, it has by repeated use assumed an indisputable connotation. . . . "Conditions beyond control" refers to an unforeseeable act of God or other extraordinary cause *which could not reasonably be anticipated by the parties.* It would cover an *unforeseeable change in the law* which made performance impossible. But it does not refer to difficulties in performance which have developed since the

[60] James J. White and Robert S. Summers, UNIFORM COMMERCIAL CODE, § 3-9, at 170 (3rd ed. 1988) (footnote omitted).

[61] Carney, *supra* note 48, at 11-8.

[62] 60 F. Supp. 555 (E.D.N.Y. 1945).

[63] *Id.* at 558.

making of the contract but which could have been anticipated.[64]

The court held the regulation existed at the time the contract was made and reallocation of supply was a development that could have been anticipated.[65]

Similar strict construction of force majeure provisions arise throughout Kentucky cases. In *Tradewater Coal Co. v. Lee*,[66] a coal supplier agreed to meet the buyer's requirements but failed to make deliveries when he could sell to others at a higher price. The supplier proved it suffered a shortage of railroad cars resulting in delayed delivery and claimed this constituted a force majeure event. The court rejected the claim, noting that Tradewater had a sufficient number of rail cars to fill orders under the contract.[67] While the shortage of rail cars might have been a valid force majeure "event," it was not the cause of nonperformance under the contract.[68] Similarly, in *Heidelberg Brewing Co. v. E.F. Prichard Co., Inc.*,[69] Heidelberg claimed government regulations limited the amount of malt it could use in the ale it contracted to deliver to Prichard. The court noted Heidelberg had a sufficient amount of malt to perform the contract and the government regulation did not prevent the performance.[70]

In *Ross Seed Co. v. Sturgis Implement & Hardware Co.*,[71] Sturgis agreed to supply a fixed quantity of "1942 drop Korean" seed to Ross. Sturgis failed to deliver when the area from which he intended to obtain the seed was flooded and the available seed was required for a prior contract. The force majeure clause provided: "The seller assumes no liability whatsoever for delay or failure to ship or to deliver goods caused by fire, flood, strike, or other causes beyond our control."[72] The court rejected the force majeure claim stating there was nothing in the contract which limited the source of the seed. While Sturgis would have lost money by buying the seed from elsewhere and performing

[64] *Id.* (emphasis added).
[65] *Id.*
[66] 68 S.W. 400 (1902).
[67] *Id.* at 401-02.
[68] *Id.* at 402.
[69] 180 S.W.2d 849 (1944).
[70] *Id.* at 852-53.
[71] 181 S.W.2d 426 (1944).
[72] *Id.* at 427.

under the contract, the court held this was the risk Sturgis assumed.[73]

B. *Application of General Law on Excuse of Performance*

Although courts allow parties to broaden the common law or UCC excuse doctrines by agreement, an event of force majeure must be listed with particularity before it will be enforced outside those doctrines.[74] In *Eastern Airlines, Inc. v. McDonald Douglas Corp.*,[75] for example, the court considered Comment eight to section 2-615 which allows express agreements to "enlarge upon or supplant" that section of the Code. If the excusing event were specifically listed in the force majeure clause, the court concluded, the risk of its occurrence was allocated by the parties and performance would be excused if all other requirements for excuse were met.[76] If a party is relying merely upon general language in a force majeure clause, however, the doctrine of commercial impracticability will apply.

> As we understand Comment 8, where there is doubt concerning the parties' intention, exemption clauses should not be construed as broadening the excuses available under the Code's impracticability rule. . . . Exculpatory provisions which are phrased merely in general terms have long been construed as excusing only unforeseen events which make performance impracticable. Courts have often held, therefore, that if a promisor desires to broaden the protections available under the excuse doctrine he should provide for the excusing contingencies with particularity and not in general language.[77]

Thus, if general language of the force majeure clause is being relied upon and the standard for excuse is commercial imprac-

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[73] *Id.* at 429. *See also* American Bridge Co. v. Glenmore Distilleries Co., 107 S.W. 279 (1908) (holding that inability to get production materials was not beyond company's "reasonable control" within the contract); Wickliffe Farms, Inc. v. Owensboro Grain Co., 684 S.W.2d 17 (Ky. Ct. App. 1984) (holding that inability to deliver corn under contract due to drought is not excuse for nondelivery when the contract did not specify where corn was to be grown).

[74] *Cf.* Kentucky Util. v. South E. Coal Co., 39 K.L.S. 6, at 30 (June 4, 1992) 1992 WL 121689 (Although interpreting a price reopener provision rather than a force majeure clause, the Supreme Court of Kentucky rejected, without discussion, an argument that such specificity is required to excuse performance under the pricing provisions of the contract and the UCC.).

[75] 532 F.2d 957 (5th Cir. 1976).

[76] *Id.* at 990-996.

[77] *Id.* at 990-991 (citations omitted).

ticability, courts assume the parties have allocated the risk of all foreseeable events in the contract. If the risk has not been expressly allocated in some other provision of the contract, however, it is assumed the risk of loss is on the promissor.[78] Every risk has a price, and the parties should have bargained through the price term for the assumption of any risk.[79] Comment eight to section 2-615 explains:

> 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.[80]

Foreseeability has been an important factor in force majeure decisions. Courts suggest that even events such as the Arab oil embargo,[81] the OPEC cartel,[82] an oversupply of gas and changing and shifting markets[83] were all foreseeable. Rather than analyzing whether an "event" was foreseeable, a better analysis would focus on whether the "effect" of changes in market price or contract costs arising from any change in the economy was foreseeable and the risk had been allocated in the contract price or other terms.[84]

C. Legislation

According to one commentator, legislation might be in a special category from other events.[85] The language of section 2-615 provides there is no breach if performance is made "impracticable . . . by compliance in good faith with any . . . gov-

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[78] Kirkham, *supra* note 5, at 6-28.

[79] Edmund M. Carney, *Risk Allocation in the Long-Term Coal Sales Agreement*, EASTERN MIN. L. INST. 9-1 at 9-8 to 9-11 (1980).

[80] U.C.C. § 2-615 cmt. 8 (1977).

[81] Iowa Electric Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 134 (N.D. Iowa 1978); Northern Illinois Gas Co. v. Energy Coop, Inc., 461 N.E.2d 1049, 1059 (Ill. Ct. App. 1984); Missouri Pub. Co. v. Peabody Coal Co., 583 S.W.2d 721, 727 (Mo. Ct. App. 1979).

[82] *Iowa Electric Light & Power*, 467 F. Supp. at 154.

[83] *Northern Illinois Gas Co.*, 461 N.E.2d at 1059.

[84] *See* U.C.C. § 2-615 cmt. 4 (1977) ("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.").

[85] Carney, *supra* note 48, at 11-11.

ernmental regulation."[86] Cases involving legislation or government regulation, however, do not differ in their analysis.[87] In *International Minerals and Chemical Corp. v. Llano, Inc.*,[88] a state regulation required reduction in emissions with the result that International Minerals and Chemical ("IMC") had to change its manufacturing process and its need for natural gas was dramatically reduced.[89] The court held IMC could not avoid its obligations under a "take or pay" gas supply contract because there was "no obstacle to IMC's ability to pay."[90] A clause allowing adjustment of the minimum contract quantity was triggered, however, because, for reasons beyond IMC's reasonable control, it was unable to receive its minimum purchase obligation of gas.[91]

A second case applied a similar analysis. In *Sabine Corp. v. ONG Western, Inc.*,[92] the court held government regulation merely permitted rather than required ONG to reduce its purchases under a "take or pay" gas supply contract.[93] Performance was not excused under section 2-615 because "governmental regulation is foreseeable as a matter of law."[94] The court noted references to governmental regulation in the contract itself demonstrated that regulation was actually foreseen by the parties.[95]

The same analysis was applied to reach an opposite result in *Far West Federal Bank v. Director, O.T.S.*,[96] where a new governmental statute was held to be sufficient to excuse performance under a conversion agreement in which a group of investors agreed to purchase a thrift.[97] An integral part of the conversion agreement was that the government would forbear enforcement of a number of regulations to allow the thrift to become profitable.[98] After the well publicized "S & L crisis"

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[86] U.C.C. § 2-615(a).

[87] Carney, *supra* note 48, at 11-12.

[88] 770 F.2d 879 (10th Cir. 1985).

[89] *Id.* at 883.

[90] *Id.* at 885.

[91] *Id.* at 887.

[92] 725 F. Supp. 1157 (W.D. Okla. 1989).

[93] *Id.* at 1170.

[94] *Id.* at 1177.

[95] *Id.*

[96] 787 F. Supp. 952 (D.Or. 1992).

[97] *Id.* at 958.

[98] *Id.* 961.

Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA).[99] The Office of Thrift Supervision (OTS) then notified the investors that they were not in compliance with the capital requirements under FIRREA.[100]

The OTS argued that, in order for the investors to be excused from the conversion agreement on frustration grounds, they must show FIRREA was not foreseeable.[101] The court held "even if it was entirely foreseeable that Congress would enact FIRREA (or some other law affecting the banking industry), FIRREA's impact on the Conversion Agreement was not foreseeable,"[102] in that it abrogated a basic assumption of that agreement and made performance impossible.[103]

D. Preventing Performance

Even if an event qualifies as a force majeure event, performance is not excused unless all other requirements of the force majeure clause or section 2-615 have been met. Typical force majeure clauses require that the event render a party "unable to carry out any of its obligations under this agreement either in whole or in part,"[104] or "which wholly or partly prevent . . . the utilizing . . . of the coal."[105] In *Northern Indiana Public Service Co. v. Carbon County Coal Co.*,[106] the Indiana Public Service Commission ordered NIPSCO to attempt to buy electrical power from neighboring utilities and produce less of its own power which had become more expensive to produce internally due to a long term coal supply contract.[107] The court refused to excuse NIPSCO's obligation to buy coal under the force majeure clause as follows:

> Such an order does not "prevent," whether wholly or in part, NIPSCO from using the coal; it just prevents NIPSCO from shifting the burden of its improvidence or bad luck in

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[99] *Id.* at 956; 12 U.S.C.A. § 1811-33e (1989).

[100] *Far West Federal Bank*, 787 F. Supp at 956.

[101] *Id.* at 961.

[102] *Id.*

[103] *Id.* at 960-61.

[104] Carney, *supra* note 48, at 11-7.

[105] Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 274 (7th Cir. 1986).

[106] *Id.*

[107] *Id.* at 267.

> having incorrectly forecasted its fuel needs to the backs of the hapless ratepayers.
>
> . . .
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> The normal risk of a fixed-price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller (except insofar as escalator provisions give the seller some protection); if it falls, as here, the seller gains at the expense of the buyer. The whole purpose of a fixed-price contract is to allocate risk in this way. A *force majeure* clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract.[108]

While NIPSCO was not required to continue to take the coal, a jury verdict of $181,000,000 for breach of the contract was upheld.[109]

In *Northern Illinois Gas Co. v. Energy Co-op, Inc.*,[110] the gas company invoked force majeure because of an order denying a rate increase due to an excessive inventory of gas in storage. The force majeure clause excused performance based on "compliance with law, regulation, requisition, request or direction made by any governmental authority."[111] The court held "[t]he rate order did not compel, suggest, or even recommend that NI-Gas act in any specific manner."[112] Rather, to constitute a force majeure event "[w]hat is required is that the order clearly direct or prohibit an act which proximately causes non-performance or breach of a contract."[113]

E. Impracticability

Under general "inability to perform" language in a force majeure clause, the question becomes whether performance has been rendered "impracticable." The RESTATEMENT (SECOND) OF CONTRACTS describes impracticability as making "performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance."[114] Another

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[108] *Id.* at 275.
[109] *Id.* at 280-81.
[110] 461 N.E.2d 1049 (Ill. Ct. App. 1984).
[111] *Id.* at 1057.
[112] *Id.* at 1058.
[113] *Id.*
[114] RESTATEMENT (SECOND) OF CONTRACTS ch. 11, Introductory note, 309 (1981).

example of impracticability might be "an abrupt ten-fold increase in cost to the seller" where the event causing the increase was an unforeseeable disaster.[115] In *Louisiana Power & Light v. Allegheny Ludlum Industries*,[116] the court held any loss must be "especially severe and unreasonable" and cost increases of thirty-eight percent over the original contract price were insufficient.[117] The court also noted that "cost increases of 50 - 58 percent had generally not been considered of sufficient magnitude to excuse performance."[118] In *Northern Illinois Gas Co. v. Energy Co-op, Inc.*,[119] the court held a "party seeking to excuse his performance must show that he can operate *only* at a loss and that the loss would be so severe and unreasonable that failure to excuse performance would result in grave injustice."[120]

The Supreme Court of Kentucky recently rejected such commercial impractibility doctrines in upholding a price reopener interpretation in *Kentucky Utilities v. South East Coal Co.*.[121] In *Kentucky Utilities* the parties entered into a twelve and one half year coal supply contract with a provision for a price adjustment for "material unforeseen events."[122] When the price of coal decreased, KU filed suit seeking a price reduction claiming unforeseen economic events, such as the demise of the Arab Oil embargo and decreased demand for electricity, caused a change in market prices which warranted a change in the contract price.[123] The trial court found as a matter of fact that such events constituted "material unforeseen events" and appeals ensued. Rather than following the reasoning in *Northern Indiana Public Service Co. v. Carbon County Coal Co.*,[124] the Supreme Court of Kentucky held the factual determination by the trial court was not clearly erroneous and commercial impracticability had no application because the parties had drafted away from the UCC.[125] The court did not discuss or distinguish the long

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[115] *Id.* at 311.

[116] 517 F. Supp. 1319 (E.D. La. 1981).

[117] *Id.* at 1324.

[118] *Id.* at 1326, citing Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978).

[119] 461 N.E.2d 1049 (Ill. App. 1984).

[120] *Id.* at 1061.

[121] 1992 WL 121689 (Ky. June 4, 1992).

[122] *Id.* at *2.

[123] *Id.* at *3.

[124] *See supra* notes 105-109 and accompanying text.

[125] 1992 WL 121689 at *5-6.

line of authority that holds interpretation of a contract is, at least, a mixed question of law and fact and is not subject to the "clearly erroneous" standard.[126] No claim was made in this case that the contract was ambiguous or was induced by fraud or mutual mistake.[127]

Justice Lambert, joined by Justice Reynolds in a fervent dissent, warned: "[T]he decision of the majority should chill the hearts of businesspersons throughout Kentucky for it stands for the proposition that detailed contracts may be rewritten by judges on a 'judgment call' to accommodate their views of equity."[128] According to Justice Lambert, the situation in *NIPSCO* was "factually similar to the case at bar and legally indistinguishable."[129] Justice Lambert further concluded "[i]n the final analysis, this case boils down to KU's seizure of an opportunity to make a greater profit by breach of its contract, and at the expense of its fuel supplier."[130]

F. *Other Considerations*

Even if a force majeure event surfaces and performance is rendered impracticable, other considerations may prevent excuse from performance. Parties will not be excused if the event on which they rely is caused by their own action or negligence.[131] In *Chemetron Corp. v. McLouth Steel Corp.*,[132] for instance, McLouth claimed explosions in its thirty-ton compressor excused performance permanently. The court held:

> Apart from the fact that there was not an adequate showing that the explosions were beyond McLouth's control, the defense of *force majeure* is subject to equitable principles and thus would not serve to perpetually release McLouth from its

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[126] *See e.g.*, Lancaster Glass Corp v. Philips Ecg, Inc., 835 F.2d 652, 658 (6th Cir. 1987); Ram Construction Co., Inc. v. American States Ins. Co., 749 F.2d 1049, 1053 (3d Cir. 1984); Kentucky Util. v. Carter, 176 S.W.2d 81, 83 (1943); Johnson v. Edwards, 20 S.W.2d 76 (1926); Neel v. Wagner-Shuck Realty, 576 S.W.2d 246, 250 (Ky.Ct. App. 1978); RESTATEMENT (SECOND) OF CONTRACTS § 212, Cmt. d (1981).

[127] Based upon mutual mistake and frustration of purpose, the court in Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp 53 (W.D.Pa. 1980) modified the price term of a contract to avoid injustice.

[128] 1992 WL 121689 at *14 (Dissenting opinion).

[129] *Id.* at *15.

[130] *Id.*

[131] Carney, *supra* note 48, at 11-29 to 11-31.

[132] 381 F. Supp. 245 (N.D. Ill. 1974).

> contractual obligations . . . . On the contrary, McLouth would be required to employ alternative means to fulfill its obligations, such as by replacing the thirty-ton compressor with safe, productive equipment.[133]

Force majeure clauses generally require a party to "overcome the effects of such force majeure events with all reasonable dispatch."[134] The implied duty of good faith in UCC section 1-203[135] will also be imposed.[136]

IV. FORCE MAJEURE ANALYSIS APPLIED TO ACID RAIN LEGISLATION

In any analysis, the foremost consideration must be the specific language of the force majeure clause. A clause that specifically mentions legislation, regulations or orders "relating to air pollution, the effect of which will make it impossible or impractical for Buyer to utilize the coal subject hereto *without substantially changing or altering its utilization equipment*"[137] would provide a good argument under many scenarios that the 1990 legislation is a force majeure event. Alternatively, the seller could argue that no change or alteration of equipment is necessary because the buyer can simply purchase sufficient allowances to compensate for the excess emissions. Another option for the buyer would be blending the current coal with adequate low-sulfur coal to meet emission requirements. A dispute could also arise over what is a "substantial" change or alteration of the utilization equipment. It is unclear what standard should be

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[133] *Id.* at 256 (footnote omitted). *See also* Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974) (performance was not excused as there was nonshowing that mine could not have produced enough potash); Iowa Electric 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) (no showing that increases were reasonably unforeseen and not a function of Atlas' own action).

[134] Carney, *supra* note 48, at 11-33.

[135] U.C.C. § 1-203 (1991). "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

[136] Big Horn Coal Co. v. Commonwealth Edison Co., 852 F.2d 1259, 1267-1269 (10th Cir. 1988); *see also* Kentucky Util. Co. v. South E. Coal Co., 1992 WL 121689 at *10 ("[h]owever, we conclude that KU was obligated under KRS 355.1-203 to use good faith in invoking force majeure"); Kirkham, *supra* note 5, at 6-19.

[137] Richard McMillan, Jr. and William L. Anderson, Remarks Regarding Force Majeure and Other Excuse Clauses, presented at the 1990 NCA Coal Lawyers Conference, Oct. 11-14, 1990, at 9, Ex. 2 (on file at *Journal of Natural Resources & Environmental Law* editorial office).

used in determining whether it is "impractical" for the buyer to utilize the coal. Courts might require the "ten-fold" increase suggested in the RESTATEMENT (SECOND) OF CONTRACTS.[138]

A buyer's opportunity to invoke the force majeure clause would be improved if he was not required to incur any "unreasonable expense" and if that term was defined as follows:

> No expense contemplated by this section shall be deemed reasonable if it would result in a total cost to buyer, in using seller's coal, in excess of the total cost of using competitive fuels which are then reasonably available to buyer and which can be utilized in conformity with all such restrictions.[139]

This language is likely to engender a heated discussion on the definition of "competitive fuels."

A more typical force majeure clause would read as follows: "In the event any restrictions are imposed by governmental agencies which restrict or prevent the burning of some or all of the coal to be supplied under this Agreement . . . ."[140] The question is whether the buyer is in any way restricted from burning coal by the new legislation. A court could conclude this legislation is no different from the economic purchase orders in *NIPSCO* where the court held such an order "does not 'prevent,' whether wholly or in part, NIPSCO from using the coal . . . ."[141]

Even if a buyer is permitted to avoid unreasonable expense, "unreasonable expense" often remains undefined. How should the cost of scrubbing be measured? If scrubbing results in bonus allowances for the utility, should the increased costs be offset by the value of the bonus allowances? Is scrubbing inevitable for the plant by the year 2000 and the only additional cost is that associated with making the capital investment a few years earlier? Assuming a Phase I utility with current fuel-related capital and operating costs of $40,000,000 annually with the cost increasing to $60,000,000 annually with scrubbers, a court could hold, drawing on *Iowa Electric Light & Power v. Atlas Corp.*, that a fifty percent cost increase does not warrant excuse from the contract.[142] A seller could also argue that some minimum

[138] RESTATEMENT (SECOND) OF CONTRACTS, ch. 11, 311 (1981).

[139] *Northern Indiana Public Service Co.*, 799 F.2d at 275.

[140] Young, *supra* note 5, at 158.

[141] *Northern Indiana Pub. Serv. Co.*, 799 F.2d at 275.

[142] Iowa Electric Light & Power v. Atlas Corp., 467 F. Supp. 129, 140 (N.D. Iowa 1978).

level of increased cost is inevitable under any compliance plan and that only the additional amount associated with using the contract coal should be taken into consideration.

If the force majeure clause is full of "weasel words" like the following, the intensity of the debate will increase dramatically:

> Purchaser and seller recognize that environmental restrictions (including air quality considerations) may *substantially hinder* the purchasing or burning of coal hereunder by purchaser at one or more of its plants. If any such restriction substantially hinders or *makes economically infeasible* the burning of coal by the plant or plants of purchaser . . . . (emphasis added).[143]

Once again, a court may suggest that purchasing or burning of the coal is not hindered in any way; it is only more expensive to do so. Economically infeasible could be construed to mean nothing more than commercially impracticable.

Assuming a buyer's force majeure clause protection is inadequate to excuse performance, a number of other issues arise under UCC section 2-615.[144] For example, were the circumstances at the time of contracting such that it can fairly be said the absence of the specific protection against this legislation is evidence of an allocation of the risk to the buyer? Sulfur dioxide has been a regulated pollutant since 1970.[145] The Senate Environment and Public Works Committee reported bills on acid rain control in 1982, 1984 and 1987.[146] The New Source Performance Standards effective in 1974 required facilities built thereafter to meet sulfur dioxide emission limits of 1.2 lbs/mmBtu, equivalent to the Phase II limits of the Act.[147] According to one author, "[t]hat the government would take action to reduce sulfur dioxide emissions is, and has been for at least a decade, as foreseeable as World War II was in 1941."[148]

Alternatives for achieving compliance increase geometrically where a utility owns or controls multiple plants. The installation of scrubbers at two out of four plants may offset the emissions

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[143] One of many similar contracts observed by the authors.

[144] U.C.C. § 2-615 (1977).

[145] 42 U.S.C.A. § 1857 (1970).

[146] 135 CONG. REC. S9,650-76, at S9,666 (daily ed. Aug. 3, 1989).

[147] 40 C.F.R. § 60.43(a)(2) (1974).

[148] Robert J. Nordstrom, *Coal Supply Contracts and Proposed Clean Air Act Amendments*, 11 E. MIN. L. INST. 12-1, 12-28 (1990).

associated with burning high sulfur coal in all four plants. Switching to low sulfur coal at one or more plants or blending could achieve compliance in itself or be combined with other emission reducing options. No matter what option a utility chooses with multiple plants, a seller is likely to argue the event of force majeure on which the utility relies was brought about by its own action and management decisions rather than by the legislation itself.

The multiple plant utility must also consider whether the section 2-615 excuse will even be available to it as a buyer, since there is no longer a single plant which would more closely resemble the "specific venture" language in Comment 9.[149] If for any reason the buyer is limited to the doctrine of frustration of purpose, a court could well conclude the principal purpose of the buyer in a long-term coal contract would be to obtain a dependable supply of coal and that purpose has not been frustrated. As many courts have held, "very seldom is a party successful in obtaining relief based on frustration of purpose."[150]

V. FURTHER IMPLICATIONS

If decisions from the 1980s provide any guidance, utilities will not fare well in court if a general force majeure clause is invoked in response to acid rain legislation. Absent very particularized language allocating the risk of environmental legislation on the supplier, courts are most likely to hold such legislation was foreseeable, it does not prevent the use of the coal or frustrate the purpose of the contract, and the increased cost of performing the contract obligations is not sufficient to excuse any obligations of performance. The warning by White and Summers bears repeating, however: "[E]ven in the face of eloquent and persuasive general statements, it remains impossible to predict with accuracy how the law will apply to a variety of relatively common cases."[151]

Courts may well view efforts to protect the environment from a much different perspective than that suggested by liti-

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[149] U.C.C. § 2-615, cmt. 9 (1977). Alternatively, the court may not be able to rely on the official commentary, as was the case in Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 277 (7th Cir. 1986).

[150] Nordstrom, *supra* note 148, at 12-23.

[151] James J. White & Robert S. Sommers, 1 UNIFORM COMMERCIAL CODE § 3-9 (3d ed.) (1988).

gation relating to market prices. Some indication of that perspective can be found in *International Minerals Corp. v. Llano*,[152] where the court rejected complaints that IMC reduced its purchases in 1981 but compliance with the emission standards was not due until 1984. The court held:

> We must reject this contention on two grounds: First, as a matter of policy, individuals and corporations who cooperate with local regulatory agencies and comply with the letter and spirit of legally proper regulations, environmental or otherwise, are to be encouraged. Stalling tactics are not regarded favorably. Second, as a matter of law, government policy need not be explicitly mandatory to cause impracticability.[153]

The clearest implication of the current decisions, however, is that careful drafting of long-term contracts will become more critical than ever. General guidelines for drafting are discussed in several articles,[154] but when hundreds of millions of dollars can hinge on a few words, extreme caution is required.

Other provisions of the contract also deserve careful thought. Quality specifications and control over testing methodology will become even more important. The increased number of regulated pollutants may lead to greater detail in specification of the coal's chemical and physical characteristics. Given the natural inconsistency of coal, a seller's risk of suspension or termination will increase as specifications become more detailed. Buyers may also insist upon greater control over sampling and analysis and, for the protection of both parties, the sampling method should be specifically described.[155]

Buyers may demand a "requirements" contract and sellers should seek protection by negotiating a minimum quantity or a long time table for deciding requirements. An estimate of the requirements included in the contract under UCC section 2-306(1)[156] may prevent any substantial reduction.[157] Other nego-

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[152] 770 F.2d 879 (10th Cir. 1985).

[153] *Id.* at 887.

[154] Young, *supra* note 5; Wright, *supra* note 48; Wright, *supra* note 12.

[155] Wright, *supra* note 12, at 8.06-8.07.

[156] U.C.C. § 2-306(1) (1991) provides:

> A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements which may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any

tiating points might include the right to supply another unit if the destination unit is converted or shut down.

Sellers who are forced to accept tight quality specifications will want to limit a buyer's remedies in order to preclude consequential damages, provide for a time to cure, and provide for specific dollar penalties where possible. Unless the contract expressly provides the stated remedies are exclusive, UCC section 2-719(1)(b)[158] permits other remedies. In *Northern Illinois Gas Co. v. Energy Co-op, Inc.*,[159] for example, the court held UCC section 2-718 permits a liquidated damages clause to override other remedies even though the contract remedies are not stated to be exclusive.[160] In that case, a jury verdict of $305,500,000 in favor of the seller was reduced by a liquidated damages clause to $13,500,000 on appeal.[161] Sellers may want to require the buyer to pay a fraction of the seller's investment in the contract if it is terminated or requirements are reduced below a certain minimum within a specified period of time. The disparities between the usual remedies of a buyer and seller were characterized by one commentator as follows:

> We need to bear in mind that the customer [buyer] often has the heavy stick of injunctive relief if the producer [seller] does not ship as required, whereas the producer may be able to do little more than wring his hands if the full invoice is not paid, or sue and wait until his grandchildren are on Social Security and he has given his fortune to lawyers before collecting.[162]

As if this result were not harsh enough, the Supreme Court of Kentucky recently approved a procedure where the buyer was

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> normal or otherwise comparable prior output or requirements may be tendered or demanded.

[157] Cyril Bath Co. v. Winters Industries, 892 F.2d 465 (6th Cir. 1989) (court awarded lost profits to seller for the minimum amount that the contract had specified to be delivered annually); City of Louisville v. Rockwell Mnfg. Co., 482 F.2d 159 (6th Cir. 1973) (Rockwell awarded damages for unsold and unsalable parking meters manufactured based on a minumum requirements quote in contract).

[158] U.C.C. § 2-719(1)(b) (1991) provides:.

> Subject to the provisions of subsections (2) and (3) of this section and of the preceding question and on liquidation and limitations of damages, resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

[159] 461 N.E.2d 1049 (Ill. Ct. App. 1984).

[160] *Id.* at 1056.

[161] *Id.* at 1054.

[162] Carney, *supra* note 79, at 9-14.

permitted to deposit contract payments into court for nearly five years and avoid even a breach of contract claim while the seller was forced to continue shipping coal until bankrupt.[163] The importance of protecting a seller from such a result through specific contract language cannot be overstated.

CONCLUSION

The 1990 Clean Air Act Amendments and their acid rain provisions will likely spawn extensive litigation on force majeure and other clauses in long-term supply contracts. Utilities faced with a hostile regulatory environment have an incentive to seek a court order rather than negotiate a compromise if existing coal supply contracts are inconsistent with emission reductions. Litigation or arbitration over the meaning of weasel words will be expensive for buyers, sellers and consumers alike. If the contract has been carefully drafted with enough specificity to shift the risk of environmental legislation to the seller, a declaration of force majeure by a utility based upon the acid rain legislation should be upheld. In all other situations, it is dangerous to predict any outcome, but the likelihood of excuse from performance of the contract obligations appears slim.

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[163] Kentucky Util. Co. v. South E. Coal Co., slip op. at 20-23 (Ky. June 4, 1992). *See supra* note 9.