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Mission Impracticable: The Impossibility of Commercial Impracticability

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Mission Impracticable: The Impossibility of Commercial Impracticability

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INTRODUCTION

Residents of Chicago’s Streeterville neighborhood certainly cannot forget the recent financial crisis thanks to a gaping hole in their midst.¹ That hole is to be the

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¹ For a discussion of the global financial and credit crisis, see *The Origins of the Financial Crisis: Crash Course*, THE ECONOMIST, Sept. 7, 2013, <http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article> [hereinafter *Financial Crisis: Crash Course*]; Martin Neil Bailly et al., *The Origins of the Financial Crisis*, in FIXING FINANCE

home of the Spire, the tallest building in the Northern Hemisphere, at 2,000 feet high with 1,194 residences ranging in price from \$750,000 for a studio to \$40 million for the penthouse.²

The developer, Shelbourne Development Group, Inc., began construction in 2007 using its own funds.³ It also obtained “starter” funds from Bank of America via a loan agreement that required Shelbourne to demonstrate proof of a construction loan by November 1, 2008.⁴ Although Shelbourne sold thirty percent of the building, it could not obtain construction financing due to the worsening global financial and credit crisis.⁵ Bank of America declared the loan in default and sued Shelbourne for the outstanding principal, interest, and fees.⁶ As part of its defense, Shelbourne argued that the court should excuse it (temporarily) from providing proof of a construction loan, due to the “unforeseeable and unprecedented economic downturn and recession, particularly in the real estate market.”⁷

Historically, parties like Shelbourne had to perform their obligations absolutely and without excuse.⁸ This principle, known as *pacta sunt servanda*, was a mainstay in English contract law and

SERIES PAPER 3 2008, at 10 (Initiative on Bus. and Pub. Policy at Brookings, Nov. 2008), available at

http://www.brookings.edu/~media/research/files/papers/2008/11/origin%20crisis%20baily%20litan/11_origins_crisis_baily_litan.pdf.

² *BofA Suing Spire Builder Says Shelbourne in Default on Loan*, CHI. TRIB., Aug. 14, 2009, available at 2009 WLNR 15844191; Robert Manor, *30% of Spire’s Condo’s are Sold, Mark Shows It Will Be Built, Developer Says*, CHI. TRIB., June 4, 2008, available at 2008 WLNR 10529156; *New Details Emerge About Spire Project*, CHI. TRIB., Mar. 13, 2007, available at 2007 WLNR 4787917.

³ Manor, *supra* note 2.

⁴ Complaint ¶ 6, *Bank of Am., N.A. v. Shelbourne Dev. Grp., Inc.*, 732 F. Supp. 2d 809, 826–28 (N.D. Ill. 2010) (No. 09CV04963), 2009 WL 4695857.

⁵ Defendant Shelbourne Dev. Grp., Inc.’s Response to Plaintiff’s Complaint ¶ 7, *Bank of Am., N.A.*, 732 F. Supp. 2d, at 826–28 [hereinafter Response]

⁶ Complaint, *supra* note 4, at ¶ 8–10.

⁷ Response, *supra* note 5, at ¶ 33.

⁸ Paula Walter, *Commercial Impracticability in Contracts*, 61 ST. JOHN’S L. REV. 225, 225 (1987); Aaron Wright, Comment, *Rendered Impracticable: Behavioral Economics and the Impracticability Doctrine*, 26 CARDOZO L. REV. 2183, 2187 (2005); e.g., *Paradine v. Jane*, 82 Eng. Rep. 897 (K.B. 1647).

naturally travelled over the Atlantic Ocean into American contract law.⁹

Both English and American courts adhered strictly to this principle until the early seventeenth century when they began to excuse parties from a contract when performance became impossible due to death.¹⁰ Over the next two centuries, courts only marginally expanded the excuse to include any circumstance rendering performance truly impossible.¹¹

When the National Conference of Commissioners on Uniform State Laws (the “Commissioners”) recommended the adoption of the Uniform Sales Act (the “USA”) in 1906,¹² the USA only provided for excuse due to absolute impossibility.¹³ However, contractual excuse made an about-face in *Mineral Park Land Co. v. Howard*¹⁴ in 1916, when the court broadened the legal definition of impossibility to include not only those actions that a party literally could not perform, but also those actions that were impracticable for a party to

⁹ Walter, *supra* note 8, at 225; *see, e.g.*, *Phillips v. Stevens*, 16 Mass. 238, 240–41 (1819); *Fowler v. Bott*, 6 Mass. 63, 66 (1809).

¹⁰ E. ALLEN FARNSWORTH, *CONTRACTS* 621 (Erwin Chemerinsky et al. eds., 4th ed. 2004) (citing *Williams v. Lloyd*, 82 Eng. Rep. 95 (K.B. 1629)); *see Beebe v. Johnson*, 19 Wend. 500 (N.Y. Sup. Ct. 1838); *Singleton v. Carroll*, 6 J.J. March. 527 (Ky. 1831).

¹¹ *E.g.*, *The Harriman*, 76 U.S. 161, 172 (1869); *Beebe*, 19 Wend. at 502. Both *The Harriman* and *Beebe* noted the distinction between true impossibility and mere impracticability. *The Harriman*, 76 U.S. at 172 (“If a condition be to do a thing which is impossible, as to go from London to Rome in three hours, it is void; but if it be to do a thing which is only improbable or absurd, or that a thing shall happen which is beyond the reach of human power, as that it will rain to-morrow, the contract will be upheld and enforced.”); *Beebe*, 19 Wend. at 502 (“[I]f the covenant be within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld. . . . To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for, if it is only improbably, or out of the power of the obligor, it is not in law deemed impossible.”).

¹² William E. McCurdy, *Uniformity and a Proposed Federal Sales Act*, 26 VA. L. REV. 572, 574 (1940).

¹³ Marianne M. Jennings, *Commercial Impracticability – Does It Really Exist?*, 2 WHITTIER L. REV. 241, 245 (1980); Michael A. Schmitt & Bruce A. Wollschlager, *Section 2-615 “Commercial Impracticability”: Making the Impracticable Practicable*, 81 COM. L.J. 9, 9 (1976).

¹⁴ *Mineral Park Land Co. v. Howard*, 156 P. 458 (Cal. 1916).

perform due to an unreasonable and excessive cost.¹⁵ Thus, the excuse of commercial impracticability was born.¹⁶

Although the relatively new excuse of commercial impracticability appeared in the Restatement (First) of Contracts in 1932,¹⁷ courts seldom permitted excuse from a contract due to commercial impracticability.¹⁸ Much of this reluctance stemmed from the theory that courts should protect the sanctity of contracts, and avoid interfering with the agreement of the parties.¹⁹ Additionally, courts believed a party's ability to rely on the terms of a contract is important to economic stability, as a party would pause to enter into a contract if she knew the court could rescind it.²⁰

Hoping to make commercial impracticability more available, the Commissioners drafting Article 2 of the Uniform Commercial Code (the "UCC"), to replace the USA, added the excuse of commercial impracticability to the 1943 draft.²¹ After the section underwent

¹⁵ *Id.* at 460 ("A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.") (citation omitted).

¹⁶ Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for 'The Wisdom of Solomon'*, 135 U. PA. L. REV. 1123, 1132–33 (1987).

¹⁷ RESTATEMENT (FIRST) OF CONTRACTS § 457 (1932) ("[W]here, after the formation of a contract, facts that a promisor had no reason to anticipate, and for the occurrence of which he is not in contributory fault, render performance of the promise impossible, the duty of the promisor is discharged."). On first glance, section 457 only excuses a party due to impossibility, but section 454 defines impossibility to include impracticability. *Id.* § 454 ("[I]mpossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficult, expense, injury or loss.").

¹⁸ William D. Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75, 77 (1974); John D. Wladis, *Impracticability as Risk Allocation: The Effect of Changed Circumstances Upon Contract Obligations for the Sale of Goods*, 22 GA. L. REV. 503, 518–20 (1988); see Schmitt & Wollschlager, *supra* note 13, at 11.

¹⁹ H. Ward Classen, *Judicial Intervention in Contractual Relationships Under the Uniform Commercial Code and Common Law*, 42 S.C. L. REV. 379, 405 (1991); George Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 NOTRE DAME L. REV. 203, 218 (1979).

²⁰ Classen, *supra* note 19, at 405.

²¹ Stephen G. York, *Re: The Impracticability Doctrine of the U.C.C.*, 29 DUQ. L. REV. 221, 251–52 (1991); Hawkland, *supra* note 18, at 77; Wallach, *supra* note 19, at 203.

minor changes during the drafting process, the section on commercial impracticability has remained the same since the promulgation of the UCC in 1950.²² Section 2-615 reads, in part:

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

(a) Delay in delivery or non-delivery 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 made²³

When the American Law Institute updated the Restatement of Contracts in 1981,²⁴ it included a revision of the section on commercial impracticability.²⁵ Taking a cue from section 2-615(a), section 261 of the Restatement (Second) of Contracts (the “Restatement”) states:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.²⁶

²² Wladis, *supra* note 18, at 566.

²³ U.C.C. § 2-615 (2013).

²⁴ *Publications Catalog: Restatement Second, Contracts*, AMERICAN LAW INSTITUTE, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=29 (last visited Oct. 11 2013, 2:15 PM) (“Restatement Second, Contracts, constitutes a thorough revision and updating of the original 1932 Restatement. It embodies additions inspired by the Uniform Commercial Code and improves the black-letter formulations by altering the order or scope of topics to enhance clarity or reduce redundancy.”).

²⁵ RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

²⁶ RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). For a thorough discussion regarding the changes on commercial impracticability from the Restatement (First) of Contracts to the Restatement (Second) of Contracts, see

Regardless of whether section 2-615 or the common law applies, courts generally require some variation of the following elements: (1) an event occurred making performance impracticable; (2) the non-occurrence of that event must have been a basic assumption on which the parties formed the contract; (3) the event was not caused by the party seeking excuse; and (4) the risk of the event occurring was not allocated to the party seeking excuse.²⁷

Despite the hope that section 2-615 and section 261 would lead to wide acceptance of commercial impracticability both under Article 2 and the common law, courts continue to rarely excuse a party under the doctrine of commercial impracticability.²⁸ Even more rare, are judicial decisions discussing commercial impracticability in any meaningful way.²⁹ The few cases that do discuss it developed muddled and inconsistent rules, leading to an unpredictable and confusing doctrine that fails to serve its intended purpose.

Accordingly, this article comprehensively analyzes commercial impracticability, revealing its many faults. It then provides a recommendation to simplify and unify the interpretation and application of the doctrine across contract law.

Part I presents examples of commercial impracticability that demonstrate the current judicial interpretation and application across jurisdictions, which almost always disfavor excuse due to commercial impracticability.

Part II presents the various faults associated with the current construction and application of commercial impracticability. First, the vague and incongruent language of Article 2 and the Restatements results in inconsistent judicial decisions and, therefore, uncertainty surrounding the application of commercial impracticability. Second, the generally accepted use of foreseeability as a key inquiry is unfounded, as neither Article 2 nor the Restatements require an event to be unforeseeable in order to

Deborah L. Jacobs, *Legal Realism or Legal Fiction? Impracticability Under the Restatement (Second) of Contracts*, 87 COM. L.J. 289 (1982).

²⁷ E.g., *Dell's Maraschino Cherries Co. v. Shoreline Fruit Growers, Inc.*, 887 F. Supp. 2d 459 (E.D.N.Y. 2012); *Bank of Am., N.A.*, 732 F. Supp. 2d at 827.

²⁸ Wallach, *supra* note 19, at 213.

²⁹ See Hawkland, *supra* note 18, at 79–80.

seek excuse under commercial impracticability. Even if foreseeability were included in Article 2 or the Restatements, such inclusion would be improper. The failure to allocate a foreseeable risk does not mean the parties meant to allocate that risk to the obligor; the parties may not have actually foreseen the foreseeable event or were unable to agree upon risk placement due to time, money, or disagreement. Behavioral economics concepts such as bounded rationality, confirmation bias, and hindsight bias also demonstrate that the emphasis on foreseeability is misguided and unworkable. Third, the narrow construct of commercial impracticability flouts the intent of the drafters of both Article 2 and the Restatements, who intended a liberal interpretation and application.

Part III presents and critiques previous recommendations for improvement to commercial impracticability, focusing on two of the most common: the superior risk bearer test and judicial loss allocation. While these proposals arguably may improve commercial impracticability, they fail to address the root issues related to its construction and inconsistent application.

Part IV recommends a complete revision of commercial impracticability, by providing suggested language and the justifications for the revision based on law, policy, and practice.

I. IMPRACTICABILITY IN PRACTICE

Most commercial impracticability cases correlate to some significant national or international economic crisis, and almost always decline to permit excuse under commercial impracticability.³⁰ The first set of decisions arose from the closure of the Suez Canal.³¹ Due to a conflict in the Middle East, the Suez Canal closed from November 2, 1956, to April 9, 1957.³² Shipping

³⁰ See Hawkland, *supra* note 18 at 79–80 (noting that, as of 1974, only five decisions relied on section 2-615).

³¹ Robert L. Birmingham, *A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory*, 20 HASTINGS L.J. 1393, 1400 (1969); Wallach, *supra* note 19, at 213.

³² Birmingham, *supra* note 31, at 1400. In July 1956, the Egyptian government took control of the Suez Canal. *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 314 (D.C. Cir. 1966). A few months later, Israel invaded Egypt followed

companies who entered into contracts prior to the closure encountered financial hardship as a result of the closure; changing their route from the Suez Canal to the Cape of Good Hope unexpectedly added thousands of miles and, thus, thousands of dollars to the cost.³³

Many of these shipping companies sought excuse from their performance obligations under commercial impracticability.³⁴ Despite the added distance and expenditure, courts refused to excuse these shippers from their obligations.³⁵ Because of the political climate in the Middle East, parties with business interests in the area knew the Suez Canal could be affected negatively.³⁶ This foreseeability, along with the availability of alternative shipping routes, prevented the shippers from excuse under commercial impracticability.³⁷

The second round of substantial judicial discussion regarding commercial impracticability arose as a result of the oil crisis of the 1970s.³⁸ Due to a war in the Middle East, the Organization of the Petroleum Exporting Countries (“OPEC”) imposed an embargo on

shortly by Great Britain and France. *Id.* Egypt responded by closing the Suez Canal. *Id.*

³³ Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUDIES 83, 103 (1977). By using the Suez Canal instead of the Cape of Good Hope, which is south of Africa, a ship may reduce its voyage anywhere from 3,315 miles to 9,887 miles. *Saving in Time and Distance via the Suez Canal*, SUEZ CANAL AUTH., <http://www.suezcanal.gov.eg/sc.aspx?show=11> (Jan. 22, 2014, 7:19 PM); see Birmingham, *supra* note 31, at 1401.

³⁴ Posner & Rosenfield, *supra* note 33, at 103–04; e.g., *Transatlantic Fin. Corp.*, 363 F.2d 312; *Glidden Co. v. Hellenic Lines, Ltd.*, 275 F.2d 253 (2d Cir. 1960). The closure of the Suez Canal also led to many cases in Great Britain seeking excuse under commercial impracticability. E.g., *Ocean Tramp Tankers Corp. v. v/o Sovfracht*, 2 Q.B. 226 (1964); *Societe Franco Tunisienne d’Armement v. Sidermar S.P.A.*, 2 Q.B. 278 (1960); see Birmingham, *supra* note 31, at 1400–02.

³⁵ E.g., *Am. Trading & Prod. Co. v. Shell Int’l Marine Ltd.*, 343 F. Supp. 91, 95 (S.D.N.Y. 1971), *aff’d* 453 F.2d 939 (2d Cir. 1972); *Transatlantic Fin. Corp.*, 363 F.2d at 320; *Glidden*, 275 F.2d at 257.

³⁶ *Transatlantic Fin. Corp.*, 363 F.2d at 318–19.

³⁷ *Am. Trading*, 343 F. Supp. at 95–96.

³⁸ See, e.g., *Freidco of Wilmington Del., Ltd. v. Farmers Bank of Del.*, 529 F. Supp. 822, 824 (D. Del. 1981); *Helms Constr. & Dev. Co. v. Nev. ex rel. Dep’t of Highways*, 634 P.2d 1224, 1225 (Nev. 1981).

the exportation of crude oil to countries “sympathetic to Israel.”³⁹ After OPEC lifted the embargo, it increased the price of crude oil by 400 percent over a four-month period.⁴⁰ The embargo followed by the sharp inflation led to a shortage of oil, and exorbitant prices for what oil was available.⁴¹ Like the Suez Canal cases, courts found the oil crisis foreseeable due to the constant interference with the trade of oil, and refused to excuse parties affected by the shortage and high prices from their contractual obligations.⁴²

The most recent set of decisions involving commercial impracticability stemmed from the recent global financial and credit crisis.^{43ahr} Like the developer of the Chicago Spire, individuals and organizations sought excuse from their contractual obligations due to commercial impracticability, arguing that the global financial and credit crisis prevented payment as required under their contracts.⁴⁴ Courts resoundingly rejected the defense because fluctuations in market conditions or the financial viability of a party are events expressly excluded by both sections 2-615 and 261.⁴⁵

³⁹ *E. Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 433–34 (S.D. Fla. 1975).

⁴⁰ *Id.* at 434.

⁴¹ Richard W. Duesenberg, *Contract Impracticability: Courts Begin to Shape § 2-615*, 32 BUS. LAW. 1089, 1093 (1977).

⁴² *E.g.*, *Helms Constr. & Dev. Co.*, 634 P.2d at 1225; *E. Air Lines, Inc.*, 415 F. Supp. at 440–42.

⁴³ *E.g.*, *Great Lakes Gas Transmission Ltd. P’ship v. Essar Steel Minn., LLC*, 871 F. Supp. 2d 843, 856–58 (D. Minn. 2012); *Howard Johnson Int’l, Inc. v. M.D.1, LLC*, No. 11 C 2593, 2012 WL 5199634, at *3 (N.D. Ill. Oct. 19, 2012); *Bank of Am., N.A.*, 732 F. Supp. 2d at 826–28; *Twin Holdings of Del. LLC v. CW Capital, LLC*, No. 005193/09, 26 Misc. 3d 1214(A), *5–6 (N.Y. App. Div. Jan. 19, 2010). For a discussion of the global financial and credit crisis, see *Financial Crisis: Crash Course*, *supra* note 1; Baily et al., *supra* note 1.

⁴⁴ *Supra* note 25

⁴⁵ *E.g.*, *Great Lakes Gas Transmission Ltd. P’ship*, 871 F. Supp. 2d at 858; *Howard Johnson Int’l, Inc.*, 2012 WL 5199634 at *3; *Bank of Am., N.A. v. Shelbourne Dev. Group, Inc.*, No. 09C4963, 2011 WL 829390, at *4-5 (N.D. Ill. Mar. 3, 2011); *Twin Holdings of Del. LLC*, 26 Misc. 3d at *5–6. Both section 2-615 and section 261 contain comments that expressly prohibit a commercial impracticability defense for market conditions. U.C.C. § 2-615 cmt. 4 (2013) (“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.”); RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b (1981) (“The continuation of existing market conditions and of the financial situations of

II. IMPRACTICABLE COMMERCIAL IMPRACTICABILITY

Commercial impracticability arose out of the necessity for excuse from contractual obligations, in order to achieve the underlying purpose of the contract and to achieve fairness. Despite these noble objectives, commercial impracticability developed into a narrowly applied, unpredictable doctrine based on vague and inconsistent language. The requirement that the supervening event was unforeseeable is unfounded statutorily, theoretically, and practically. Neither Article 2 nor the Restatement refers to foreseeability, and neither precludes excuse under commercial impracticability due to the foreseeability of the supervening event. Nevertheless, the inquiry into foreseeability is fraught with incorrect assumptions about how parties allocate risks, failing to account for the circumstances surrounding the contract formation and the effect of human psychology on risk assessment and allocation.

A. Linguistic Impracticability

The drafters of both Article 2 and the Restatement purposely omitted a definition of “impracticable,” leaving the task to the courts.⁴⁶ Unfortunately, judges have defined “impracticable” with equally vague terms such as “commercial senselessness”⁴⁷ and “excessive and unreasonable cost,”⁴⁸ creating inconsistency and uncertainty as to what constitutes impracticability.⁴⁹ Although

the parties are ordinarily not such assumptions, so that mere market shifts or financial ability do not usually effect discharge.”).

⁴⁶ U.C.C. § 2-615 cmt. 2 (2013) (“The present section deliberately refrains from any effort at an exhaustive expression of contingencies.”); RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. a (1981) (“But, like Uniform Commercial Code § 2-615(a), this Section states a principle broadly applicable to all types of impracticability.”); Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 RUTGERS L.J. 343, 348 (1996); Steven Walt, *Expectations, Loss Distribution and Commercial Impracticability*, 24 IND. L. REV. 65, 65–66 (1990).

⁴⁷ See, e.g., *Natus Corp. v. United States*, 371 F.2d 450, 457 (Ct. Cl. 1967).

⁴⁸ Classen, *supra* note 19, at 385; e.g., *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 277 (4th Cir. 1987); *Asphalt Int’l, Inc. v. Enter. Shipping Corp., S.A.*, 667 F.2d 261, 266 (2d Cir. 1981); *Natus Corp.*, 371 F.2d at 456; *Mineral Park Land Co.*, 156 P. at 460.

⁴⁹ Henry Chajet, Comment, *Contractual Excuse Based on a Failure of Presupposed Conditions*, 14 DUQ. L. REV. 235, 251 (1976); Jennings, *supra* note

courts indicate that unprofitability or financial burden is insufficient for excuse,⁵⁰ no quantitative standards exist to understand when unprofitability becomes impracticability.⁵¹ Anything less than 100 percent cost increase appears almost conclusively insufficient,⁵² but, beyond that, courts vary wildly as to what is sufficient.⁵³

Additionally, the UCC version of commercial impracticability, section 2-615, only references the seller,⁵⁴ thus, technically rendering commercial impracticability unavailable to buyers.⁵⁵ However, Comment 9 suggests that commercial impracticability may be available to buyers as well.⁵⁶ The Commissioners purposely

13, at 254; see Richard E. Speidel, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management*, 32 S.C. L. REV. 241, 267 (1980); Richard S. Wirtz, *Revolting Developments*, 91 OR. L. REV. 325, 348 (2012).

⁵⁰ E.g., *Neal-Cooper Grain Co. v. Tex. Gulf Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974); *Schafer v. Sunset Packing Co.*, 474 P.2d 529, 530 (Ore. 1970).

⁵¹ Gerald T. McLaughlin, *Unconscionability and Impracticability: Reflections on Two U.C.C. Indeterminacy Principles*, 14 LOY. L.A. INT'L & COMP. L.J. 439, 450 (1992); Posner & Rosenfield, *supra* note 33, at 86; Alan O. Sykes, *The Doctrine of Commercial Impracticability in a Second-Best World*, 19 J. LEGAL STUD. 43, 75 (1990); Speidel, *supra* note 49, at 267. Professor Dick Speidel argues that a quantitative inquiry for commercial impracticability is improper. *Id.* He suggests that courts instead should examine the extent to which performance differs from the agreed performance as well as the amount of undeserved gain, if any, the buyer receives without excuse. *Id.* at 266–68.

⁵² *Am. Trading & Prod. Corp. v. Shell Int'l Marine Ltd.*, 453 F.2d 939, 942 (2d Cir. 1972) (one-third cost increase insufficient); *Transatlantic Fin. Corp.*, 363 F.2d at 319 (\$43,972 cost increase on contract of \$304,843 insufficient); see, e.g., *Aluminum Co. of Am. v. Essex Grp., Inc.*, 499 F. Supp. 53, 73–76 (W.D. Pa. 1980) (finding \$60 million loss sufficient); *Iowa Elec. Light and Power v. Atlas Corp.*, 467 F. Supp. 129, 140 (N.D. Iowa 1978) *rev'd*, 603 F.2d 1301 (8th Cir. 1979) (finding 52% cost increase insufficient); *Publicker Indus. Inc. v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. 989, 992 (E.D. Pa. 1975).

⁵³ Wallach, *supra* note 19, at 217; Walt, *supra* note 46, at 67; see, e.g., *Publicker Indus. Inc.*, 17 U.C.C. Rep. Serv. At 992 (\$5.8 million loss over life of contract sufficient); *Wilson & Co. v. Fremont Cake & Meal Co.*, 43 N.W.2d 657, 667 (Neb. 1950) (double costs insufficient).

⁵⁴ U.C.C. § 2-615 (2013) (“Except so far as a seller may have assumed a greater obligation...”).

⁵⁵ Thomas Black, *Sales Contracts and Impracticability in a Changing World*, 13 ST. MARY’S L.J. 247, 257 (1981); see Posner & Rosenfield, *supra* note 33, at 109.

⁵⁶ U.C.C. § 2-615 cmt. 9 (2013); Black, *supra* note 55, at 257; Richard W. Duesenberg, *Exiting from Bad Bargains via U.C.C. Section 2-615: An Impracticable Dream*, 1 UCC L.J. 32, 34–35 (1980) [hereinafter *Exiting from Bad Bargains*]; Duesenberg, *supra* note 41, at 1091.

drafted section 2-615 in this manner given the uncertainty of the common law at that time regarding a buyer's ability to invoke commercial impracticability.⁵⁷

Regardless of the rationale, this linguistic conflict has led to a split among courts as to whether a buyer may claim commercial impracticability as an excuse to performance.⁵⁸ Some courts only look to the language of section 2-615 to prevent a buyer's excuse under commercial impracticability,⁵⁹ while others read the section in conjunction with the Official Comments to allow a buyer to seek excuse under commercial impracticability.⁶⁰

The Mississippi legislature recognized this inconsistency and revised section 2-615 to expressly include buyers.⁶¹ Interestingly, the Permanent Editorial Board (the "PEB") for the UCC criticized this revision.⁶² Without providing examples or even hypotheticals, the PEB quickly dismissed the addition, stating that including buyers in section 2-615 could result in "excuse in inappropriate cases."⁶³ This concern is unfounded as it merely gives a buyer the *opportunity* to seek excuse under commercial impracticability; the buyer still must meet the requirements of section 2-615.⁶⁴

⁵⁷ Posner & Rosenfield, *supra* note 33, at 109.

⁵⁸ See, e.g., *Int'l Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 884 (10th Cir. 1985).

⁵⁹ E.g., *Ky. Util. Co. v. S. E. Coal Co.*, 836 S.W.2d 392, 397 (Ky. 1992); see *N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co.*, 799 F.2d 265, 277 (7th Cir. 1986).

⁶⁰ E.g., *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 748 (Iowa 1976); *N. Ill. Gas Co. v. Energy Coop., Inc.*, 122 Ill. App. 3d 940, 954 (Ill. App. Ct. 1984).

⁶¹ MISS. CODE ANN. § 75-2-615(d) (West 2014). Mississippi currently is the only state to revise section 2-615 to include buyers. U.C.C. LOCAL CODE VARIATIONS § 2-615 (West 2013).

⁶² Arthur Nakazato, Comment, *Uniform Commercial Code Section 2-615: Commercial Impracticability from the Buyer's Perspective*, 51 TEMP. L.Q. 518, 547 (1978). The PEB oversees the drafting of the UCC and recommends revisions. *Permanent Editorial Board for Uniform Commercial Code*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Committee.aspx?title=Permanent%20Editorial%20Board%20for%20Uniform%20Commercial%20Code> (last visited Jan. 24, 2014).

⁶³ Brian S. Conneely & Edmond P. Murphy, Comment, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137, 183–84 (1976); Nakazato, *supra* note 62, at 547.

⁶⁴ Conneely & Murphy, *supra* note 63, at 184; Nakazato, *supra* note 62, at 547–48 (discussing why section 2-615 should expressly include buyers).

The failure to define “impracticable,” and the conflict over whether a buyer is allowed excuse due to commercial impracticability, results in an inconsistent application of commercial impracticability. Inconsistent application creates unpredictability, which often leads parties to spend additional time and money during the contracting phase to eliminate the unpredictability.⁶⁵ Moreover, vague and incongruent provisions are in opposition to the stated objective of the UCC, which is “to simplify, clarify, and modernize the law governing commercial transactions.”⁶⁶

B. *Unforeseen Impracticability*

A key judicial inquiry in the evaluation of commercial impracticability is whether the event was foreseeable at the time of contracting.⁶⁷ The focus on foreseeability stems from the theory that a party would, or should, protect itself from a foreseeable event by adjusting the contract price or obtaining insurance to cover the risk of the event’s occurrence.⁶⁸

This fixation with foreseeability as the crux of commercial impracticability is unwarranted and inappropriate. First, the foreseeability test is not derived from the language of section 2-615 or Restatement section 261.⁶⁹ Neither section expressly or implicitly requires, or even suggests, that the event be unforeseeable in order for a party to seek excuse under commercial impracticability.⁷⁰

⁶⁵ Sykes, *supra* note 51, at 72–73.

⁶⁶ U.C.C. § 1-103(a) (2013).

⁶⁷ *Rockland Indus., Inc. v. E+E (US) Inc., Manley-Regan Chems. Div.*, 991 F. Supp. 468, 472 (D. Md. 1998), *reconsidered in part*, 1 F. Supp. 2d 528 (D. Md. 1998).

⁶⁸ *Waldinger Corp. v. CRS Grp. Eng’rs., Inc., Clark Dietz Div.*, 775 F.2d 781, 786 (7th Cir. 1985); *Exelon Generation Co., LLC v. Gen. Atomics Techs. Corp.*, 559 F. Supp. 2d 892, 901 (N.D. Ill. 2008); John Elofson, *The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests*, 30 COLUM. J.L. & SOC. PROBS. 1, 4 (1996).

⁶⁹ York, *supra* note 21, at 229.

⁷⁰ Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 NW. U. L. REV. 1032, 1038 (1978) [hereinafter *Contractual Flexibility*]; Thomas R. Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under U.C.C. Section 2-615*, 54 N.C. L. REV. 545, 569 (1976); York, *supra* note 21, at 229.

Indeed, the Comments to section 261 expressly reject foreseeability as a conclusive element of commercial impracticability.⁷¹

Courts applying section 2-615 often point to Comment 1 of section 2-615 to justify the use of foreseeability,⁷² which states: “This section excuses a seller...where his performance had become commercially impracticable because of *unforeseen* supervening circumstances not within the contemplation of the parties at the time of contracting.”⁷³ However, a distinct difference exists between “unforeseen,” which is utilized in Comment 1 to section 2-615, and “unforeseeable,” which is utilized by courts.⁷⁴

Unforeseen means that the parties did not actually anticipate the event, while unforeseeable means the event was not capable of being anticipated.⁷⁵ Comment 1 hints at this distinction by its language “not within the contemplation of the parties at the time of contact.”⁷⁶ Using foreseeable and not foreseen significantly matters. Rather than inquire into whether the parties *actually* anticipated the event, courts incorrectly look to whether the parties *should have* anticipated the event.⁷⁷ Given the continuous economic fluctuations, political disruptions, and natural disasters of today’s world, most every event is foreseeable, but not necessarily foreseen, virtually eliminating the application of commercial impracticability.⁷⁸

The second flaw of the foreseeability test stems from the underlying rationale that contracts generally allocate foreseeable

⁷¹ RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. b (“The fact that the event was foreseeable, or even foreseen, does not necessarily compel a conclusion that its occurrence was not a basic assumption.”).

⁷² See, e.g., *Heat Exchangers, Inc. v. Map Constr. Corp.*, 34 Md. App. 679, 682 (Md. Ct. Spec. App. 1977).

⁷³ U.C.C. § 2-615, cmt. 1 (emphasis added).

⁷⁴ *Contractual Flexibility*, *supra* note 70, at 1039; *York*, *supra* note 21, at 229–30.

⁷⁵ Classen, *supra* note 19, at 407–08; OXFORD DICTIONARY, “*Unforeseen*” vs. “*Unforeseeable*”, www.oxforddictionaries.com (last visited April 2, 2014) (defining unforeseen as “not anticipated or predicted” while unforeseeable defined as “not able to be anticipated or predicted.”).

⁷⁶ U.C.C. § 2-615 cmt. 1; *Contractual Flexibility*, *supra* note 70, at 1039.

⁷⁷ See, e.g., *Bende & Sons, Inc. v. Crown Recreation, Inc.*, 548 F. Supp. 1018, 1022 (E.D.N.Y. 1982) *aff’d*, 722 F.2d 727 (2d Cir. 1983); *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 517 F. Supp. 440, 454 (E.D. Va. 1981).

⁷⁸ Classen, *supra* note 19, at 408; Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 479 (1985).

risks of performance to the obligor;⁷⁹ thus, if an event were foreseeable, the parties would have allocated the risk to the obligor.⁸⁰ Failure to allocate a foreseeable risk does not necessarily lead to the conclusion that the parties would have allocated that risk to the obligor.⁸¹ The lack of risk allocation could be due to numerous facts, including that the parties did not foresee the foreseeable risk or the parties' inability to reach an agreement due to time, cost or bargaining power.⁸²

Behavioral economics also may explain why parties have not allocated a foreseeable risk. A relatively young field of study, behavioral economics evaluates the effect of human psychology on economic theory "to improve the predictive power of...economics by building in more realistic accounts of actors' behavior"⁸³ than neoclassical economics.⁸⁴

A fundamental theory within behavioral economics is bounded rationality.⁸⁵ Developed by Nobel Prize winning psychologist and economist Herbert Simon, bounded rationality provides that individuals possess limited cognitive resources to process relevant

⁷⁹ *E.g.*, *Lloyd v. Murphy*, 153 P.2d 47, 50 (Cal. 1944) ("The purpose of a contract is to place the risk of performance upon the promisor.").

⁸⁰ *Waldinger Corp.*, 775 F.2d at 786; Classen, *supra* note 19, at 409; Duesenberg, *supra* note 40, at 43; Eloffson, *supra* note 68, at 4; York, *supra* note 21, at 231.

⁸¹ *Transatlantic Fin. Corp.*, 363 F.2d at 318 ("Foreseeability or even recognition of a risk does not necessarily prove its allocation."); *see* Hurst, *supra* note 70, at 567.

⁸² *Contractual Flexibility*, *supra* note 70, at 1040; Eloffson, *supra* note 68, at 5; Richard E. Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369, 373 (1981) [hereinafter *Court-Imposed Price Adjustments*]; Walt, *supra* note 46; York, *supra* note 21, at 231; *see* Speidel, *supra* note 49, at 242. The drafters of the Restatements even acknowledge that "foreseeable" and "foreseen" do not lead to the conclusion that the parties meant for the risk of the event's occurrence to remain with the promisor. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. c (1981) ("Factors such as the practical difficulty of reaching agreement on the myriad of conceivable terms of a complex agreement may excuse a failure to deal with improbably contingencies.").

⁸³ Christine Jolls, *Behavioral Law and Economics*, BEHAVIORAL ECONOMICS AND ITS APPLICATIONS 115, 116 (Peter Diamond & Hannu Vartiainen eds., 2007).

⁸⁴ Christine Jolls, et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1475 (1998); Wright, *supra* note 8, at 2200–01, 2209. For an explanation of the fundamentals of behavioral economics as well as some legal applications, *see* Jolls, *supra* note 83; Jolls et al., *supra* note 84.

⁸⁵ Wright, *supra* note 8, at 2200-01.

information and make decisions.⁸⁶ These cognitive limitations result in various behavioral biases during the decision-making process, including confirmation bias, over-optimism, and hindsight bias.⁸⁷ These biases likely contribute to the failure to allocate a foreseeable risk by limiting parties' ability to accurately assess the probability of a foreseeable risk occurring.⁸⁸

Confirmation bias provides that an individual only seeks information that supports a favored result.⁸⁹ People unwittingly seek evidence to support their position, or avoid evidence that counters their position.⁹⁰ They avoid information and activities that do not support their choice.⁹¹ In the context of risk allocation, confirmation bias often prevents an individual from changing their initial risk assessment.⁹² Despite new evidence that informs a risk assessment, confirmation bias suggests individuals ignore that evidence, and, therefore, fail to protect themselves in the event the risk occurs.⁹³

Over-optimism likewise hinders individuals' risk assessment.^{ahr} Even when a risk is foreseeable, individuals often are quixotically optimistic about the probability of a negative event affecting them.⁹⁴ Although they know the potential risks associated with the contract, individuals believe that the worst-case scenario will not happen to them, and thus fail to protect themselves within the contract or through other risk management techniques.⁹⁵

⁸⁶ Jolls et al., *supra* note 84, at 1477; Symposium, *Listening to Cassandra: The Difficulty of Recognizing Risks and Taking Action*, 78 *FORDHAM L. REV.* 2329, 2347–48 (2010); Wright, *supra* note 8, at 2201.

⁸⁷ Symposium, *supra* note 86, at 2348; Wright, *supra* note 8, at 2201, 2203.

⁸⁸ Wright, *supra* note 8, at 2206–07.

⁸⁹ Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *REV. OF GEN. PSYCH.* 175, 175 (1998) (“When men wish to construct or support a theory, how they torture facts into their service!”) (citation omitted).

⁹⁰ *Id.*; Wright, *supra* note 8, at 2204.

⁹¹ Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 *LA. L. REV.* 117, 132 (2007).

⁹² Wright, *supra* note 8, at 2204–05.

⁹³ *Id.* at 2205, 2208.

^{ahr} Becher, *supra* note 91, at 147; Wright, *supra* note 8, at 2203–04. For a discussion on studies demonstrating this over-optimism, see Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *STAN. L. REV.* 211, 216–17 (1995).

⁹⁴ *Id.*

⁹⁵ Wright, *supra* note 8, at 2208–09.

The third issue with the foreseeability test also stems from behavioral economics. Hindsight bias indicates that events seem more foreseeable *ex post* than *ex ante*.⁹⁶ When individuals recall the past, their memory is inadvertently clouded with events and knowledge that occurred subsequent to that past.⁹⁷ Because hindsight bias limits an individual's ability to accurately recall what she knew at a particular moment, an inquiry into what was foreseeable at that moment may not produce accurate results.⁹⁸

In experiments conducted by noted psychologist Baruch Fischhoff, subjects consistently recalled giving higher probabilities to events that occurred than they did initially.⁹⁹ Even more telling is that these subjects were unaware of this hindsight bias.¹⁰⁰

In the context of commercial impracticability, judges generally consider the event foreseeable first, and then seek evidence to prove otherwise.¹⁰¹ Because of hindsight bias, it is difficult to provide evidence that the event was not foreseeable.¹⁰² Consequently, hindsight bias hinders the application of commercial impracticability, by making every event seem foreseeable.¹⁰³

⁹⁶ Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. OF EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION AND PERFORMANCE, No. 3, 1975 at 288–99; Baruch Fischhoff et al., *Evolving Judgments of Terror Risk: Foresight, Hindsight, and Emotion*, 11 J. OF EXPERIMENTAL PSYCHOL. 124, 125 (2005) [hereinafter *Evolving Judgments*]; Wright, *supra* note 8, at 2205, 2211.

⁹⁷ *Evolving Judgments*, *supra* note 96 at 125.

⁹⁸ Hurst, *supra* note 70, at 568; Wallach, *supra* note 19, at 215; Walter, *supra* note 8, at 239; see *Evolving Judgments*, *supra* note 93, at 127; Wright, *supra* note 8, at 2211.

⁹⁹ *Evolving Judgments*, *supra* note 96, at 288, 292, 297. In one experiment, Professor Fischhoff randomly assigned subjects to one of two groups. *Id.* at 289. The first group received a brief description of a historical event and a list of four possible outcomes. *Id.* The second group received the same description and list but also told which outcome came to fruition. *Id.* The second group consistently assigned a higher probability of occurrence to the outcome they knew occurred. *Id.* at 289–93.

¹⁰⁰ *Id.* at 297.

¹⁰¹ See *Evolving Judgments*, *supra* note 96, at 298.

¹⁰² *Id.* Wright, *supra* note 8, at 2211.

¹⁰³ Howard O. Hunter, MODERN LAW OF CONTRACTS, § 19:24 (updated Mar. 2013); Hurst, *supra* note 70, at 568.

The emphasis on foreseeability is arguably the biggest defect with commercial impracticability. Regardless of its lack of a linguistic basis, foreseeability simply is not indicative of how parties allocate the risk of a supervening event.¹⁰⁴ Even if it were indicative, hindsight bias limits the ability to accurately determine the foreseeability of an event once the parties and the court know the outcome.¹⁰⁵

C. *Unintentional Impracticability*

Professor Karl Llewellyn, the lead drafter of UCC Article 2, intended Article 2 as a practical approach to commercial law.¹⁰⁶ In the context of section 2-615, he utilized the term “commercial impracticability” rather than the traditional term of “impossibility” in order to broaden the application of excuse due to commercial impracticability.¹⁰⁷

This intent to broaden the availability of commercial impracticability is evident both in the language of section 2-615 and its Official Comments.¹⁰⁸ For example, Comment 3 specifically

¹⁰⁴ Wright, *supra* note 8, at 2207–08.

¹⁰⁵ *Id.* at 2205–06.

¹⁰⁶ Hawkland, *supra* note 18, at 77; York, *supra* note 21, at 235–36, 252; *see* Jennings, *supra* note 13, at 246. Professor Llewellyn, who is often dubbed the “Father of the UCC,” greatly influenced the development of commercial law in the mid-twentieth century. To learn more about Professor Llewellyn and his impact, *see* Charles E. Clark, *Karl Llewellyn*, 29 U. CHI. L. REV. 614 (1962); Arthur L. Corbin, *A Tribute to Karl Llewellyn*, 71 YALE L.J. 805 (1962); Henry Murray et al., *The Poetic Imagination of Karl Llewellyn*, 29 U. TOL. L. REV. 27 (1997); William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIAMI L. REV. 119 (1993). To read a few of Professor Llewellyn’s noted works, *see* KARL LLEWELLYN, *THE BRAMBLE BUSH: ON LAW AND ITS STUDY* (Oxford U. Press 2008); KARL LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (Transaction Publishers 2008); KARL LLEWELLYN, *THE THEORY OF RULES* (Frederick Schauer, ed., U. of Chi. Press 2011); KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (Paul Gewirtz, ed., Michael Ansaldi, trans., U of Chi. Press 1989).

¹⁰⁷ Nakazato, *supra* note 62, at 533; *see* Jennings, *supra* note 13, at 246; Conneely & Murphy, *supra* note 63, at 171.

¹⁰⁸ *Nora Springs Coop. Co.*, 247 N.W.2d at 748; Black, *supra* note 55, at 249; Duesenberg, *supra* note 40, at 1101. Professor Llewellyn intended each UCC section to express its purpose within its language in order to promote uniform judicial application. York, *supra* note 21, at 239.

contrasts commercial impracticability from impossibility and frustration of performance, while Comment 6 permits judges to “use equitable principles in furtherance of commercial standards and good faith.”¹⁰⁹ These excerpts suggest that the Commissioners viewed commercial impracticability more broadly than the common law.¹¹⁰

Professor Llewellyn’s private notes confirm the intent to liberalize commercial impracticability.¹¹¹ Discussing a proposed revision to the USA, which was inserted verbatim into a draft of Article 2, Professor Llewellyn notes the goal of the commercial impracticability provision was to broaden the current availability of commercial impracticability.¹¹² Professor Llewellyn believed the widespread use of *force majeure* clauses in contracts demonstrated that most parties presume excuse when performance becomes commercially impracticable due to certain supervening circumstances.¹¹³

The drafters of section 261 likewise anticipated a broader application of commercial impracticability under the Restatements. Not only is section 261 based largely on section 2-615, comment a expressly relays the intent to liberalize the application: “[L]ike Uniform Commercial Code § 2-615(a), this Section states a principle broadly applicable to all types of impracticability.”¹¹⁴

Despite evidence to broaden commercial impracticability in both Article 2 and the Restatements, the current judicial interpretation and application of commercial impracticability contravenes the intent of the Commissioners.¹¹⁵ Courts continue to apply commercial

¹⁰⁹ U.C.C. § 2-615 cmts. 3, 6. *Nora Springs Coop. Co.*, 247 N.W.2d at 748 (“Comment 3...clearly indicates that this less stringent test was consciously adopted to reflect the commercial character of modern business practice.”); Black, *supra* note 55, at 249–50;; York, *supra* note 21, at 236–39. Courts generally treat the Official Comments akin to legislative history, looking to them for explanation of the history and policy of the UCC. Wladis, *supra* note 18, at 567; York, *supra* note 21, at 237 (citing Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 599 (1966)).

¹¹⁰ York, *supra* note 21, at 238; see *Nora Springs Coop. Co.*, 247 N.W.2d at 748.

¹¹¹ Jennings, *supra* note 13, at 246.

¹¹² *Id.*; Hawkland, *supra* note 18, at 77.

¹¹³ 2 WILLIAM D. HAWKLAND & LINDA J. RUSCH, HAWKLAND UCC SERIES 2-615:1 (Frederick H. Miller, ed., updated Sept. 2014).

¹¹⁴ RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. a.

¹¹⁵ Black, *supra* note 55, at 249–50; Jennings, *supra* note 13, at 246; Wallach, *supra* note 19, at 218.

impracticability narrowly,¹¹⁶ and the few courts that attempt to broaden in accordance with the intent of sections 2-615 and 261 are criticized heavily.¹¹⁷

III. IMPRACTICABLE SOLUTIONS

A number of scholars have suggested alternatives to commercial impracticability, ranging from minor revisions to a complete overhaul.¹¹⁸ Although many of these recommendations arguably improve the current scheme, most only address specific concerns rather than improve the doctrine comprehensively or create new concerns.¹¹⁹ Two of the most referenced and analyzed recommendations are the superior risk bearer test and judicial loss allocation.¹²⁰

A. *Superior Risk Bearer Test*¹²¹

A primary function of a contract is to allocate the inherent risks of the transaction among the parties.¹²² When the parties fail to allocate a particular risk, contract law provide default terms that do

¹¹⁶ *E.g.*, *Barbarossa & Sons v. Iten Chevrolet, Inc.*, 265 N.W. 2d 655 (Minn. 1978); *Neal-Cooper Grain Co.*, 508 F.2d.

¹¹⁷ *E.g.*, John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 BOSTON U. L. REV. 1 (1984).

¹¹⁸ *E.g.*, Christopher J. Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEGAL STUD. 311 (1982); Hurst, *supra* note 70, at 575–83; Posner & Rosenfield, *supra* note 32; Walt, *supra* note 46, at 76–102; Wirtz, *supra* note 48, at 355–56; York, *supra* note 21, at 248–52.

¹¹⁹ *See, e.g.*, Hurst, *supra* note 70, at 575–83 (revision creates rebuttable assumption of placing risk on seller and adds “impossibility”); Walt, *supra* note 46, at 76–102 (revision based on loss distribution principles); Wirtz, *supra* note 48, at 355–56 (revision removes foreseeability and basic assumption); York, *supra* note 21, at 248–52 (revision focuses on comports with intent of drafters).

¹²⁰ *See, e.g.*, Bruce, *supra* note 118; Eloffson, *supra* note 68; Posner & Rosenfield, *supra* note 32; Trakman, *supra* note 78, at 485–86.

¹²¹ This section presents an overview of the superior risk bearer test and its critiques. To read a more in-depth presentation of the superior risk bearer test, see Bruce, *supra* note 118, and Posner & Rosenfield, *supra* note 32. For a detailed critique of the superior risk bearer test, see Eloffson, *supra* note 68; Halpern, *supra* note 16, at 1159–61; Pietro Trimarchi, *Commercial Impracticability in Contract Law: An Economic Analysis*, 11 INT’L REV. L. & ECON. 63 (1991).

¹²² Classen, *supra* note 19, at 409; Posner & Rosenfield, *supra* note 32, at 88.

so for them.¹²³ According to Professor Richard Posner and Andrew Rosenfield, these default terms should achieve economic efficiency (i.e. maximize the value of the transaction and reduce transaction costs) by providing the terms the parties likely would have negotiated.¹²⁴

In the context of commercial impracticability, Posner and Rosenfield argue that economic efficiency occurs when the risk of an event is allocated to the party with the lowest cost of appraising and either preventing or minimizing risks associated with a supervening event.¹²⁵ In other words, the risk of a supervening event should fall upon the superior risk bearer.¹²⁶

To determine which party is the superior risk bearer, courts would examine who had (1) knowledge of the risk, (2) knowledge of the possible magnitude of the risk, (3) knowledge of the probability of the risk materializing, and (4) the ability and cost to minimize the risk or its loss through self-insurance, an insurance policy, or other diversification.¹²⁷ Generally, the obligor is the superior risk bearer under these elements, because it usually is in the better position to understand the risks of performing under the contract, and, therefore, in the better position to prevent or minimize the risk.¹²⁸ The obligee becomes the superior risk bearer only when the obligee could have insured against the risk at a lower cost.¹²⁹

Economics professor Christopher Bruce agrees with Posner and Rosenfield's superior risk bearer test but offers a number of improvements.¹³⁰ First, the evaluation of which party is the superior risk bearer should include an assessment of damage mitigation.¹³¹ In particular, the availability of discharge under commercial impracticability should depend upon each party's attempt to mitigate damages and the results of those attempts.¹³² Second, Professor

¹²³ Posner & Rosenfield, *supra* note 32, at 88–89.

¹²⁴ *Id.* at 88–89, 98.

¹²⁵ *Id.* at 90; *see* Elofson, *supra* note 68, at 8; Halpern; *supra* note 16, at 1158–59; Speidel, *supra* note 49, at 248.

¹²⁶ Posner & Rosenfield, *supra* note 32, at 90.

¹²⁷ *Id.* at 91–92, 117.

¹²⁸ *Id.* at 91–92.

¹²⁹ *Id.*

¹³⁰ Bruce, *supra* note 118, at 311–12.

¹³¹ *Id.* at 315–17, 321–23.

¹³² *Id.* at 316, 321–23.

Bruce suggests a decreased emphasis on the ability of the more knowledgeable party to obtain insurance at a lower cost, because the more knowledgeable party often will circumvent this rule due to an increased bargaining position and shift the burden to the less-informed party.¹³³

Even with Professor Bruce's refinements, the superior risk bearer test is inadequate to remedy the defects of commercial impracticability. The fundamental assumption that parties allocate risks efficiently is incorrect.¹³⁴ First, parties generally do not allocate risk to the party with the best information.¹³⁵ Indeed, as Professor Bruce himself points out, the parties with better information possess greater bargaining power, which enables them to negotiate the risk away to the other party.¹³⁶ This asymmetric information instead leads to inefficiencies due to increased negotiation costs and the obligor's failure to insure.¹³⁷ Second, parties may not allocate risks efficiently due to industry customs, confirmation bias, over-optimism, or willingness to accept a loss in the short term with the hope it will achieve a large profit in future contracts.¹³⁸

Moreover, the superior risk bearer test fails to examine whether the party who could have insured against the loss through self-insurance, an insurance policy, or other diversification actually did so.¹³⁹ That party may have assumed (incorrectly) that the other party was the cheaper insurer¹⁴⁰ or had knowledge that the other party actually obtained insurance despite not being the more efficient insurer. Furthermore, insurance, while not impossible to obtain, is often unworkable due to the difficulty to calculate statistically these uncommon, supervening events without sufficient actuarial data.¹⁴¹

Irrespective of these fundamental defects, the application of the superior risk bearer test is unworkable. Information and insurance

¹³³ *Id.* at 318–20.

¹³⁴ Halpern, *supra* note 16, at 1158, 1165.

¹³⁵ Elofson, *supra* note 68, at 10–11.

¹³⁶ *Id.* at 10.

¹³⁷ Bruce, *supra* note 118, at 318, 320; Sykes, *supra* note 50, at 68.

¹³⁸ Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 626 (1983); *see supra* notes 81–91 and accompanying text.

¹³⁹ Elofson, *supra* note 68, at 7.

¹⁴⁰ *Id.* at 24–25.

¹⁴¹ Trimarchi, *supra* note 118, at 66–67.

costs are often similar for both parties, making the determination of the cheaper insurer irresolvable, a defect which Posner and Rosenfield acknowledge.¹⁴² Other relevant factors such as the party best able to estimate the probability of the supervening event and the best party able to estimate the event's resulting loss often result in conflicting conclusions as to which party is the superior risk bearer.¹⁴³

Moreover, ascertaining which party was able to minimize the risk or insure against it creates an administrative nightmare.¹⁴⁴ Given the nature of the information necessary to determine the superior risk bearer, determining and collecting the relevant information is difficult, time-consuming, and subject to hindsight bias.¹⁴⁵

Furthermore, the superior risk bearer test suffers from hindsight bias much the same way as the current construct of commercial impracticability, because the court is examining who could have insured or minimized the risk more efficiently in hindsight and with greater information than the parties had at the moment of contract formation.¹⁴⁶

B. *Loss Allocation*

If a court holds that performance is commercially impracticable, then the remedy is to excuse the obligor from the performance required under the contract.¹⁴⁷ Otherwise, the obligor must perform

¹⁴² Bruce, *supra* note 118, at 321; Eloffson, *supra* note 68, at 13–27; Ostas & Darr, *supra* note 46, at 352–53; Posner & Rosenfield, *supra* note 32, at 110; Speidel, *supra* note 49, at 252–53;

¹⁴³ George G. Triantis, *Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability*, U. TORONTO L.J. 450, 455, 476 (1992).

¹⁴⁴ Halpern, *supra* note 16, at 1159–60; *see* Bruce, *supra* note 118, at 321 (noting that often “the court will be unable to determine which of the parties is the superior risk bearer, either because the parties' insurance costs are very similar or because the court lacks sufficient information.”); Sykes, *supra* note 51, at 50.

¹⁴⁵ Bruce, *supra* note 118, at 321; Halpern, *supra* note 16, at 1159–61; Sykes, *supra* note 51, at 93.

¹⁴⁶ *See* Halpern, *supra* note 16, at 1160–61; *supra* notes 92–JAM01 and accompanying text.

¹⁴⁷ Steven W. Hubbard, Comment, *Relief from Burdensome Long-Term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact,*

and absorb the entire resulting loss.¹⁴⁸ The consequence of this framework is that commercial impracticability is an all-or-nothing doctrine; either the obligor is fully liable or it is fully free of its obligations.¹⁴⁹ Under the current construct of commercial impracticability, the obligor almost always absorbs the entire loss.¹⁵⁰

To alleviate this harsh effect of commercial impracticability, some scholars recommend that, rather than place the entire burden on just one party, both parties share the loss.¹⁵¹ In addition to creating a fairer result for all parties, this remedial scheme helps to preserve any long-term contractual relationship.¹⁵² Moreover, the possibility of judicial loss allocation may incentivize parties to settle out of court in order to achieve greater control over the allocation.¹⁵³

One approach to loss allocation is for the parties to split the loss equally.¹⁵⁴ Professor Jeffrey Harrison supports this approach, citing both legal and moral foundation based on the view of a contract as a moral partnership.¹⁵⁵ Because the parties in both contracts and partnerships create the relationship for their mutual benefit, Professor Harrison considers contracts as “quasi-partnership.”¹⁵⁶ Accordingly, just as partners share losses equally absent agreement, the parties to a contract likewise should share losses equally absent agreement.¹⁵⁷ Moreover, Professor Harrison argues that an equal split results in the fair and moral result as neither party agreed to bear the entire loss of an unexpected event.¹⁵⁸

and Equitable Adjustment, 47 MO. L. REV. 79, 80 (1982); see Trakman, *supra* note 78, at 485.

¹⁴⁸ See Trakman, *supra* note 78, at 485.

¹⁴⁹ *Id.*; Hubbard, *supra* note 147, at 80; Robert W. Reeder III, Comment, *Court-Imposed Modifications: Supplementing the All-or-Nothing Approach to Discharge Cases*, 44 OHIO ST. L.J. 1079, 1080 (1983).

¹⁵⁰ Reeder, *supra* note 149, at 1080.

¹⁵¹ E.g., Jeffrey L. Harrison, *A Case for Loss Sharing*, 56 S. CAL. L. REV. 573 (1983); Reeder, *supra* note 149, at 1095; Trakman, *supra* note 78, at 484, 486.

¹⁵² *McGinnis v. Cayton*, 312 S.E.2d 765, 779 (W. Va. 1984) (Harshbarger, J., concurring).

¹⁵³ Reeder, *supra* note 149, at 1090.

¹⁵⁴ Harrison, *supra* note 151, at 592–601.

¹⁵⁵ *Id.* at 575, 592–601.

¹⁵⁶ *Id.* at 592–95.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 601.

Because an equal split may result in just as unfair a division of loss as the current remedial scheme, many scholars instead suggest a proportionate, judicial loss allocation.¹⁵⁹ To assist the judge in determining the allocation, the parties would present evidence such as the nature of the risk, the ability to mitigate the risk, the ability to withstand the loss, and the effect of the allocation on consumer interests.¹⁶⁰

Only one case utilized proportionate loss allocation upon a finding of commercial impracticability: *Aluminum Co. of America vs. Essex Group, Inc.*¹⁶¹ In *ALCOA*, the parties entered into a Molten Metal Agreement in which ALCOA would convert aluminum supplied by Essex into molten aluminum which Essex would then process into aluminum wire.¹⁶² The long-term agreement contained a price escalation clause based, in part, on the Wholesale Price Index – Industrial Commodities (“WPI”).¹⁶³ Historically, the WPI closely mirrored ALCOA’s non-labor costs.¹⁶⁴ However, due to an oil embargo and pollution control measures, ALCOA’s electricity costs skyrocketed and substantially deviated from the WPI.¹⁶⁵

ALCOA filed suit asking the court to modify the agreement due to commercial impracticability.¹⁶⁶ Judge Teitlebaum held that ALCOA’s performance was commercially impracticable given that ALCOA would lose \$60 million over the life of the contract and, although an unnecessary requirement, that the substantial deviation from the WPI was unforeseeable.¹⁶⁷ Rather than excuse ALCOA from performance, Judge Teitlebaum chose to reform the agreement in order to “better preserve the purposes and expectations of the parties” and “avoid injustice in this case.”¹⁶⁸

The parties agreed that, should the court find commercial impracticability applicable, the appropriate loss allocation was to

¹⁵⁹ Trakman, *supra* note 78, at 484, 503–04.

¹⁶⁰ *Id.* at 484, 490, 503–04.

¹⁶¹ 499 F. Supp. 53 (W.D. Pa. 1980); Hubbard, *supra* note 147, at 103–04.

¹⁶² *Aluminum Co. of Am.*, 499 F. Supp. at 55–56.

¹⁶³ *Id.* at 56.

¹⁶⁴ *Id.* at 58.

¹⁶⁵ *Id.* at 58–59.

¹⁶⁶ *Id.* at 70.

¹⁶⁷ *Id.* at 73, 76.

¹⁶⁸ *Aluminum Co. of Am.*, 499 F. Supp. at 79.

reform the contract to the ceiling price set forth in the agreement.¹⁶⁹ Nonetheless, Judge Teitlebaum created his own allocation to ensure that ALCOA would not receive a windfall as a result of the modification, which was the lesser of (i) the ceiling price set forth in the agreement, or (ii) the greater of the price calculated using the original escalation clause or the price which provides ALCOA a profit of one cent per pound.¹⁷⁰

Although ALCOA's proportionate loss allocation is supported by the comments to section 2-615, which allow courts to "use equitable principles in furtherance of commercial standards and good faith,"¹⁷¹ it is an unrealistic remedial framework. First, gathering the necessary information is administratively difficult and costly.¹⁷² The ALCOA trial, for example, lasted five weeks and comprised over 2000 pages of testimony.¹⁷³ With the overloaded and underfunded federal and state court system,¹⁷⁴ the time and costs of a proportionate loss allocation are simply unworkable for the court system.

Second, because it relies heavily on each case's facts and circumstances, a proportionate loss allocation would vary for each case, creating uncertainty in contracting.¹⁷⁵ Certainty and finality

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 79–80.

¹⁷¹ U.C.C. § 2-615 cmt. 6; Reeder, *supra* note 149, at 1095.

¹⁷² Posner & Rosenfield, *supra* note 32, at 114; Sykes, *supra* note 51, at 50 (noting that loss allocation is generally absent from remedies throughout the law due to administrative costs).

¹⁷³ Reeder, *supra* note 149, at 1096–97.

¹⁷⁴ *The Feeblest Branch*, ECONOMIST, Oct. 1, 2011, available at <http://www.economist.com/node/21530985>; Paula Hannaford-Agor, *Why Are Trials Vanishing*, Caseload Highlights: Examining the Work of State Courts (2005), available at <http://www.courtstatistics.org>.

¹⁷⁵ *Printing Indus. Ass'n of N. Ohio v. Int'l Printing & Graphic Commc'ns Union, Local No. 56*, 584 F. Supp. 990, 998 (N.D. Ohio 1984) ("The willingness of courts to reform contracts on the basis of subsequent knowledge may undermine the policy of finality which is so essential and revered in contract law."); *Wabash, Inc. v. Avnet, Inc.*, 516 F. Supp. 995, 999 n.5 (N.D. Ill. 1981) ("Under the logical consequences...there would be no predictability or certainty for contracting parties."); Robert A. Hillman, *Maybe Dick Speidel Was Right About Court Adjustment*, 46 SAN DIEGO L. REV. 595, 599 (2009) [hereinafter *Maybe Spiedel Was Right*]; Subha Narasimhan, *Of Expectations, Incomplete Contracting, and the Bargain Principle*, 74 CALIF. L. REV. 1123, 1127 (1986).

are important objectives of contract law given the role that contracts play in the global commercial environment.¹⁷⁶ Also, uncertainty causes parties to spend more in transaction costs negotiating and drafting the agreement in order to help minimize that uncertainty.¹⁷⁷

Finally, inherent in a loss allocation approach is that a judge is rewriting the contract for the parties whether or not they agree with the revised terms.¹⁷⁸ American law recognizes that competent adults are free to contract with whom they choose, over which matters they choose, and under which terms they choose, provided such contract is not regarding an illegal subject matter.¹⁷⁹ This freedom of contract is a fundamental principle in the United States.¹⁸⁰ Only in extreme circumstances should the law interfere with the freedom to contract.¹⁸¹ These circumstances include individuals who are incompetent, individuals who did not voluntarily enter into the contract, and individuals who were induced to enter into the contract through fraudulent means.¹⁸² Accordingly, paternalistic doctrines of unconscionability, incapacity, coercion, and fraud are appropriate

¹⁷⁶ *E.g.*, *Williams Trading LLC v. Wells Fargo Sec., LLC*, No. 12 Civ. 5984(KBF), 2013 WL 1718916, at *1 (S.D.N.Y. Apr. 19, 2013) (“The smooth functioning of the United States economy depends on predictability in contract construction. Contracting parties need to be able to have confidence that the bargain they strike will be the bargain to which they shall be held.”); *Sabetay v. Sterling Drug, Inc.*, 506 N.E.2d 919, 923 (N.Y. 1987) (“[S]tability and predictability in contractual affairs is a highly desirable jurisprudential value.”); *see also In re Atkins*, 139 B.R. 39, 40 (Bankr. M.D. Fl. 1992).

¹⁷⁷ Halpern, *supra* note 16, at 1170; Sykes, *supra* note 51, at 72–73.

¹⁷⁸ Dawson, *supra* note 117, at 18, 37–38.

¹⁷⁹ Hurst, *supra* note 70, at 572 (“Contract is a consensual medium of doing business.”); *see, e.g., Lochner v. New York*, 198 U.S. 45, 53–54 (1905), *overruled in part by Ferguson v. Skrupa*, 372 U.S. 726 (1963).

¹⁸⁰ *Balt. & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) (“[I]t must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties...to escape from their obligation.”).

¹⁸¹ *Steele v. Drummond*, 275 U.S. 199, 205 (1927) (“[I]t is a matter of great public concern that freedom of contract be not lightly interfered with.”)

¹⁸² *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356–57 (1931) (“The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.”); Hurst, *supra* note 70, at 565.

limitations of the freedom to contract.¹⁸³ But, when competent adults voluntarily enter into an agreement, the law should not interfere with its terms.¹⁸⁴ A court cannot and should not force parties to accept terms or perform obligations created by a court and not agreed upon by the parties, but that is precisely what loss allocation entails.¹⁸⁵

Even if proportional loss allocation were feasible, it only addresses the remedial defects of commercial impracticability and not any of the multitude of underlying issues with its rules and application discussed throughout this article. The form and substance of the commercial impracticability doctrine first needs to be revised before the result of such a finding is addressed.

IV. PRACTICABLE COMMERCIAL IMPRACTICABILITY

The following provision is one alternative way to restructure commercial impracticability to remedy its defects through straightforward language and the use of factors.

In the event that performance under a contract becomes impracticable due to excessive and unreasonable difficulty, expense, injury, or loss, a court may excuse such performance to the extent necessary to prevent injustice.

¹⁸³ See Harrison, *supra* note 151, at 593–94 (noting that rules “dealing with duress, fraud, misrepresentation, and capacity” are intended “to protect the parties’ autonomy” and make them “less likely to enter into enforceable agreements that do not hold the promise of a shared surplus.”)

¹⁸⁴ *Balt. & Ohio Sw. Ry. Co.*, 176 U.S. at 505–06 (“[M]en of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.”) (quoting Sir George Jessel, an English judge influential in matters of contract law); *George Backer Mgmt. Corp. v. Acme Quilting Co.*, 385 N.E.2d 1062, 1066 (N.Y. 1978) (“Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement.”).

¹⁸⁵ *Williams Trading LLC*, 2013 WL 1718916, at *1; Dawson, *supra* note 117, at 18, 37–38.

In making this determination, the following factors are significant:

- a) The extent to which the event is outside of the control of the party seeking excuse;
- b) The extent to which the party seeking excuse has made reasonable efforts to minimize the difficulty, expense, injury, or loss;
- c) The extent to which the party seeking excuse would make a net profit or loss if performed as originally agreed upon under the contract;
- d) The existence of insurance, performance bond, guaranty, or other mechanism that compensates either party for all or part of the expense, injury, or loss; and
- e) Usage of trade, course of performance, or course of dealing.

The provision begins by stating the basic rule for permitting excuse under commercial impracticability: a court may excuse a party in the interest of fairness if performance becomes excessively and unreasonably difficult, expensive, or leads to excessive and unreasonable loss or injury.¹⁸⁶ While the fundamental concept of commercial impracticability remains unchanged, the provision uses more straightforward language to create clarity and, therefore, lead to consistent interpretation and application.

In particular, it eliminates the “basic assumption” requirement in order to focus the analysis on the present rather than on the past intent of the parties.¹⁸⁷ The provision also does not distinguish

¹⁸⁶ See *Mineral Park Land Co.*, 156 P. at 460 (“A thing is impossible in legal contemplation when it is not practicable; [and a] thing is impracticable when it can only be done at an excessive and unreasonable cost.”); *Aluminum Co. of Am.*, 499 F. Supp. At 70–73 (stating that impracticability focuses “distinctly on hardship” and applies in “occurrences which greatly increase the costs, difficulty, or risk of the party's performance”).

¹⁸⁷ *Rockland Indus., Inc.*, 991 F. Supp. at 471–72.

between buyer and seller to ensure the availability of commercial impracticability to any party meeting its requirements.¹⁸⁸

Moreover, it provides a simple definition of commercial impracticability that sets parameters to quiet arguments that courts can discharge at will, yet broadens what constitutes commercial impracticability beyond excessive financial burden.¹⁸⁹ Even though excessive expense is likely the most prevalent result of a supervening event, other detrimental results are possible, such as severe damage to business reputation, which could justify excuse from a contract under commercial impracticability.¹⁹⁰ The definition accepts this possibility by including “difficulty, injury, or loss.”

Most notably, the provision limits excuse under commercial impracticability to circumstances in which it is necessary to prevent injustice. While stability and reliability of a contract undoubtedly are important considerations in commercial law,¹⁹¹ fairness and equity are also valuable considerations.¹⁹² Although some judges recognize that achieving fairness is an important objective,¹⁹³ the current commercial impracticability provisions incorrectly assume that these considerations are mutually exclusive.¹⁹⁴ The proposed provision expressly incorporates injustice into the analysis but balances these policy concerns by maintaining a narrower definition of commercial impracticability.¹⁹⁵

Although the provision begins fairly broad, it then sets forth relevant factors that further guide judicial decisions to create a more homogenous, predictable application. The use of factors certainly is

¹⁸⁸ See *supra* notes 54–63 and accompanying text.

¹⁸⁹ Hurst, *supra* note 70, at 555; *supra* notes 46–53 and accompanying text.

¹⁹⁰ See York, *supra* note 21, at 266–68 (discussing the “paramount” importance of business reputation in “current commercial practices”).

¹⁹¹ *Neal-Cooper Grain Co.*, 508 F.2d at 294; *Lloyd*, 153 P.2d at 54; Classen, *supra* note 19, at 405; Ostas & Darr, *supra* note 46, at 364; Wallach, *supra* note 19, at 218.

¹⁹² Halpern, *supra* note 16, at 1166–67, 1170; Ostas & Darr, *supra* note 46, at 358.

¹⁹³ *Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588, 599 (3d Cir. 1977); *Aluminum Co. of Am.*, 499 F. Supp. at 76 (“Courts must decide the point at which the community’s interest in predictable contract enforcement shall yield to the fact that enforcement of a particular contract would be commercially senseless and unjust.”); *E. Air Lines, Inc.*, 415 F. Supp. at 438; *Lloyd*, 153 P.2d at 54; *McGinnis*, 312 S.E.2d at 772; see *Helms Constr. & Dev. Co.*, 634 P.2d at 1225.

¹⁹⁴ Ostas & Darr, *supra* note 46, at 345.

¹⁹⁵ See *id.*

not novel in contract law; both Article 2 and the Restatements utilize factors in varying ways to provide some constraints to doctrines that require both stability and flexibility.¹⁹⁶

Each factor relates to either the extent to which excuse is necessary to prevent injustice or the inability to prevent or avoid the supervening event. These factors derive from commonalities among judicial opinions. The weight of each factor should vary by case, but by focusing the court on specific inquiries, commercial impracticability can develop into a more uniformly applied doctrine, which would lead to greater predictability.

The first factor courts would examine under this revision is the extent to which the party seeking excuse could have prevented the occurrence of the supervening event. This concept of “contributory fault” is found implicitly in the Official Comments to section 2-615 and expressly in case law and speaks to the fairness of allowing excuse.¹⁹⁷ A party cannot cause or contribute to the cause of the supervening event then expect excuse under commercial impracticability.¹⁹⁸ To allow otherwise incentivizes the obligor to create or contribute to a supervening event in order to avoid its obligations.

The second factor evaluates the extent to which the party seeking excuse attempted to mitigate the effects of the supervening event by utilizing alternative means of performance, provided that the contract does not prohibit those means. Current case law unanimously supports this factor, because an alternative means of performance (or lack thereof) speaks to whether performance truly is impracticable.¹⁹⁹ If a reasonable alternative exists, then the obligor’s

¹⁹⁶ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 139, 241–42, 360; U.C.C. § 2-206 (allowing for contract formation “by any medium reasonable in the circumstances”).

¹⁹⁷ U.C.C. § 2-615 cmt. 5 (“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.”); Chajet, *supra* note 48, at 244–48; Hillman, *supra* note 131, at 619; e.g., Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245, 257 (N.D. Ill. 1974), *aff’d*, 522 F.2d 469 (7th Cir. 1975) (“A party may not, by its own conduct, create the event causing the impracticability of performance.”).

¹⁹⁸ Chemetron Corp., 381 F. Supp. at 257.

¹⁹⁹ E.g., Jennie-O Foods, Inc. v. United States, 580 F.2d 400, 409 (Fed. Cl. 1978); N. Ill. Gas Co., 461 N.E.2d at 1061; Nora Springs Coop. Co., 247 N.W.2d at 748.

performance is possible and not excusable under commercial impracticability.²⁰⁰

The third and fourth factors focus on the financial impact of the supervening event and the financial status of the obligor after that event. Although the proposal expands circumstances of commercial impracticability beyond financial impracticability, the reality is that a majority of cases seek excuse due to the obligor's excessive financial burden caused by a supervening event.²⁰¹ Additionally, contract law remedies typically focus on granting money damages to either give the benefit of the bargain or to place the party in the same position she was in prior to contract formation.²⁰²

Specifically, factor three requires courts to examine the transaction affected by the supervening event as a whole. While the event may itself create a financial burden, the party seeking excuse may nonetheless make a net profit or only a small, manageable net loss. In these circumstances, excuse due to commercial impracticability is neither necessary nor warranted. The fourth factor focuses on the extent to which the party seeking excuse is made whole or close to whole under an insurance policy, self-insurance, or other loss-mitigating mechanism.

The last factor examines usage of trade, course of dealing, and course of performance to determine whether excuse due to commercial impracticability is appropriate. Usage of trade,²⁰³ course of dealing,²⁰⁴ and course of performance²⁰⁵ are mainstays in contract

²⁰⁰ *E.g., Am. Trading & Prod. Co.*, 343 F. Supp. at 95–96.

²⁰¹ See *supra* notes 32–45 and accompanying text.

²⁰² RESTATEMENT (SECOND) OF CONTRACTS § 344.

²⁰³ Under Article 2, “usage of trade” is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.” U.C.C. § 1-303(c). The Restatements similarly define usage of trade as “a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement.” RESTATEMENT (SECOND) OF CONTRACTS § 222(1).

²⁰⁴ The U.C.C. defines a course of dealing as “a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” U.C.C. § 1-303(b). The Restatements define a course of dealing almost identically as “a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a

law, with numerous references in both Article 2 and the Restatements.²⁰⁶ The drafters of Article 2 specifically intended this emphasis on commercial custom and conduct in issues of contract formation, contract interpretation, and contractual liability in order to avoid rigid rules devoid of the parties' actual intent.²⁰⁷ Arguably, the drafters of Article 2 intended to excuse performance under section 2-615 in accordance with commercial custom and practice.²⁰⁸

By evaluating usage of trade, course of dealing, and course of performance in each commercial impracticability case, courts can reach a decision that reflects the commercial practices and customs in the parties' industries.²⁰⁹ In doing so, courts can come nearer to a decision that more closely reflects what the parties would have agreed upon prior to the occurrence of the supervening event.²¹⁰ Indeed, some courts already look to usage of trade, course of dealing,

common basis of understanding for interpreting their expressions and other conduct." RESTATEMENT (SECOND) OF CONTRACTS § 223(1).

²⁰⁵ Only Article 2 contains a definition for course of performance, which is "a sequence of conduct between the parties to a particular transaction." U.C.C. § 1-303(a).

²⁰⁶ See, e.g., U.C.C. § 2-202; RESTATEMENT (SECOND) OF CONTRACTS §§ 202, 203.; see Hillman, *supra* note 131, at 623.

²⁰⁷ *Aluminum Co. of Am.*, 499 F. Supp. at 76 ("The spirit of the Code is that such decisions cannot justly derive from legal abstractions. They must derive from courts sensitive to the mores, practices and habits of thought in the respectable commercial world."); U.C.C. § 1-303 cmt. 1; Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 710-12 (1999); David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617, 620 (2001). The original drafters of the UCC, and in particular Karl Llewellyn, were legal realists who sought to replace the formalistic common law with a "functional reality." N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302, 1303 (1989). To read more about the effect of the legal realists on the UCC, see WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (Cambridge Univ. Press, 2d. ed. 2012); Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325 (1995); Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541 (2000).

²⁰⁸ York, *supra* note 21, at 245-46.

²⁰⁹ Snyder, *supra* note 191, at 617-18.

²¹⁰ York, *supra* note 21, at 245-46.

and course of performance under the current commercial impracticability for these very reasons.²¹¹

V. CONCLUSION

The current construct of commercial impracticability is unnecessarily complex and focuses on irrelevant and inappropriate inquiries such as foreseeability of the event and whether “performance . . . has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption.”²¹² Given the number of articles critiquing commercial impracticability or offering alternative schemes,²¹³ the doctrine clearly requires a comprehensive, straightforward revision that aligns with the reality of doing business in the modern, complex economy.

The objective of this article was to propose alternative language that simplifies, clarifies, and modernizes commercial impracticability to achieve the UCC’s stated purpose and to create consistency and, thus, predictability. The intent is not to broaden the availability of commercial impracticability, but to clarify when it is available and to whom through straightforward language and relevant inquiries. The proposal maintains the fundamental principles intended by the drafters but not achieved through poor language choices and illogical and inconsistent judicial decisions.

The mission, should the drafters of Article 2 and the Restatements choose to accept it, is to revise commercial impracticability utilizing clearer language and appropriate inquiries so that commercial impracticability can meet its mission to provide a fair excuse mechanism that reflects business practices in a consistent and predictable manner.

²¹¹ See, e.g., *Asphalt Int’l, Inc.*, 667 F.2d at 265; *Aluminum Co. of Am.*, 499 F. Supp. at 67.

²¹² U.C.C. § 2-615; RESTATEMENT (SECOND) OF CONTRACTS § 261.

²¹³ E.g., Classen, *supra* note 19; Dawson, *supra* note 117; Duesenberg, *supra* note 40; Eloffson, *supra* note 68; Halpern, *supra* note 16, at 1132–34; Ostas & Darr, *supra* note 46; Posner & Rosenfield, *supra* note 32; Wallach, *supra* note 19; Walt, *supra* note 46; Walter, *supra* note 8; Wladis, *supra* note 18; York, *supra* note 21.