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Richard E. Speidel
Northwestern University School of Law

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EXCUSABLE NONPERFORMANCE IN SALES CONTRACTS: SOME THOUGHTS ABOUT RISK MANAGEMENT

RICHARD E. SPEIDEL*

I. BACKGROUND

When will a promisor be excused from performance because of events which occur after the contract is formed and which are not within the control of either party?[1] One answer is when the event is dealt with explicitly in the agreement and the risks are allocated to the promisee or others. The usual issues are whether the allocation clause was part of the agreement, whether its inclusion was the product of a bargaining process where the par-

* Professor of Law, Northwestern University School of Law. A.B., Denison University, 1954; LL.B., University of Cincinnati, 1957; LL.M., Northwestern, 1959.

1. Traditional analysis of excusable nonperformance has produced three "event" categories: those existing at the time of contracting, those "supervening" contract formation and impairing the capacity of one party to perform, and those frustrating an important purpose of one party, usually the payor. *See* RESTATEMENT (FIRST) OF CONTRACTS §§ 288, 456, 457 (1933); J. MURRAY, MURRAY ON CONTRACTS §§ 197-204 (2d ed. 1974). The *Restatement (Second) of Contracts* retains these three categories, but links them through a common test for excuse. This test is whether the promisor's performance was made "impracticable," or the party's principal purpose was "substantially frustrated," by the "occurrence of an event the nonoccurrence of which was a basic assumption of the contract." RESTATEMENT (SECOND) OF CONTRACTS §§ 281, 285, 286 (Tent. Draft No. 10, 1975). *See also* U.C.C. § 2-615(a); Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 86 (1977)(in every discharge case, the problem is to decide who should bear the loss resulting from an event that has rendered performance by one party uneconomical). In deciding who assumed what risk, however, whether the event existed at the time of contracting is relevant to the relative capacities of the parties to learn of it. In short, it may be easier to identify and protect against existing rather than supervening risk events. *See* Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 2-9 (1978)(information is the antidote to mistake).

ties had adequate information and choice, and whether the language, reasonably interpreted, supports the relief claimed.[2] Assuming a fairly-bargained exchange, the court's basic objective should be to ascertain and to support the agreed allocation of performance risks.[3]

Experience demonstrates, however, that, even if the parties were aware of risk events at the time of contracting, the agreement may not contain a clause explicitly allocating them.[4] The

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2. Answers to these questions are provided by the relevant provisions of Articles 1 and 2 of the Uniform Commercial Code. On whether the clause became part of the agreement, see U.C.C. §§ 1-201(3), -205, 2-202, -207; Murray, *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597 (1978). On whether a clause that is part of the agreement is unconscionable, see U.C.C. § 2-302; Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975). On the interpretation of a typical risk-allocation clause, see Eastern Air Lines Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976).

3. Professor Posner asserts that "the purpose of the law of contracts is to effectuate the desires of the contracting parties" by assuring "compliance with the allocation of risks that the parties have agreed upon" and reducing the "costs of contract negotiation by supplying contract terms that the parties would probably have adopted explicitly had they negotiated over them." Posner & Rosenfield, *supra* note 1, at 88-89. The overall objective here is economic efficiency. *Id.* Another purpose of contract law is to relieve against hardship. According to Professor Stewart Macaulay, courts should allow "one party out of his contract in exceptional cases where enforcement would be unduly harsh, or, where the content of the bargain is in doubt, to place the burden on the party best able to spread the loss or absorb it." Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 815 (1961). This approach requires a case-by-case analysis, which is based "not on considerations of market functioning but on ethical ideals and emotional reactions to the plight of the underdog, to pressing an advantage too far, to making undue profit, or to inequality of resources." *Id.* Tension between "economic efficiency" and "relief of hardship" arises when postcontract events make the enforcement on one party of a risk allocation clause much harsher than is expected. The clause may have "failed its essential purpose." See U.C.C. § 2-719(2). If, however, the clause was the product of a fairly-bargained exchange and the promisor is the "most efficient insurer," it has been argued that consistent enforcement achieves "end result efficiency," a preferred outcome. See Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and A Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 578-93 (1977).

4. Professor Ian Macneil has stated: "No contract can ever be fully planned; every contract presents the possibility that events will occur for which the planning was incomplete by reason of omission or ineffectiveness, or both." Macneil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627, 668 (1975). *See* Transatlantic Financing Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966) ("parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy"). *See also*, Cheung, *Transactions Costs, Risk Aversion, and the Choice of Contractual Arrangements*, 12 J. L. & ECON. 23 (1969) (advancing the hypothesis that the choice of contractual arrangements is made so as to maximize the gain from risk dispersion subject to the constraint of transaction costs). The effect on contract theory of the inability of the parties to "presentiate" is

bargaining process, on this aspect of allocation at least, was incomplete. The promise to perform was unconditional. Suppose, for example, that the owner of a tract of standing timber contracted to sell 1000 cords of wood to a buyer for a fixed price. After the contract was formed, but before the first tree was cut, a fire destroyed sixty percent of the timber on the tract. Enough timber remained to perform the contract for sale, but the most accessible timber had been destroyed and the seller's cost to perform from that tract had doubled. Suppose further, that the written contract for sale was unconditional and that no risk allocation agreement can be found from trade usage or a prior course of dealing or course of performance with the buyer. Finally, suppose that the risk of fire was neither identified nor discussed by the parties in the contract negotiations. The seller, who bears the risk of loss on the burned timber, asserts that he should be excused from performing the contract on the ground of financial hardship. Should the seller be granted relief?

In a dynamic and interdependent economy, this question assumes an importance beyond the allocation of risks between particular parties. Volatile shifts in supply and demand, inflation, the "energy" and other crises, exploding volcanoes and other events with macroeconomic implications, put a severe strain on all contracts, whether or not risks have been explicitly allocated. But the stress is greatest when one or both parties have made a predictive error about the future. Because of incomplete information or inadequate foresight, factual assumptions, shared or not, have proved to be false. The bargaining process to this extent is deficient and the predictive error, unless adjusted, results in additional costs to the parties and impairs allocative efficiency.[5] The parties can adjust the disruption through a contract modification[6] or, under judicial supervision,

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explored in Macneil, *The Many Futures of Contract,* 47 S. CAL. L. REV. 691 (1974).

5. Allocative efficiency is the "process of allocating goods to their highest-valuing users." Kronman, *supra* note 1, at 3.

6. *Compare* Angel v. Murray, 113 R.I. 482, 322 A.2d 630 (1974) (modification based upon "unforeseen" event upheld) *with* Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971) (modification unenforceable due to economic duress). *See* Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. App.), *cert. denied,* 444 U.S. 865 (1979) (buyer's refusal to accept seller's offer to modify not bad faith); Hillman, *Policing Contract Modifications Under the Uniform Commercial Code,* 64 IOWA L. REV. 849 (1979).

reach a settlement that preserves the contract.[7] Short of a consensual adjustment, however, the question of excuse is typically an either-or proposition: either the promisor is discharged, leaving a disappointed promisee with a limited restitution remedy, or the contract is enforced increasingly by specific performance.[8] If the seller's performance costs have increased substantially, the effect of discharge may be to fuel inflation and impair needed contract stability. The effect of enforcement may be to impose unbargained-for financial burdens on the promisor, which are passed on to others, leave the buyer with undeserved gains, or possibly, promote economic duress as promisors seek modifications from unwilling but dependent promisees. To date, the courts have been unwilling unilaterally to modify or reform the agreement or to impose some other form of compromise.[9] Thus, if an agreed modification or settlement cannot be reached, the court must decide whether excuse, with its significant redistributional effects, should be granted or whether the risk should be left on the promisor.[10]

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7. In Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 134 (N.D. Iowa 1978), *rev'd on other grounds,* 603 F.2d 1301 (8th Cir. 1979), a long-term contract for the sale of uranium oxide was, by court order, performed under its original terms pending resolution of the discharge question. The consolidation and transfer to one federal district court of the litigation growing out of separate uranium contracts with Westinghouse Electric Corporation, *see In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 405 F. Supp. 316 (Judicial Panel on Multidistrict Litigation 1975), provided the court with an excellent opportunity to supervise and orchestrate this sort of settlement. *See* Note, *Commercial Law:* In Re Westinghouse Elec. Corporation Uranium Contracts Litigation, 47 U. Mo. K.C.L. REV. 650 (1979). *See also* note 104 *infra.*

8. *See, e.g.,* Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975) (interpreting U.C.C. § 2-716); Schwartz, *The Case for Specific Performance,* 89 YALE L.J. 271 (1979) (arguing that specific performance is the best method for achieving the compensation goal in contract law).

9. In Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 138 (N.D. Iowa 1978), *rev'd on other grounds,* 603 F.2d 1301 (8th Cir. 1979), the court, on a motion to reopen, stated that it had no power, under a decree for specific performance or otherwise, to "reform" the contract through an equitable price adjustment without the consent of both parties. *Accord,* Talackson Potato Co. v. M.T.K. Potato Co., 278 N.W.2d 417 (N.D. 1979). *See* Mueller, *Contract Remedies: Business Fact and Legal Fantasy,* 1967 WIS. L. REV. 833, 836-37 (arguing that the losses upon discharge should be apportioned between the parties); Note, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution,* 69 YALE L.J. 1054 (1960). *See also* Coons, *Compromise as Precise Justice,* 68 CAL. L. REV. 250 (1980). *But see* note 109 *infra.*

10. A promisor who makes an unconditional promise presumptively bears the risk of supervening events. But, as Justice Reardon stated, if the risk event was unanticipated, the "contract cannot be reasonably thought to govern . . . and the parties are both thrown upon the resources of the open market without the benefit of their contract."

From the beginning, courts have struggled to define and explain the scope of excuse through an intriguing and contrived process of "gap" filling.[11] In the penumbra of explicit risk allocation, the key questions are whether the court should deny the excuse because the promisor could have or should have provided against the event in the contract or whether the court should "imply" or "construct" a condition.[12] By the time of the *Restatement (First) of Contracts*, a number of developments seemingly had softened the rigors of "absolute" liability.[13] If the parties at the time of contracting "intended or contemplated" that a specific person, thing, or state of facts was essential to performance and would continue to exist and, without the "contributing fault" of the promisor, these essentials failed to continue in existence, the contract was discharged.[14] Another explanation for this result was that the court concluded from the total bargaining context that both parties *assumed* the continued exis-

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Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 129, 310 N.E.2d 363, 367 (1974) (citation omitted). A decision to discharge the promisor avoids the moral problem that arises when redistributing resources in a manner inconsistent with the agreement, *see* Kronman, *Contract Law and Distributive Justice,* 89 YALE L.J. 472 (1980), but does not avoid the need for acceptable reasons for this result. *See* Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification,* 63 CORNELL L. REV. 707 (1978). Reasons offered to justify the nonconsensual redistribution of losses from one party to the other should be evaluated constantly. *See generally* Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract,* 89 YALE L.J. 1261 (1980).

11. *See, e.g.,* Farnsworth, *Disputes Over Omission in Contracts,* 68 COLUM. L. REV. 860, 884-87 (1968).

12. *See* Patterson, *Constructive Conditions in Contracts,* 42 COLUM. L. REV. 903, 943-54 (1942).

13. Exceptions to "absolute" liability evolved to avoid the rigid reasoning of some courts in some very early and not so early cases: "[B]ut when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." Paradine v. Jane, Aleyn 26, 83 Eng. Rep. 897, 897 (K.B. 1647). *See* Willis v. Shockley, 52 Del. 295, 297, 157 A.2d 252, 253 (1960) (promisor made "absolute" commitment and did not at time of contract "see fit to relieve himself from liability for his failure to perform"). This approach ignored the question whether the promisor could or should have "provided against it." For an excellent treatment of the early English developments, see A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 22-33, 525-32 (1975). The current scope of the English doctrine of "frustration" is treated in G. TREITEL, THE LAW OF CONTRACTS 583-616 (4th ed. 1975).

14. See § 459 (death or illness); § 460 (nonexistence or injury of specific thing or person necessary for performance); § 461 (nonexistence of essential facts other than specific things or persons) of the *Restatement (First) of Contracts* (1933).

tence of these essentials.[15] The foreseeability of the particular disrupting event was less important than the parties' assumption or contemplation that the essential thing would continue.[16]

If the event did not disrupt basic assumptions, a second approach was to claim that the event made performance "impossible." This claim could be made in addition to the "continued existence" argument. In the *Restatement (First) of Contracts,* the definition of impossibility included "impracticability."[17] The event, however, must have been one that the "promisor had no reason to anticipate, and for the occurrence of which he is not in contributing fault"[18] and must have caused "extreme and unreasonable difficulty, expense, injury or loss."[19] Events making performance "more difficult or expensive" than anticipated did not amount to impracticability.[20] Our seller of standing timber, therefore, had two possible arrows for his excuse bow: first, he

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15. In Kansas, Okla. & Gulf. Ry. v. Grand Lake Grain Co., 434 P.2d 153, 158 (Okla. 1967) the court excused performance when a railroad deemed essential to performance ceased to exist and placed the "exception upon the basis of an implied condition, in that the contract involved was based upon an assumed, continued existence of a particular thing essential to performance." *See* Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 258 N.Y. 194, 198-99, 179 N.E. 383, 384 (1932) (inquiry is whether the "continuance of a special group of circumstances appears from the terms of the contract, . . . to have been a tacit or implied presupposition in the minds of the contracting parties").

16. The word "contemplated" suggests that the parties identified the specific risk, if not the probability and impact of its occurrence, in the contract negotiations. *See* Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 70 Cal. 2d 666, 676-77, n.13, 451 P.2d 721, 728 n.13, 75 Cal. Rptr. 889, 896 n.13 (1969) (question whether risk was foreseeable is "quite distinct" from whether it was "contemplated" by the parties); West Los Angeles Inst. for Cancer Research v. Mayer, 366 F.2d 220, 224-26 (9th Cir. 1966), *cert. denied,* 385 U.S. 1010 (1967) (fact that a risk is foreseeable does not mean that the promisor assumed it by not explicitly providing against it when the risk was identified in negotiations and the promisor repeatedly stated that he would not assume it). Professor Patterson criticized the "contemplation" test as "appropriate to describe the mental state of philosophers but . . . scarcely descriptive of the mental state of business men making a bargain." Patterson, *supra* note 12, at 947. *See* Note, *"Tacit Assumptions" as a Problem of Psychology,* in L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 804-08 (3d ed. 1972) (whatever term is used, one must distinguish between a conscious state with an awareness of alternatives and an opportunity for deliberate choice and a psychological state described as a "tacit" assumption that does not involve a consciousness of alternatives). The word "contemplation" is not used in the *Restatement (Second) of Contracts'* approach to the problems of excuse. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 281, 285, 286 (Tent. Draft No. 9, 1974).

17. RESTATEMENT (FIRST) OF CONTRACTS § 454 (1933).

18. *Id.* § 457.

19. *Id.* § 454.

20. *Id.* § 467.

could try to establish that the continued existence of all of the timber was essential to performance, or, second, even if enough timber remained to perform the contract, he could claim that the fire was unanticipated and made performance inpracticable.[21]

These approaches promised more excuse than they delivered. The traps, semantic or otherwise, were legion. How did one establish that the "continued existence" of something was "essential"? Suppose the event was reasonably foreseeable to the promisor. Did that mean that the promisor tacitly assumed the risk by not providing for it explicitly in the contract? How much hardship constituted impracticability? Should the focus be upon the particular contract or the promisor's overall situation? What principles should guide the courts as they allocated losses within the gaps in the agreement? In this fuzzy world of "constructive" conditions, "tacit" risk assumption and "extreme" loss, the answers were not clear. The commentators, however, had a field day[22] and the courts, seemingly ill at ease, preferred the "continued existence" route, eschewed impracticability,[23] and left a trail of analytical confusion in a world in which excuse on any ground was the exception rather than the rule.[24] Nevertheless, some

21. In International Paper Co. v. Rockefeller, 161 A.D. 180, 185, 146 N.Y.S. 371, 375 (3d Dept. 1914), however, the case upon which this problem is based, the court decided that the seller was "not excused from delivering the . . . spruce . . . which survived the fire by the mere fact that its location upon the tract is such that it would be very expensive . . . to deliver it." The estimated increased costs of performance exceeded the contract price by four times.

22. For discussions prompted by the closing of the Suez Canal and the subsequent Anglo-American decisions that consistently denied excuse, see, for example, Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade,* 63 COLUM. L. REV. 1413 (1963); Birmingham, *A Second Look at the Suez Canal Cases,* 20 HASTINGS L.J. 1393 (1969); Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things,* 23 RUTGERS L. REV. 419 (1969).

23. If the risk event was unanticipated, the relevance of any increased cost is to determine if the performance was made vitally different by the occurrence of the event. City of Littleton v. Employers Fire Ins. Co., 453 P.2d 810, 812 (Colo. 1969). *But see* Gulf Oil Corp. v. F.P.C., 563 F.2d 588, 599 (3d Cir. 1977), *cert. denied,* 434 U.S. 1062, *rehearing denied,* 435 U.S. 981 (1978), in which the court stated that the cost of performance must become "so excessive and unreasonable that the failure to excuse performance would result in grave injustice . . . ." For a thoughtful comment that illustrates both the infrequency of excuse based upon impracticability and argues that the courts have unduly emphasized the "drastic" cost-increase test, see Note, *U.C.C. § 2-615: Excusing the Impracticable,* 60 B.U.L. REV. 575 (1980).

24. The apparent analytical confusion is revealed in Annot., *Modern Status of the Rules Regarding Impossibility of Performance as Defense in Action for Breach of Con-*

commentators saw the birth of a more liberal excuse doctrine and applauded the apparent substitution of commercial common sense for what had been called the "fetish" of impossibility.[25]

II. THE "SUPERIOR" RISK BEARER ANALYSIS

In an admirable effort to provide a clearer framework for analysis, Professor Richard Posner suggests that, in all excuse cases, the key question is "who should bear the loss resulting from an event that has rendered performance uneconomical?"[26] According to Posner, the answer suggested by this economic analysis is the party who is "the most efficient bearer of the particular risk in the particular circumstances."[27] He argues that one purpose of contract law is "to reduce the costs of contract negotiation by supplying contract terms that the parties would probably have adopted explicitly had they negotiated over them."[28] The goal, then, is to effectuate as closely as possible the desires of the contracting parties. If those desires are not clear, the judicial approach to "gap" filling should be guided by the principle of economic efficiency, that is, to "maximize the value of the exchange."[29] In excuse cases, this maximization occurs

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tract, 84 A.L.R.2d 12-115 (1962).

25. *See* Note, *The Fetish of Impossibility in the Law of Contracts*, 53 COLUM. L. REV. 94 (1953). For a sample of reactions, see G. GILMORE, THE DEATH OF CONTRACT 79-82 (1974); Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under Section 2-615*, 54 N.C.L. REV. 545 (1976); Speziale, *The Turn of the Twentieth Century as the Dawn of Contract "Interpretation": Reflections in Theories of Impossibility*, 17 DUQ. L. REV. 555 (1978).

26. Posner & Rosenfield, *supra* note 1, at 86.

27. *Id.* at 90.

28. *Id.* at 88.

29. *Id.* at 89. Professor Posner claims that the "superior risk-bearer" analysis "provide[s] an analytical framework that transforms a group of seemingly random case holdings into a generally [though not perfectly] coherent array of outcomes." Posner & Rosenfield, *supra* note 1, at 118. This is consistent with his view that economic analysis provides a superb tool for understanding and predicting outcomes. Whether it should be adopted as a norm for decision is another question. See Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979). Some of the benefits of economic analysis in discharge claims are thought to be that it gives the cases coherency, shows the internal economic logic of the common law and can be expanded to other contract and other legal problems. Posner & Rosenfield, *supra* note 1, at 118. For a helpful discussion of the different conceptions of economic efficiency, see Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221 (1980). For elaborate discussions of such questions as whether the common law can be explained in terms of economic efficiency and whether "wealth maximization" is a

when discharge is limited to situations in which the promisee is the "superior" risk bearer:

> The discharge question arises only in those cases where the contract does not assign the risk in question and the event giving rise to the discharge claim was not avoidable by any cost-justified precautions. When these threshold conditions have been satisfied, economic analysis suggests that the loss should be placed on the party who is the superior (that is, lower-cost) risk bearer. To determine which party is the superior risk bearer three factors are relevant—knowledge of the magnitude of the loss, knowledge of the probability that it will occur, and (other) costs of self- or market-insurance.[30]

Risk appraisal costs are incurred in acquiring knowledge of the probability that the event will occur and the magnitude of the loss if it does occur. These costs must be known "in order for the insurer to know how much to ask for from the other party to the contract as compensation for bearing the risk in question."[31] Transaction costs are the "costs involved in eliminating or minimizing the risk through pooling it with other uncertain events . . . either through self-insurance or through the purchase of an insurance policy (market insurance)."[32]

In sum, the promisee may be the superior risk bearer when the promisor could not "reasonably have prevented" the event and the promisee could have "insured against the occurrence of the event at a lower cost than the promisor" because he was in the best position to appraise the probability and magnitude of the loss.[33] Imposing risk on the superior risk bearer is consistent with the risk of loss provisions of the Uniform Commercial Code[34] and a cluster of policy objectives in the development of

value, see Symposium, *Change in the Common Law: Legal and Economic Perspectives*, 9 J. LEG. STUD. 189-366 (1980).

30. Posner & Rosenfield, *supra* note 1, at 117.

31. *Id.* at 91.

32. *Id.* at 91-92. *See* Cheung, *supra* note 4. *Cf.* Kronman, *supra* note 1, at 2-9 (the focus is on the cost of preventing mistakes through the acquisition of information rather than the cost of insuring against the future).

33. Posner & Rosenfield, *supra* note 1, at 92.

34. The assumption is that a merchant seller in control of the goods is in the best position to purchase market insurance against their loss or destruction. Thus, unless otherwise agreed, the risk of loss passes to the buyer only when the seller has transferred possession to a carrier, a bailee, or the buyer as part of the process of completing delivery under a contract for sale. U.C.C. § 2-509. *See* Note, *Risk of Loss in Commercial Transac-*

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strict liability in tort.[35] Presumably, if the promisor is found to be the superior risk bearer, enforcement of the contract will be both efficient and fair—there is no undue hardship for the superior risk bearer to absorb the extra costs since he was in the best position to minimize or avoid them. This determination has other consequences as well. If, for example, the promisor is found to be the superior risk bearer, how should this affect his power to shift by contract that risk to the promisee? Clearly, as Posner concedes, the parties' risk-bearing capacities will be relevant in interpreting the contract.[36] But should the court insist on a higher level of information and choice for the promisee in the bargaining process?[37] More importantly for our purposes, if Posner's analysis makes sense in transactions between seasoned risk takers, how does it square with the relevant provisions of the Uniform Commercial Code? In the balance of this article, I will test his analysis and its implications against the Code and tentatively assess the appropriateness of the test as a normative standard in commercial excuse cases.

To illustrate, let us develop our hypothetical more fully. Suppose that Arnold, the owner of 300 acres of timber, contracted with Beetle, the owner of a sawmill, to cut and deliver 1000 cords of hardwood for $50,000. The prevailing market price

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tions: Efficiency Thrown Into the Breach, 65 VA. L. REV. 557 (1979) (The Code's effort to create an efficient risk allocation scheme was "largely successful.").

35. Professor David Owen has questioned the accuracy and continued utility of the assumed policies underlying strict liability in tort, including the objectives of compensation, loss shifting, loss spreading, and risk control. He advocates renewed efforts to construct a "principled" system of product liability law. Owen, *Rethinking the Policies of Strict Liability,* 33 VAND. L. REV. 671, 703-15 (1980).

36. "Interpretation depends on context, and the parties' risk bearing capacities may be part of the context." Posner & Rosenfield, *supra* note 1, at 117. *See* RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note, ch. 11, at 43 (Tent. Draft No. 9, 1974) (the Reporter identifies "relative bargaining positions" and the "effectiveness of the market in spreading . . . risks" as relevant factors in deciding whether the nonoccurrence of a particular event was a basic assumption of the parties).

37. The risk of loss rules of U.C.C. § 2-509 are "subject to contrary agreement of the parties." Comment 5 to Code § 2-509(4) states that the "buyer and seller are left free to readjust their rights and risks as declared . . . in any manner agreeable to them." *But see* Mercanti v. Persson, 160 Conn. 468, 280 A.2d 137 (1971) (agreement not proved); McCoid, *Allocation of Loss and Property Insurance,* 39 IND. L.J. 647 (1964) (if seller is the superior risk bearer, loss should not be reallocated to buyer through equitable subrogation). Other efforts to allocate contractual risks, such as warranty disclaimers and limited remedies for breach, are more closely regulated by the U.C.C. *See* U.C.C. §§ 2-316(2), -719.

at the time of contracting was fifty dollars per cord. Delivery was to be made in six months. Based upon historic costs and inflation rates, Arnold estimated that each cord would cost forty dollars to deliver. Before the first tree was cut and without the fault of Arnold, fire destroyed sixty percent of the timber on the tract. Enough timber remained to perform the contract with Beetle (there were no other contracts to perform), but the estimated cost of performance had increased from forty to eighty dollars per cord. Further, due to accelerating inflation, the cost of production increased by another five dollars per cord. Finally, because of a dramatic increase in the demand for hardwood, the market price per cord jumped from fifty to one hundred dollars at the time of delivery. Arnold estimated that the total cost increase would be $45,000 (112.5%) and the loss on the contract would be $35,000 (70%) if he completed performance. He concluded that he should not invest $85,000 for a $50,000 return, especially when a sale in the open market would return $100,000. Since this was a contract for the sale of goods, Arnold claimed excuse under U.C.C. sections 2-613 through 2-616. Beetle denied that an excuse existed and claimed breach of contract.

There are three risk events in this problem—fire, inflation, and a shift in market demand. Before examining the Uniform Commercial Code, let us focus on the fire and explore which party, Arnold or Beetle, is the superior risk bearer. If that were the legal test for excuse, Arnold would have the burden of proving that Beetle was the superior risk bearer.[38] Assume that Arnold's evidence would establish that Beetle was a sawmill operator of twenty years experience in the area. He purchased timber from over fifty sellers, processed it, and, depending upon the type, resold it to various manufacturers and other customers. Beetle offered a standard form agreement to his sellers. There were no express conditions or exculpatory clauses favoring the seller and the form contained a "merger" clause making the writing the final expression of the parties' agreement and a clause excluding reliance on trade usage. The price in Arnold's contract was in line with the market, and the seller's obligation to cut, prepare, and deliver the timber was consistent with usual practice. About fifty percent of Beetle's resale contracts were

38. *See generally* Farnsworth, *supra* note 11, at 884-87.

"output" agreements, that is, Beetle agreed to furnish a stated percentage of his output of particular timber to customers, frequently as "required" by the customer. This type of agreement forced Beetle to make constant efforts to develop diversified sources of supply and to anticipate shifts in demand.

Arnold, on the other hand, was a dentist who had recently purchased the 300 acre tract. He owned no other timber. This was his first contract to sell timber. He had hired local labor to cut, trim, and move the logs. Arnold did not object to the standard form agreement supplied by Beetle and there was discussion about price and time of delivery. During the negotiations, the risk of fire was not discussed. Experts, however, would testify that in most years the region's moist climate made the risk of fire negligible; the ordinary chance of fire was calculated at one in fifty. The last six months, however, had been exceptionally dry and the incidence of a serious fire was calculated at twenty in fifty. The expert also would testify that this was an "abnormally" high risk of fire. Both Arnold and Beetle were aware of the ordinary risk and the abnormal risk due to dry weather but this risk was not discussed in the negotiations. Finally, the agreement obligated Arnold to deliver 1000 cords of hardwood timber, but did not specify the source of these goods. Arnold was neither specifically required nor explicitly limited to supply from the 300 acre tract. Arnold had no insurance on the timber[39] and made no effort, either before or after the fire, to arrange for other sources of supply.

In this hypothetical set of facts, is Beetle or Arnold the most "efficient bearer of the particular risk in the particular circumstances?"[40] Assuming that the risk of fire impairing the source of supply was not allocated explicitly in the agreement and neither party was in a position reasonably to prevent the fire, the answer should be Beetle. Since both parties had equal information on the magnitude of the loss and the probability that it would occur, it is difficult to conclude that one was in a better position to acquire this information at a lower cost than the other. The question, then, is which party was in the best

39. Arnold clearly bears the risk of loss for the timber destroyed by fire. U.C.C. § 2-509. The question is whether the fire excuses Arnold from performance under the contract for sale.

40. Posner & Rosenfield, *supra* note 1, at 90.

position to use this information most efficiently. Since neither party appears to have acted on the information, a certain amount of speculation about transaction costs must occur. Suppose, for example, Arnold had stated in the negotiations that a clause was required, excusing him if "sixty percent of the timber was destroyed by fire." One purpose of acquiring risk information is clearly related to the possibility of risk management in the contract. If the answer is that the clause or some reasonable version of it would have been accepted by Beetle, then Arnold's case is impaired. On the other hand, if Beetle had controlled the bargaining process and, in all probability, would have refused to accept the proposal, one dimension of Arnold's capability to use important risk information was foreclosed. Although not fully developed by Professor Posner, one factor in the determination of the superior risk bearer is the "relative bargaining positions of the parties and the relative ease with which either party could have included a clause."[41] If the contract was not a feasible way for Arnold to protect against the unusual risk and market insurance was not available, were there other self-insurance opportunities that he could have pursued more efficiently than Beetle? For example, could Arnold have diversified his risk by arranging for alternative sources of supply should fire destroy the timber on his tract, or should he be expected to absorb the loss, either because of a very "deep pocket" or the ability to reallocate losses suffered on a particular contract through future contracts with Beetle and other customers? Given Arnold's limited experience and capacity compared with that of Beetle, the answer is no. Beetle functioned as a processor between the grower and the manufacturer. He could control the supply of timber through multiple contracts and was in the best position to manage risks through appropriate terms in those contracts. Beetle, therefore, was in the best position to appreciate the importance of the risk information obtained, to diversify that risk through multiple contracts, and to redistribute any extra costs incurred in contracts with timber suppliers and, over the long term, contracts with the manufacturers. Under this analysis, then, Beetle was the superior risk bearer in this transaction, and Arnold, who made an unconditional promise, should be excused—at least in

41. RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note, Ch. 11, at 43 (Tent. Draft No. 9, 1974).

the cost efficient world of economic analysis.

Given this useful analysis and the conclusion that Arnold should be excused, how would Arnold fare under the Uniform Commercial Code? More specifically, in this contract for the sale of goods,[42] is the conclusion reached under the "superior" risk bearer analysis consistent with that reached under sections 2-613 and 2-615 of the U.C.C., the two provisions that control this case? Recognizing that the "risk bearer" analysis, if adopted, could or should influence choices that the courts must make under the Code, let us indulge in some further analysis.[43]

III. THE "SUPERIOR" RISK BEARER ANALYSIS UNDER THE U.C.C.

Arnold grew timber and contracted to sell 1000 cords of wood to Beetle. We have postulated that Arnold and Beetle had equal information about the probability that a fire could occur and its possible location and magnitude. We also have concluded that Beetle was the superior risk bearer. Given this information and the futility of attempting to further reduce uncertainty, Beetle was in the best position to diversify the risk through the contract with Arnold, self-insurance, or other market devices. Under economic analysis, Arnold should be excused from the contract. Would this result be the same under Article 2 of the Uniform Commercial Code? Of the four sections relevant to excusable nonperformance, sections 2-613 and 2-615 control the instant case.[44] With some differences and omissions,[45] these sec-

42. Under the 1972 revision of Article 2, a contract for the sale of standing timber is a contract for sale of goods, regardless of who is to cut it. U.C.C. § 2-107(2). The transaction, therefore, is within the scope of Article 2. U.C.C. § 2-102.

43. Professor Posner concluded that the "Uniform Commercial Code has not greatly affected the common law discharge doctrines," Posner & Rosenfield, *supra* note 1, at 110, but did not test his "superior risk bearer" analysis against its provisions. *Id.* at 108-10.

44. Code § 2-614 governs when the agreed transportation, docking, or payment methods fail, and U.C.C. § 2-616 governs the buyer's options upon receiving notice from the seller that performance will be delayed or an allocation under U.C.C. § 2-615(b) will be made. For further discussion of these sections, see J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 3-9 (2d ed. 1980).

45. No explicit provision covering buyer excuse occurs in either U.C.C. § 2-613 or § 2-615. Comment 9 to U.C.C. § 2-615 states that, in certain situations, the "reason" for the section may entitle the buyer to the exemption and the courts have not resisted the use of this suggestion. *See, e.g.,* Hancock Paper Co. v. Champion Int'l Corp., 424 F. Supp. 285 (E.D. Pa. 1976); Nora Springs Coop. Co. v. Brandau, 247 N.W.2d 744 (Iowa

tions have stimulated considerable comment and have had a significant influence on the *Restatement (Second) of Contracts.*[46]

A. *Goods Identified When the Contract Is Made*

Code section 2-613 provides that "where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer," the contract is "avoided" if the loss is "total."[47] If the loss is partial, the buyer is given the option either to treat the contract as avoided or to accept the available goods with due allowance and "without further right against the seller."[48] This section preserves one traditional pre-Code test for excuse: if both parties assume the continued existence of things deemed essential for performance and those things cease to exist, the contract is discharged.[49] Most of the litigation under section 2-613 has concerned crops planted at the time of the contract that were later lost or damaged due to flood, disease, or some other scourge.[50] These goods are usually

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1976) (dictum). *See generally* Comment, *Uniform Commercial Code Section 2-615: Commercial Impracticability from the Buyer's Perspective,* 51 TEMP. L.Q. 518 (1978).

46. Despite Professor Posner's conclusion, see note 43 *supra,* it has been suggested that the principal architect of Article 2, Karl Llewellyn, "specifically coined the term 'commercial impracticability' and avoided use of common law terminology in an effort to expand and liberate courts from the old restrictive concepts of excuse." Spies, *Article 2: Breach, Repudiation and Excuse,* 30 MO. L. REV. 225, 255 (1965). Llewellyn's term permeates the *Restatement (Second) of Contracts* §§ 281, 285, 286 (Tent. Draft No. 9, 1974). In § 281, the key to excuse is a contingency the "non-occurrence of which was a basic assumption on which the contract was made" that made a party's performance "impracticable without his fault." Due credit is given to U.C.C. § 2-615 in Comments a and b to § 281.

47. U.C.C. § 2-613(a).

48. *Id.* § 2-613(b).

49. See notes 14-16 and accompanying text *supra.* RESTATEMENT (SECOND) OF CONTRACTS § 283 (Tent. Draft No. 9, 1974) provides that if the "existence of a specific thing is necessary for the performance of a duty, its . . . destruction . . . is an event the non-occurrence of which was a basic assumption on which the contract was made."

50. If the crops were not identified at the time of contracting, *i.e.,* not planted, U.C.C. § 2-501(1)(c), the excuse question is governed by U.C.C. § 2-615. *See* U.C.C. § 2-615, Comment 9; Dunavant Enterprises, Inc. v. Ford, 294 So. 2d 788 (Miss. 1974) (crops to be planted). Presumably, if the contract required the seller to supply a particular crop to be planted on particular land and that crop was destroyed, impracticability would result from the seller's lack of obligation to acquire the goods from another source of supply.

fungible. When the seller is a grower rather than a dealer, excuse has been granted, especially if the conclusion from the agreement or surrounding circumstances is that he sold a particular crop, which was to be grown on particular land.[51] Without considering who is the superior risk bearer, however, some courts have refused to excuse a farmer-grower when the agreement did not specifically limit his obligation to crops from a particular source.[52] These decisions seem to ignore an implicit judgment that growers are not the superior risk bearers in crop contracts and to expect a degree of explicitness in limiting the obligation not found in pre-Code law.[53]

This trend poses a small problem for Arnold. If all the timber on Arnold's tract had been destroyed or he had several contracts to fulfill and the fire had impaired his capacity to perform

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51. *See* Low's Ezy-Fry Potato Co. v. J.A. Wood Co., 26 Agric. Dec. 583 (1967) (crop to be supplied from a particular tract); Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652 (Miss. 1975) (existing crops; excuse under special MISS. CODE ANN. § 75-2-617 (1972); Dunavant Enterprises, Inc. v. Ford, 294 So. 2d 788 (Miss. 1974) (crop to be planted); Campbell v. Hostetter Farms, Inc., 251 Pa. Super. Ct. 232, 380 A.2d 463 (1977) (crop yield tied to particular land). *But see* Pearce-Young-Angel Co. v. Charles R. Allen, Inc., 213 S.C. 578, 50 S.E.2d 698 (1948) (dealer excused when bad weather prevented seller from obtaining "Texas" blackeyed peas from a particular locality).

52. A leading case is Bunge Corp. v. Recker, 519 F.2d 449 (8th Cir. 1975), in which the contract identified the goods only by "kind and amount," and the seller apparently warranted delivery from crops grown within the "continental United States." The court concluded that there was no evidence that the goods sold were intended to be produced on identified acreage. *Accord,* Ralston Purina Co. v. McNabb, 381 F. Supp. 181 (W.D. Tenn. 1974); Bunge Corp. v. Miller, 381 F. Supp. 176 (W.D. Tenn. 1974); Semo Grain Co. v. Oliver Farms, Inc., 530 S.W.2d 256 (Mo. App. 1975) (contract must specifically limit crop to a specific source); Colley v. Bi-State, Inc., 21 Wash. App. 769, 586 P.2d 908 (1978) (parties intend to be bound regardless of particular crop). In these cases, there was no discussion of the farmer-seller's capacity to self-insure by diversifying sources beyond land he owned or controlled or had bargaining power vis-à-vis the buyer's. *Cf.* Note, *Frustration as an Agricultural Buyer's Excuse Under U.C.C. Section 2-615,* 11 U. CAL. D.L. REV. 351 (1978).

53. *See* Posner & Rosenfield, *supra* note 1, at 106-07 (whether a particular source is explicitly designated is "irrelevant save as a reasonable instrumental variable that distinguishes" growers from dealers). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 283, Comment b, Illustration 7 (Tent. Draft No. 9, 1974):

> A, a farmer, contracts with B in the spring to sell a large quantity of beans to B during the following season. Although the contract does not state where the beans are to be grown, A owns but one tract of land, on which he has in the past raised beans, and both parties understand that the beans will be raised on this tract. A properly plants and cultivates beans on this tract in sufficient quantity to perform the contract, but an extraordinary flood destroys the crop. A delivers no beans to B. A's duty to deliver beans is discharged . . . .

them, U.C.C. section 2-613 would control. If the contract does not explicitly limit Arnold's obligation to the particular tract, yet Beetle is the superior risk bearer, should Arnold be excused? Current trends notwithstanding, if economic efficiency is the objective, the answer should be yes. Beetle is the superior risk bearer because he is in the best position to diversify the risk of source failure through multiple contracts with timber suppliers. In addition, Arnold intended to supply timber only from this tract and Beetle had reason to know this. Thus, in the absence of an explicit provision allocating the risk to Arnold, economic efficiency dictates the legal conclusion that the contract "required" timber from Arnold's tract.[54]

B. Section 2-615

The problem is that not all of the trees on the tract were destroyed; enough remained to fulfill the contract with Beetle but at a substantial increase in cost. Because U.C.C. section 2-613 does not provide a final answer, Arnold must turn to section 2-615. Assume that Arnold has given Beetle seasonable notice that the timber will not be delivered and that no issue of allocation by Arnold among his "regular customers" is involved.[55] What must Arnold prove to establish excuse?

Section 2-615 provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a

54. See notes 51 & 53 and accompanying text *supra*. *But see supra* note 52, where it is argued that farm buyers as well as sellers should be protected from unanticipated, severe weather.

55. Under U.C.C. § 2-615(c), the seller "must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer." *See* Bunge Corp. v. Miller, 381 F. Supp. 176 (W.D. Tenn. 1974) (failure to give notice one ground for denying excuse). Code § 2-616 becomes operative when this notice is received and gives the buyer the option to terminate or modify the contract. U.C.C. § 2-616(1). *See* U.C.C. § 2-613(b). The relationship between these sections and the allocation problem is explored in Mansfield Propane Gas Co. v. Folger Gas Co., 231 Ga. 868, 204 S.E.2d 625 (1974); J. WHITE & R. SUMMERS, *supra* note 44, at 134-36. *See also* White, *Allocation of Scarce Goods Under Section 2-615 of the Uniform Commercial Code: A Comparison of Some Rival Models*, 12 U. MICH. J.L. REV. 503 (1979).

> breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

When a seller claims excuse under this section, a sound analysis requires the court to answer three questions: First, did the seller assume a "greater obligation" than the degree of excuse normally available under section 2-615? If so, the excuse should be denied. Second, if a "greater obligation" was not assumed, was the event "a contingency the non-occurrence of which was a basic assumption on which the contract was made?" If not, the excuse should be denied. Third, if so, did the contingency make "performance as agreed . . . impracticable?" If the answer is yes, section 2-615 has been satisfied and the seller is excused.[56] The first two questions focus upon risk allocation, while the third examines the impact upon "agreed" performance of a risk that the seller did not assume. How will Arnold fare under this analysis? Although Arnold was not the superior risk bearer, his promise to sell was unconditional. Further, he knew that the risk of fire was abnormally high, but this event was not discussed in the negotiations and the agreement did not provide for its possible occurrence.

1. Greater Obligation.—According to Comment 8, the seller may assume a "greater obligation" under section 2-615(a)

56. *See* Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979) (consistent with this analysis). Another condition is that a "contingency" must have occurred. *See* Note, *supra* note 23, at 577-78.

by agreement and "such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like."[57] Moreover, the exemption of section 2-615 does 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."[58] Thus, it appears that the "greater obligation" can be based upon both explicit and "tacit" risk assumption within the Code's expansive concept of agreement.[59] Further, it is reasonably clear that by agreement, the parties can expand the seller's protection beyond that afforded by section 2-615.[60] Thus, whether the agreement is claimed to expand or contract the seller's excuse, the important tasks are to ascertain the scope of agreement under the Code[61] and, within that scope, to determine what the parties actually agreed.[62]

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57. U.C.C. § 2-615, Comment 8.

58. *Id.*

59. Agreement, as defined in U.C.C. § 1-201(3), means "the bargain of the parties in fact as found in their language and by implication from other circumstances . . . ." *See* Heat Exchangers, Inc. v. Map Constr. Corp., 34 Md. App. 679, 690, 368 A.2d 1088, 1094-95 (1977) (when the event could be foreseen at the time of contracting as a "real possibility" and the seller rejected the need for an exculpatory clause, the risk of its occurrence was tacitly assigned to the seller by his "failure explicitly to provide against it."); Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 128-29, 310 N.E.2d 363, 367 (1974) (was the event beyond the "scope of the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties?").

60. Professor Hawkland expressed concern that the language, "assumed a greater obligation," would be interpreted to foreclose agreements imposing on the seller a lesser obligation than envisioned in U.C.C. § 2-615. In a carefully researched article, he argued that despite the "greater obligation" language, the intended power of contract was more consistent with the "unless otherwise agreed" language found throughout the Code. Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75 (1974). His concern has been characterized as "unfounded" in light of Comment 8 which "plainly indicates that parties may 'enlarge upon or supplant' section 2-615." Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 990 (5th Cir. 1976). *See* Olson v. Spitzer, 257 N.W.2d 459 (S.D. 1977) (an exculpatory clause excusing seller of farm equipment if he was unable to obtain goods from the manufacturer was upheld).

61. For example, "agreement" includes "usage of trade." U.C.C. § 1-201(3). Under proper circumstances, usage of trade can be introduced to "supplement or qualify terms of an agreement," U.C.C. § 1-205(3), including supplying a condition to a buyer's otherwise unconditional promise to pay a fixed price for fertilizer. Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971).

62. Courts have struggled with the relationship between an exculpatory clause and

In Arnold's case, an abnormally high risk of fire was foreseen, but neither discussed in the negotiations nor explicitly provided for in the agreement. Is this enough to conclude that Arnold "assumed a greater obligation"? Again, economic analysis dictates a negative answer. At best it is a "tacit" assumption implied from the circumstances. But when Beetle is the superior risk bearer, when there is no negotiation over a particular risk, and when the location and magnitude of the foreseen event are uncertain, agreement should not be implied. That Arnold knowingly accepted an abnormally high risk ought not to be conclusive on whether he agreed to assume it and its consequences.[63] The advantage of having this information is to encourage the superior risk bearer to insure against it. If Beetle did not attempt explicitly in the agreement to allocate the risk to Arnold, arguably, a judicial decision to do so would promote inefficiency, particularly if Beetle had diversified the risk of fire through contracts with other suppliers.

2. Basic Assumption.—The question of "greater obligation" frequently arises in the uncertain area between agreement in fact and a genuine gap in the agreement. Different conclusions might be reached if explicit negotiations had occurred or the identity of the superior risk bearer was less clear. In any event, in the case contrived for Arnold, doubts in the clarity and

U.C.C. § 2-615 when the seller's interpretation of the clause would give broader protection than the Code. By what standards should the clause be interpreted? In *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, the Fifth Circuit Court of Appeals, in remanding the case for a new trial, stated that: (1) "mercantile sense and reason" should control; (2) in the case of ambiguity the clause should not be construed to broaden excuse; (3) foreseeability will not condition events specifically listed in the clause, but will condition others; and (4) the clause will be construed to incorporate U.C.C. § 2-615 to fill the gaps unless specified otherwise. 532 F.2d 957, 990-92 (5th Cir. 1976). For cases in which an exculpatory clause was construed not to cover the risk event in question and U.C.C. § 2-615 did not justify relief, see Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975).

63. "Foreseeability or even recognition of a risk does not necessarily prove its allocation. . . . Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs." Transatlantic Financing Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966) (citations omitted) (promisor was superior risk bearer). *Accord*, West Los Angeles Inst. for Cancer Research v. Mayer, 366 F.2d 220, 224-26 (9th Cir. 1966), *cert. denied*, 395 U.S. 1010 (1967) (fact that the frustrating event was foreseen is not enough to bar rescission if it appears that the parties did not intend the promisor to assume the risk of its occurrence).

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quality of the agreement should be resolved against the assumption of a greater obligation by one who is not the superior risk bearer. One should proceed to the second question: was the fire a contingency "the non-occurrence of which was a basic assumption on which the contract was made"? It is at this point that a final conclusion on risk assumption can be made.

The statutory analysis is difficult. Even if the seller did not assume a greater obligation by agreement, excuse may be denied if the contingency (fire) was one which, inverting the statutory language, the parties assumed might occur. If the risk of fire was abnormally high and both parties knew this, clearly it might occur. How, then, can one conclude that fire was a contingency that both parties assumed would *not* occur? Apart from the superior risk bearer analysis, the deck seems to be stacked against the seller in these circumstances.

The Comments to section 2-615 provide marginal assistance. Comment 1 asserts that if the contingency was "unforeseen" and not within the "contemplation" of the parties, then its nonoccurrence is assumed. But does the use of "unforeseen" mean something other than "unforeseeable"? It has been argued that the distinction is critical to the policy of section 2-615. If a risk event must be foreseen rather than foreseeable to be assumed, then the seller must know of it rather than have reason to know. The former interpretation broadens the scope of excuse, while the latter holds the seller to contingencies of which he is not actually aware.[64] To suggest that the contingency must be both unforeseen and not contemplated ignores the possibility that a risk both "foreseen" and "contemplated" at the time of contracting may not be assumed by the seller.[65] Does a fair reading

64. In Comment, *Contractual Flexibility in a Volatile Economy: Saving UCC Section 2-615 From the Common Law*, 72 Nw. L. Rev. 1032, 1051 (1978), the author asserts that the purpose of the basic assumption test is to "discern if the parties actually intended at the time of contracting that the seller assume the risk of the occurrence of the condition . . . ." If the seller is not actually aware of the contingency, then it is improper to conclude that he should have been and that a failure to provide against it means "tacit" risk assumption.

65. [T]he question whether a risk was foreseeable is quite distinct from the question whether it was contemplated by the parties. It is possible for the parties to contemplate and make express provision for a risk that would not otherwise be considered foreseeable. Conversely, some risks may be so wholly foreseeable that it would strain credulity to believe they were not contemplated by the parties. . . . Finally, the parties may have contemplated and expressly

of section 2-615 allocate to Arnold foreseen "abnormal" risks that were not explicitly discussed in the negotiations or covered in the agreement?

Most courts, in struggling with section 2-615, have assumed that the contingency must be unforeseeable rather than unforeseen to be a "contingency the non-occurrence of which was a basic assumption of the contract."[66] Because of experience, capacity, or other factors, a seller who is unaware of a particular contingency may have reason to know of the event, if not the probability of its occurrence. A compromise is struck, however, when abnormal risks are foreseen at the time of contracting, but the occurrence of the particular event or its magnitude is unanticipated. Rather than holding that the failure to provide explicitly means that the seller assumed the risks,[67] a few decisions

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> provided for a type of risk that in fact occurs, but the magnitude or duration of which is so great that it cannot fairly be said to have been either contemplated or foreseeable. . . . When a risk has been contemplated and voluntarily assumed, however, and the manner of its occurrence is not so extraordinary as to justify the invocation of the last stated rule, foreseeability is not an issue and the parties will be held to the bargain they made.

Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 70 Cal. 2d 666, 676-77, n.13, 451 P.2d 721, 728 n.13, 75 Cal. Rptr. 889, 896, n.13 (1969) (citations omitted). See notes 16 & 63 *supra*.

The word "contemplated" does not appear in the *Restatement (Second) of Contracts* treatment of discharge by supervening impracticability. Whether the nonoccurrence of the event was a "basic assumption" is the primary risk allocation question to be determined from "all the circumstances, including the terms of the contract." As the Reporter noted:

> The fact that the event was unforeseeable is signigicant as suggesting that its non-occurrence was a basic assumption. However, the fact that it was foreseeable, or even foreseen, does not, of itself, argue for a contrary conclusion, since the parties may not have thought it sufficiently important a risk to have made it a subject of their bargaining.

RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note, Chapter 11, at 43 (Tent. Draft No. 9, 1974).

66. "Was the contingency which developed one which the parties could reasonably be thought to have foreseen as a real possibility which could affect performance? . . . If it could not be so considered, performance is excused. The contract cannot be reasonably thought to govern in these circumstances, and the parties are both thrown on the resources of the open market without the benefit of their contract." Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 129, 310 N.E.2d 363, 367 (1974). *See* Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. App.), *cert. denied,* 100 S. Ct. 135 (1979); cases discussed in Comment, *supra* note 64, at 1042-56.

67. For decisions holding that experienced sellers tacitly assumed the risk of foreseeable contingencies, see, Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 140 (N.D. Iowa 1978), *rev'd on other grounds,* 603 F.2d 1301 (8th Cir. 1979) (seller was a corporation engaged in the production and sale of uranium concentrate and, apparently, in a position to protect itself contractually); Heat Exchangers, Inc. v. Map Constr. Corp.,

suggest that the seller should be held to a stricter standard in establishing that performance "as agreed" is impracticable.[68] Although the opinions are frequently muddled, the compromise shows some sensitivity to the reality of uncertainty. An experienced seller usually has reason to know that a particular class of events might occur. But what are the probabilities?—where, when and how much? Even when a risk is foreseen as likely to occur, it does not follow that the parties intended for the seller to bear or that the seller should bear the full brunt of the loss when it occurs.[69]

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34 Md. App. 679, 368 A.2d 1088 (1977) (seller was a corporation specializing in air conditioning and plumbing and rejected exculpatory clause aimed at foreseeable risks); Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc., 265 N.W.2d 655 (Minn. 1978) (seller was an experienced car dealer who chose not to use the usual exculpatory clause); Security Sewage Equip. Co. v. McFerren, 140 Ohio St. 2d 251, 237 N.E.2d 898 (1968) (seller was a company specializing in sewage treatment plants and familiar with zoning laws). In Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc., 265 N.W.2d 655, 660 n.6 (Minn. 1978), the court held that the seller had tacitly assumed, by not explicitly providing against it, a material risk foreseen as a real possibility and also suggested without deciding that the seller might have "assumed a greater obligation." In either event, no excuse was granted. *See also* Robberson Steel, Inc. v. J.D. Abrams, Inc., 582 S.W.2d 558 (Tex. Civ. App. 1979).

68. The source of this compromise is Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966). The court concluded that the closing of the Suez Canal was "unexpected" but, because hostilities in the area had commenced at the time of contracting, the promisor had accepted "some degree of abnormal risk" by making an unconditional promise. Thus, the seller, who was in the "best position" to diversify risk, is held to a stricter view of impracticability when he "legitimately [can] be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone." *Id.* at 319 (footnote omitted). *Accord,* Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (App. Div. 1974). *See* Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 439-42 (S.D. Fla. 1975).

69. The "basic assumption" test provides a possible excuse from absolute liability on a promise. The foreseeability test of Hadley v. Baxendale, 156 Eng. Rep. 145 (1854), and its progeny seeks to limit a promisor's liability for consequential damages caused by a breach. If the consequences were neither foreseen nor reasonably foreseeable at the time of contracting, then the promisor could not have "provided" for them in the contract and ought not to be responsible for them. *See* Danzig, Hadley v. Baxendale: *A Study in the Industrialization of the Law,* 4 J. LEGAL STUD. 249 (1975). This "foreseeability" limitation on liability still exists in England, *see, e.g.,* The Heron II (Kaufas v. C. Czarnikow, Ltd.), [1967] 3 All E.R. 686, and in the United States, *see, e.g.,* Spang Indus. Inc. v. Aetna Cas. & Sur. Co., 512 F.2d 365 (2d Cir. 1975). In England, the probabilities that a consequence otherwise reasonably foreseeable would in fact occur have been discussed. In The Heron II, Lord Reid stressed the need of the business community for protection and concluded that, if a consequence, though foreseeable as a substantial possibility upon breach, would happen in only a small minority of cases, the promisor would not be liable without "actual knowledge" that the consequence might "likely" occur. 3 All E.R. at 694-95. *But see* note 64 *supra.* In this way, the breaching promisor has an

How should Arnold fare in this sea of words? Given the vagueness of the statutory language and the confusion in the courts, the answer, again, turns upon the persuasiveness of Professor Posner's "superior risk bearer" analysis. Short of an explicit assumption of a "greater obligation," the answer must depend upon how much risk Arnold ought to assume. The parties are generally equally aware of abnormal risks and equally unaware of whether or where the fire will hit or its magnitude. Expenditure of additional money to reduce these uncertainties would be wasted. Yet Beetle has the superior capacity to deal with what is known, through a risk diversification or "management" program. The failure to diversify, either through his contract with Arnold, self-insurance, or contracts with other suppliers should not alter the judgment that Beetle, not Arnold, bears

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extra ounce of insulation.

At first blush, U.C.C. § 2-715(2)(a) appears to reach an opposite result in contracts for the sale of goods. The seller is liable for "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know . . . ." *Id.* Also, Comment 2 to that section rejects the notion that the seller must "tacitly agree" to assume the consequences of a breach. *Id.* Comment 2. *See generally* J. WHITE & R. SUMMERS, *supra* note 44, § 10-4. But the liability gate is closed a notch by two factors: (1) the buyer cannot recover consequential damages which could have been "reasonably . . . prevented by cover or otherwise," U.C.C. § 2-715(2)(a), and (2) sellers have the power to exclude consequential damages by agreement with the buyer, *id.* § 2-719(3). In commercial cases at least, the courts have consistently enforced well-drafted, standard form clauses accomplishing that result. *See, e.g.,* S.M. Wilson & Co. v. Smith Int'l, Inc., 587 F.2d 1363, 1372-75 (9th Cir. 1978).

One must conclude that sellers have fared better by excluding consequential damages under U.C.C. § 2-719(3), than seeking excuse under U.C.C. § 2-615. This approach preserves liability, but limits its scope. In addition, the seller has a difficult burden of proof in excuse cases. *See, e.g.,* Tecon Corp. v. United States, 411 F.2d 1271, 1281-82 (Ct. Cl. 1969) (promisor must prove impracticability and exclude other possible causes); Iowa Elec. & 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) (seller must establish that cost increase was caused in fact by the risk event); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (factual basis for establishing impracticability was not made). Finally, like the buyer who has a "duty" to use reasonable efforts to avoid consequential damages after a seller's breach, the seller also has the "duty" to "employ any practicable alternative means of fulfilling the contract" after the occurrence of an unanticipated contingency. Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245, 257 (N.D. Ill. 1974), *aff'd,* 522 F.2d 469 (7th Cir. 1975) (explosion in large boiler). For variations on this theme, see Jennie-O Foods, Inc. v. United States, 580 F.2d 400, 409-12 (Ct. Cl. 1978); Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283, 293-94 (7th Cir. 1974); Center Garmet Co. v. United Refrigerator Co., 369 Mass. 633, 341 N.E.2d 669 (1976) (failure of expected source of supply). One wonders whether the rigidity in excuse matters is an efficient trade off against the ease with which sellers can exclude consequential damages.

the risk. Whether this result is articulated as a risk not reasonably foreseeable to Arnold or a contingency the nonoccurrence of which was assumed, it is rooted in a realistic approach to risk allocation that takes over when the agreement falls short. But Arnold's is a special situation. The cases suggest serious problems for the merchant-seller with access to risk information and the capacity to do something about it.[70] In the absence of an explicit allocation to the buyer, a truly unanticipated event, or a buyer who is clearly the superior risk bearer, the merchant-seller may not be permitted to pass through the "basic assumption" stage to the issue of impracticability.

3. Impracticability.—To repeat, the impracticability issue should not arise if the seller has assumed the risk of the contingency, either by agreement or because it was a contingency the occurence of which *was* assumed. If the seller did not assume the risk of its occurrence, excuse is granted under section 2-615 if the "performance as agreed is made impracticable." What does this mean?

There is, in my judgment, a difference between what it actually means and the way the courts have interpreted it. The courts are required to assess the impact upon the "agreed performance" of a risk event that the seller did not assume. This impact may increase performance costs or affect the method or manner of the seller's performance.[71] Not all increases or disrup-

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70. For a recent example, see Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. App.), *cert. denied*, 444 U.S. 865 (1979). The court rejected the seller's argument that in litigation only the contract should be considered in resolving the excuse question, stating:

> A commercial, governmental or business trend affecting a contract's value which would be foreseeable to a party with wide experience and knowledge in the field and, perhaps, not to a party with less; a loss to a party with vast resources and ample supply of raw materials to perform a bad bargain would be less harmful than to a party without them; and, the application of the doctrine and the equitable principles inherent therein might call for relief in one instance and not another based on these factors, and others, outside the strict confines of the contract itself.

Id. at 726.

71. *See* Note, *supra* note 23, at 581-83, 588-94. After a careful review of the cases, the author concludes that the requirement of an extreme cost increase has been treated as conclusive rather than probative and argues that the "extent of financial loss entailed" should be just one factor in judging "how the parties indeed allocated the risk in question." *Id.* at 599. See note 23 *supra*. The author, however, fails to develop a satisfactory theory of risk allocation.

tions make performance impracticable and, in the common-law tradition, lines of inclusion and exclusion must be drawn by the courts. But in drawing these lines, the emphasis should be on the degree to which performance has been made different, rather than upon the degree of financial hardship suffered. Thus, one should look for a contingency which "alters the essential nature of the performance" or makes the agreed performance "vitally different." In Arnold's case, this can be measured both by the additional costs required to perform and by the serious disruptions in the method and manner of performance.[72] All things being equal, a jury verdict that Arnold's "performance as agreed" was made "vitally different" by a fire the risk of which Arnold did not assume should be upheld. This result is clear with regard to the fire, if not to inflation or to the market disruption,[73] and

72. In Transatlantic Financing Corp. v. United States, 363 F.2d 312, 319-20 (D.C. Cir. 1966), the court determined that the unexpected closing of the Suez Canal did not materially impair the ability of the shipper to complete the voyage by an alternate route. The diversion would not affect the cargo, and the vessel and crew were fit for the extra mileage. If, upon occurrence of the contingency, the seller must employ any practicable, alternative means of fulfilling the contract, see note 69 *supra,* the mere fact that performance by the intended means is impracticable is insufficient. Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245, 257 (N.D. Ill. 1974), *aff'd,* 522 F.2d 469 (7th Cir. 1975).

73. The chances that Arnold will be excused on any theory because of inflation or a sharp increase in the market price due to changes in supply and demand are negligible. On inflation as an excuse, see Iowa Elec. & 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) (rampant inflation, although less foreseeable than war in the Middle East, did not make performance impracticable because seller was in the best position to "effectively spread its risk among other buyers"); Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. App.), *cert. denied,* 444 U.S. 865 (1979) (inflation was foreseeable at the time of contracting and was covered by a price escalation clause); Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (App. Div. 1974) (although the rate of inflation was unanticipated, seller knew of abnormal inflation risk and accepted it). *See also* Schwartz, *Sales Law and Inflations,* 50 S. CAL. L. REV. 1 (1976).

A seller invariably is held to bear the risk of a "rise . . . in the market for that is exactly the type of business risk which contracts made at fixed prices are intended to cover." U.C.C. § 2-615, Comment 4, *quoted in,* Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283, 293 (7th Cir. 1974). *See* R.N. Kelly Cotton Merchant, Inc. v. York, 494 F.2d 41 (5th Cir. 1974) (seller not excused when market price of cotton tripled); Hancock Paper Co. v. Champion Int'l Corp., 424 F. Supp. 285 (E.D. Pa. 1974) (unexpected drop in market price does not excuse buyer). When the market price tripled, a broker, caught in the middle between a farmer and a manufacturer to whom the goods had been resold, was held to have assumed the risk that the farmer would repudiate. So long as the goods were available, covering in the market at the increased price was not "impracticable." Swift Textiles, Inc. v. Lawson, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

it is reinforced by the earlier conclusion that Beetle is the superior risk bearer.

This straightforward analysis, although supported by the language of the Code if not its Comments, has not been adopted by the courts. The courts' focus has been narrowed to an inquiry into the extent of the seller's financial loss. In discussing the degree of loss required, the catch words have been "drastic" and "onerous," rather than losses of lesser magnitude or those which make performance less profitable.[74] The cases have been preoccupied with the arithmetic of loss and, in analyses that overlap the "basic assumption" test, have suggested that sellers who have accepted some "abnormal risk," without assuming the risk that the contingency will occur, may have to prove an even greater loss to be excused.[75] To date we know what degree of loss will not excuse,[76] but have no idea how "drastic" a loss will make performance impracticable or how that result should be explained.

Three other trends can be detected in the cases—trends that are more consistent with a rigid, rather than a flexible, attitude toward excuse and reveal the courts' limited perception of the issue. First, some decisions have carried the impracticability inquiry beyond the impact of the contingency upon "performance as agreed." With an eye on financial hardship rather than altered performance, courts have noted, in denying excuse, that an apparently heavy loss on the contract may be neutralized or

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74. *E.g.*, Publiker Indus. Inc. v. Union Carbide Corp., 17 U.C.C. Rep. (CCH) 989 (E.D Pa. 1975). *See* Gulf Oil Corp. v. F.P.C., 563 F.2d 588, 599 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062, *rehearing denied*, 435 U.S. 981 (1978) (has the "cost of performance . . . in fact become so excessive and unreasonable that the failure to excuse performance would result in grave injustice?"); Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 128, 310 N.E.2d 363, 366 (1974) ("drastic" increase in difficulty or expense).

75. See note 68 *supra*.

76. In Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 134 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), a cost increase of 52.2% in the contract price, caused by risks the seller did not assume, was insufficient. *See In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, MDL Docket No. 235 (E.D. Va.) (Bench opinion Oct. 27, 1978) (seller liable despite increases in cost of performance approaching 600%). The arithmetic in these and other cases is critiqued in Note, *supra* note 23, at 578. *Cf.* Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916) (excusing a contractor from performance when unanticipated subsurface conditions would increase costs by ten to twelve times the contract price). *But see* note 109, *infra*.

offset through future contracts with the same buyer.[77] Similarly, they have concluded that a particular loss might better be absorbed by a strong seller, reallocated to other customers, or simply offset over time, because the contingency actually created more opportunities for profit.[78] This broader approach is more relevant to the "basic assumption" stage of the analysis, and, in fact, the courts appear to be using the amount of financial loss as a factor in deciding whether the parties assumed that the contingency would occur.[79] Conceding the relevance of these factors to the "basic assumption" test, it is improper statutory interpretation for the court to use this approach after it has concluded that the seller did not assume the risk. The question is whether "performance as agreed" has become impracticable, not whether the seller's overall welfare has improved.

Second, even if, after an unanticipated contingency occurs, the focus is properly upon the degree of financial hardship suffered, this inquiry should be paired with an inquiry into the amount of undeserved gain received by the buyer if excuse is not granted. This question has not received systematic treatment by the courts, even though sellers with substantial cost increases have been denied excuse.[80] To illustrate, suppose the cost to Ar-

77. United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966) (projected income from total program made loss on initial contract "unattractive" but not "clearly prohibitive").

78. In *Iowa Elec. Light & Power Co. v. Atlas Corp.*, the court, after learning that the seller of uranium ore would confront a cost increase of fifty to fifty-eight percent on the particular contract, concluded that performance was not made impracticable. The seller was in the best position at the time of contracting to measure the impact of various events upon the uranium market and had, in fact, "spread" the loss through subsequent "highly profitable" contracts with other buyers. In short, the seller had "effectively spread" its risk. 467 F. Supp. 129, 135 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979). In *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, the court rejected the seller's argument that in litigation only the contract should be considered. In concluding that the seller's financial condition, experience, resources, and coal reserves were relevant to the issue of foreseeability and the capacity to bear and reallocate loss and relative hardships, the court also noted that the value of the seller's coal reserves had increased because of the events which produced the alleged hardship on the particular contract. 583 S.W.2d 721, 726-28 (Mo. App.), *cert. denied*, 444 U.S. 865 (1979). *Cf.* Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (factual basis for establishing and evaluating onerous burden was not made); Joskow, *Commercial Impossibility, The Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119 (1976); Note, *supra* note 7.

79. A good example is Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. App.), *cert. denied*, 444 U.S. 865 (1979).

80. In Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 128, 310

nold from a risk not assumed has jumped from forty dollars to eighty dollars per cord and that this risk even caused a corresponding increase in the market price of the goods. This rise is a one-hundred percent increase in the cost of Arnold's performance and a eighty percent increase, from fifty dollars to ninety dollars, in the market price. If Arnold did not assume this risk and the contract is enforced at the agreed price of fifty dollars per cord, will Beetle have an undeserved gain and should this be an important factor in the excuse equation? Professor Alan Schwartz, in a challenging article,[81] has argued that an important objective should be to minimize undeserved gains and losses in this context and that the decision whether to excuse should be evaluated against this objective. In Schwartz' judgment, however, the calculation and the overall elements of proof are too complicated for judicial determination.[82] Further, because of the proper scope of the judicial process and the objective of certainty in contract law, he asserts that the undeserved gain-loss calculus should not be attempted. It should be noted that the calculus would not help Arnold on the facts of our hypothetical as originally stated: the cost increase caused by fire, the risk of which Arnold did not assume, affected only Arnold's performance. The market price increase was caused by a supply-demand disruption, a risk that Arnold assumed.[83] Thus, the costs caused by the fire could not be translated into any market increase that would give Beetle an undeserved gain. More significantly, the importance of Beetle's undeserved gain, if any, is minimized if

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N.E.2d 363, 367 (1974), the court stated that to require performance when the risk was beyond those inherent in the contract would "grant the promisee an advantage for which he could not be said to have bargained in making the contract." In Ashland Oil & Refining Co. v. Cities Serv. Gas Co., 462 F.2d 204, 209 (10th Cir. 1972), the court announced its intention to construe the agreement "in a manner which would not result in one party being placed at a severe disadvantage while the other party was gaining an unexpected windfall."

81. Schwartz, *supra* note 73.

82. *Id.* at 11-12. Professor Alan Schwartz has argued that an "undeserved" loss occurs when a risk materializes that the seller was not paid to bear, and an "undeserved" gain is a gain the buyer "did not buy the right to enjoy." *Id.* at 8. When the risk is an unanticipated increase in the cost of performance, excuse should be granted "when the actual price rise more than doubles" the anticipated one; this would minimize undeserved losses and gains. *Id.* at 12. He contends, however, that difficulties in applying the "desert" test coupled with adverse effects on the stability of contracts dictate "nonintervention" by the courts. *Id.* at 20.

83. See note 73 *supra*.

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the focus is upon the extent to which the contingency altered Arnold's performance, rather than the degree of hardship suffered. The degree of undeserved gain or loss is just one factor in deciding whether "performance as agreed" has been made "impracticable" or "vitally different." It is a factor, however, that should not be ignored in the calculus.

Finally, the consistent unwillingness of the courts to grant excuse despite substantial cost increases to sellers comes at a time when injunctions against breach and specific performance increasingly have been granted.[84] Against a backdrop of resource scarcity, market disruptions, and long-term supply contracts, a specific performance decree compels the seller to incur the additional costs when conventional market remedies might interject flexibility into the situation.[85] To date, the courts have refused to condition the decree or to impose an equitable adjustment in the contract price in response to the seller's increased costs.[86] Yet, if specific performance is proper on the facts and the contingency is one the risk of which the seller did not assume, the excuse question seems ideally suited for the creative use of equitable powers. If the seller has not assumed the risk of an event that has a substantial impact upon performance, would not some important objectives of contract law be served by a decree preserving the contract under a price adjusted by the court?[87] Even

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84. *See* notes 7 & 8 *supra;* J. WHITE & R. SUMMERS, *supra* note 44, at § 6-6; Kronman, *Specific Performance,* 45 U. CHI. L. REV. 351 (1978) (uniqueness test). *See also* Leubsdorf, *The Standard for Preliminary Injunctions,* 91 HARV. L. REV. 525 (1978).

85. Assume that Arnold has repudiated the contract because of a one hundred percent cost increase caused by fire but a market price increase of only fifty percent. Arnold has incurred no costs at the time of repudiation. If Beetle were to "cover," that is, to make a reasonable purchase of timber in substitution, U.C.C. § 2-712(1), he would have the goods at the current market price and could assert a claim for damages to cover his losses. U.C.C. § 2-712(2). *See generally* Jackson, *"Anticipatory Repudiation" and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance,* 31 STAN. L. REV. 69 (1978). If this remedy is inadequate because the supply of timber has made "cover" uncertain or more costly, the flexibility of the market remedy is reduced. Beetle can claim that specific performance is available because the circumstances are "proper" under § 2-716(1). That standard must be balanced against the hardship to Arnold of completing full performance. *See* Schwartz, *supra* note 8, at 301-03; Schmitt & Pasterczyk, *Specific Performance Under the Uniform Commercial Code—Will Liberalism Prevail?,* 26 DE PAUL L. REV. 54, 66-76 (1976). Without power to condition the decree or adjust the contract, the court's decision cannot fully protect the interests of either party.

86. *See* note 9 *supra.*

87. *See* Schmitt & Pasterczyk, *supra* note 85, at 66-73. *Cf.* Note, *supra* note 23, at

if the parties cannot agree to this adjusted price, the role of the court is not more complicated or questionable than that assumed when the parties have agreed upon a pricing formula that subsequently fails and the court fills the gap with a "reasonable" price.[88] With the hard realities of the typical either-or choice in excuse cases, remedial flexibility in the teeth of uncertainty may be the most promising way to adjust disrupted performance in that gray area beyond explicit risk allocation.

In sum, the judicial analysis of "impracticability" under section 2-615 is unsatisfactory and incomplete. The courts have failed to focus on the critical question, whether performance "as agreed" has been made impracticable. Further, they have confused the analysis, focused unduly upon the degree of financial hardship without examining the corresponding "undeserved" gain to the buyer, and failed to grasp the mediating potential of equitable relief in the process. As a result, the promise that section 2-615 would catalyze a more realistic excuse jurisprudence has not materialized.

IV. CONCLUSION: TOWARD A JURISPRUDENCE OF ADJUSTMENT?

Excuse under section 2-615 is a game with a predictable outcome—the buyer wins. The courts consistently have found that the occurrence of the contingency was assumed or that the occurrence failed to make performance "as agreed" impracticable. These results are reinforced when tested by Professor Posner's "superior risk bearer" analysis, because sellers frequently appear to be in a better position than buyers to anticipate and diversify risk. The results also are compatible with some traditional views about the nature and purpose of contract law, namely, that an "objective" theory of contracts which tightly controls both the creation of contract liability and the grounds for excuse through standards of reasonableness is desirable.[89]

596-99 (equitable adjustment).

88. *See* U.C.C. § 2-305. If an agreed method of pricing fails because of the omissions of third parties, the price is a "reasonable price at the time for delivery," U.C.C. § 2-305(1), unless "the parties intend not to be bound unless the price be fixed or agreed." U.C.C. § 2-305(4). *See* J. WHITE & R. SUMMERS, *supra* note 44, at § 3-7.

89. These values and others are explored in G. GILMORE, THE DEATH OF CONTRACT (1974). *See* Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161, 1161-67 (1975). Professor Morton J. Horwitz has argued that this approach, largely formulated in the nineteenth century, replaced a more equita-

When this is combined with the natural tendency to leave the loss on the maker of an unconditional promise,[90] the results are not surprising. Even Arnold, our inexperienced seller, had to be led carefully to excuse through the Code's labyrinth.

In the light of the above analysis, should the superior risk bearer test be adopted as the legal standard for excuse? The answer turns in part on the validity of a number of assumptions: (1) the court can determine who is the superior risk bearer; (2) the market is an effective mechanism to diversify risk and redistribute loss; (3) enforcement of a contract against the superior risk bearer is neither unfair nor does it confer undeserved gains on the promisee; (4) enforcement of a contract against a superior risk bearer will supply needed commercial certainty in an uncertain world economy[91] and minimize the contribution to inflation from easy excuse; and (5) a consistent application of this approach could stimulate a more effective private risk management system, either through contract planning, internalized forms of self-insurance, or market insurance.[92] The last point is important, for it is the absence of contract planning (*i.e.*, the presence of risk mismanagement) that forces a court to manage the risks

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ble approach prevalent in the eighteenth century and became a weapon for economic oppression. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 161-210 (1977). Horwitz' reading of the eighteenth century has been questioned in Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

90. "Ordinarily . . . each of the parties supposes that a contract he signs is in his own interest; but if someone has made a mistake in calculating his self-interest, the fact that he did contract is a strong reason for the fairness of holding him nevertheless to the bargain." R. DWORKIN, TAKING RIGHTS SERIOUSLY 151 (1977). For a similar argument in a nonbargaining context, see Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979).

91. Given the interdependent nature of the world economy, this uncertainty would be a strong reason to restrict rather than liberalize excuse in the view of Professor Harold Berman. Berman, *supra* note 22, at 1438-39 (importance of reliance on stability of contract in international trade). Section 1 of Article 65 of the Draft Convention on Contracts for the Sale of Goods, approved at the United Nations Conference on Contracts for the International Sale of Goods, Vienna, March, 1980, adheres to a conservative excuse line:

> A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

92. *See* Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. L. REV. 854, 873-80 (1978). *See also* Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1286-88 (1980).

retroactively under a principle of economic efficiency.

One conclusion from this study is that most courts have had trouble conducting this retroactive risk management. The rigid, common-law past is allowed to restrict the more liberal excuse doctrine supposedly built into section 2-615. An instinctive search for the superior risk bearer emerges imperfectly in the opinions, confusing the analysis of both "basic assumption" and "impracticability." Accepting for now the assumptions underlying the superior risk bearer analysis and recognizing that section 2-615 was designed to inject more flexibility into the excuse decision, an explicit use of the test in conjunction with a proper interpretation of the statute should achieve sounder outcomes. A modest suggestion to accomplish this follows.

The first question remains: have the parties allocated the risk in the agreement? As previously noted, the Code's elastic concept of agreement furnishes a flexible framework within which to search for explicit and tacit allocation. If the matter has not been resolved by agreement, the seller should then have the burden of establishing in two steps a prima facie case for excuse under section 2-615: first, the contingency was not foreseen as likely to occur at the time of contracting;[93] and second, the occurrence of the contingency had a materially adverse effect on the cost, method, or manner of performance "as agreed." The first part of the test requires actual knowledge of a contingency likely to occur and the second part stresses the total impact of the occurrence on performance "as agreed." Thus, a contingency not foreseen as likely to occur is a contingency "the nonoccurrence of which was a basic assumption" upon which the contract was made. A contingency that has a materially adverse effect on performance "as agreed" makes performance "impracticable." This test highlights the individual hardship features of the excuse problem, but only establishes a prima facie case. The buyer then can avoid excuse by establishing through a preponderance of the evidence that the seller was the superior risk bearer. More precisely, if the seller establishes a prima facie case for excuse under section 2-615, the burden shifts to the buyer to establish that excuse would be inefficient under the superior risk bearer

93. The word "foreseen" requires actual knowledge of the contingency and the word "likely" relates to the probability that it will occur. See note 69 *supra*.

analysis.[94]

This approach injects a sense of order and clarity into the analysis of the excuse problem. At the same time, it improves the seller's chances for excuse under section 2-615. The seller prevails if a prima facie case for excuse is established and the buyer is unable or unwilling to show that the seller was the superior risk bearer. Even if a prima facie case is not established, the seller prevails if he establishes that the buyer is the superior risk bearer. But under no circumstances should the seller be excused if the contingency does not have a materially adverse effect on performance "as agreed." Thus, in our case of *Arnold v. Beetle*, Arnold's knowledge at the time of contracting that the risk of fire was abnormally high means that the contingency of fire was "foreseen as likely to occur." If Arnold can establish that Beetle was the superior risk bearer and that the fire had a materially adverse effect on performance "as agreed," however, excuse should be granted. Both of these requirements are satisfied under the facts as developed in this case.

The above analysis is a better way to identify and accomodate the interests of particularized fairness and economic efficiency under section 2-615. It requires, however, that one accept the concept of economic efficiency as an integral part of the legal standard for excuse. I will not enter that debate at this time[95] other than to say that my "modest suggestion" makes economic efficiency but one part of the legal solution in excuse cases and to explore one further question: is the superior risk bearer test an appropriate solution to the excuse problem in long-term supply contracts, especially when the buyer can obtain a preliminary injunction against breach and, ultimately, a specific performance decree?[96]

94. This process of shifting the burden of proof has much to recommend it in other contexts where consent is missing or defective. *See* Speidel, *Unconscionability, Assent and Consumer Protection,* 31 U. PITT. L. REV. 359, 367-69 (1970) (consumer buyer establishes prima facie unconscionability of contract term, the burden shifts to seller to establish term as commercially reasonable).

95. For a sample of the literature critical of economic analysis in law, see C. FRIED, RIGHT AND WRONG 81-107 (1978); Schwartz, *Economics, Wealth Distribution, and Justice,* 1979 WIS. L. REV. 799; Michelman, *Norms and Normativity in the Economic Theory of Law,* 62 MINN. L. REV. 1015 (1978).

96. Prototype transactions are found in Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 134 (N.D. Iowa 1978), *rev'd on other grounds,* 603 F.2d 1301 (8th Cir. 1979) (long-term uranium ore supply contract negotiated at fixed price); Eastern Air

When specific performance is sought in long-term supply contracts, should the superior risk bearer analysis be invoked to offset a prima facie case for excuse established by the seller? In my judgment the answer is no. A different approach to efficiency must be developed. The cause of the problem is the initial failure of risk planning between the parties: There was no conscious bargaining over the risk. The seller will argue that enforcement of the original agreement after the occurrence of an unforeseen contingency produces an unacceptable degree of hardship. The hardship case is more appealing in the absence of an effective bargaining process to insulate the allegedly disproportionate outcome.[97] The buyer will assert, however, that the hardship is neutralized if the seller was the superior risk bearer: In that case, unforeseen risks simply do not create excessive hardship. The court is required to assess the relative capacities of the parties and recreate a hypothetical bargaining process to determine who should have and could have diversified the risk through the contract or otherwise.

The buyer's argument is most persuasive when, after the seller repudiates or fails to perform, the buyer cancels the contract and pursues market-oriented remedies. The seller is not compelled to incur the additional costs and is free to pursue other profitable opportunities. The buyer, in theory at least, is fully protected through access to other sources of supply and compensatory damages.[98] Finally, the assumptions underlying the superior risk bearer analysis are not called into question.[99] This argument is impaired, however, when the buyer seeks an injunction against breach and specific performance. If these equitable remedies are granted, the flexibility present when the buyer cancels and pursues market-oriented remedies disappears. The seller is directed to perform the contract as originally

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Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (long-term aviation fuel supply contract at fixed price with escalation); Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. App.), *cert. denied,* 444 U.S. 865 (1979) (long-term coal supply contract negotiated at fixed price with escalation).

97. See note 3 *supra.*

98. For the proposition that the world of Code-oriented market remedies is not all sweetness and efficiency, see Jackson, *supra* note 85.

99. *But see* note 95 *supra;* Leff, *Unspeakable Ethics, Unnatural Law,* 1979 DUKE L.J. 1229, 1240-45 (questioning the ethical foundations of economic efficiency, as extended to political theory); Owen, *supra* note 35, at 703-14 (questioning several of the "efficiency" arguments used to justify strict liability).

agreed and, of course, to incur the additional costs. One solution would be to deny specific performance when the seller establishes a prima facie case for excuse under section 2-615, *i.e.*, that the contingency was not "foreseen as likely to occur" and its occurrence had a materially adverse effect on performance "as agreed." In essence, the seller might argue that, in equity, relief of hardship should take precedence over economic efficiency. In response, the buyer could still argue persuasively that the hardship was caused by the seller's failure to take advantage of his superior risk management capacities. More to the point, if specific performance is denied, the buyer is left with inadequate market remedies in a case in which the seller is the superior risk bearer. The tension between the more liberal granting of specific performance and the restrictive view toward excuse under section 2-615 cannot be resolved, then, simply by junking the superior risk bearer analysis.[100]

When the specific enforcement of long-term supply contracts is sought, the court might play a more aggressive role in seeking an adjustment of the original agreement and completion of the modified exchange. In a case where equitable relief is otherwise justified, the court should typically issue a preliminary injunction against breach and the parties should consent to continue performance as agreed during the trial. At this point, the court can encourage and supervise efforts by the parties to bargain in good faith toward a modification of the contract and completion of the exchange.[101] Assuming that the seller can establish a prima facie case for excuse, but is the superior risk

100. Arguing for an expanded specific peformance remedy, Professor Alan Schwartz urges the curtailment of defenses based upon "unfair terms" unless they are accompanied by unfairness in the contracting process. Otherwise, the denial of specific performance "inappropriately redistributes wealth from promisees to promisors and creates uncertainty." Schwartz, *supra* note 8, at 302.

101. *See* Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U.L. REV. 673, 720-26 (1969). In Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), the court, on a motion to reopen, held that a consent order maintaining performance as agreed during the trial was not a modification under U.C.C. § 2-209. The court stated that a modification must emanate from good-faith bargaining between merchants. Code § 2-209 "does not undertake to give the court a role in imposing an adjustment. . . . No court-imposed adjustment is available under this section." *Id.* at 139 (citations omitted). *See* Note, *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 STAN. L. REV. 1563 (1975) (arguing for a restrictive role for negotiations after injunctions have issued in environmental litigation). *But see* note 109 *infra*.

bearer, and that both parties bargain in good faith, the court's leverage is the discretion to grant or deny specific performance. If the parties cannot agree, the court, depending on the circumstances, might grant or deny the decree without condition, grant the decree conditioned upon the buyer's agreement, or unilaterally adjust the contract in an equitable way and grant the decree.[102] The court's effort to achieve adjustment as an incident of specific performance has the potential to develop another model of economic efficiency for the transaction in question. One has an intuitive feeling that it is at least as efficient for the court to pursue these objectives as to impose a "superior risk bearer" analysis retroactively upon a disrupted agreement when an exchange cannot be completed and market remedies are inadequate.

An effort to develop a "jurisprudence of adjustment,"[103] when specific performance of long-term supply contracts is sought, appears to be consistent with some versions of reality. Professor Stewart Macaulay has long contended that parties to

102. Code § 2-716(1) provides that "[s]pecific performance may be decreed where the goods are unique or in other proper circumstances." Code § 2-716(2) provides that the "decree . . . may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just." It has been suggested that this provision gives the court power to rewrite the price term in conflict between U.C.C. §§ 2-615 and 2-716 when the seller can actually produce the goods in accordance with the long-term contract. Schmitt & Pasterczyk, *supra* note 85, at 73-76. In Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), however, the court squarely held that no court-imposed adjustment was available under U.C.C. § 2-716. Similarly, the North Dakota Supreme Court in a case in which U.C.C. § 2-615 was not involved, held that the court had no power unilaterally to adjust a contract through the medium of reformation: "While 'courts of equity have power to reform written instruments to conform to the true intention of the parties' . . ., they will not make new contracts by reforming existing contracts in a manner never considered, so obviously not intended by the parties." Tallackson Potato Co. v. MTK Potato Co., 278 N.W.2d 417, 424 (N.D. 1979) (quoting Oliver-Mercer Elec. Coop., Inc. v. Fisher, 146 N.W.2d 346, 355 (N.D. 1966) (citations omitted). *But see* note 109 *infra*.

103. *But see* Berman, *supra* note 22, at 1438-39 (criticizing the "unwarranted liberalization of excuse" and a "jurisprudence of adjustment . . . appropriate in the realm of remedies" but not in the "realm of substantive rights"). Article 42(1) of the Draft Convention on Contracts for the Sale of Goods, *supra* note 91, provides that the "buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement." In short, the exigencies of international trade justify specific performance as the rule rather than the exception and, when combined with the narrow basis for excuse in Article 65, *supra* note 91, allows a narrow range for adjustment.

long-term supply contracts are predisposed to avoid or settle disputes, rather than to rely on contract doctrine and the courts.[104] This predisposition coincides with Professor Ian Macneil's conclusion that traditional contract law has not adapted to the evolution of the long-term business relationship with its need over time for flexibility and adjustment.[105] According to Macneil, traditional contract law developed for what he calls "discrete" transactions. In excuse cases, it tends to leave the loss on sellers, features a total rather than a shared shift of risks if excuse is granted, and encourages "flexibility through the market outside of the transaction," rather than through agreement between the parties.[106] This tendency accurately describes the model of economic efficiency supporting the superior risk bearer analysis, a model which Professor Macneil suggests is inappropriate for long-term contracts, because it is based upon the "assumptions of a discrete transaction system" and "channels planning through the market system rather than through cooperation, sharing and agreement between the parties."[107] On the other hand, a court, which can foster agreed modifications or impose balanced adjustments in the process of administering equitable remedies,[108] and still preserve the contract, also can develop a different and more relevant approach to efficiency for the long-term supply contract.

In sum, if the buyer seeks market remedies, the analysis under section 2-615 arguably would be improved, if, under a

104. *See, e.g.*, Macaulay, *Elegant Models, Empirical Pictures and the Complexities of Contract*, 11 L. & Soc. Rev. 507 (1977). For a concise summary of earlier research and findings, see Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 Wis. L. Rev. 805, 812-19. Professor Macaulay acknowledges that the resort of Westinghouse Corporation to contract law, *e.g.*, U.C.C. § 2-615, in the uranium contracts dispute shows that contract norms and the possibility of litigation "can play important roles that are not clearly reflected in the court records and appellate opinions." Macaulay, *supra*, at 515-18.

105. *See* Macneil, *supra* note 92.

106. *Id.* at 861-65.

107. *Id.* at 872 n.52. *See* Macneil, *A Primer of Contract Planning*, 48 S. Cal. L. Rev. 627 (1975).

108. For a discussion of the "balanced" adjustment, see E. Murphy & R. Speidel, Studies in Contract Law 1248-69 (2d ed. 1977) (equitable adjustment and dispute settlement in government contracts); Schmitt & Pasterczyk, *supra* note 85, at 73-76 (actual cost of producing the goods plus the percentage of profit the seller would have made on the contract had the unforeseen circumstances not occurred); Note, *supra* note 23, at 596-99 (adjust costs incurred because of unforeseen contingency).

more liberal test, the seller established a prima facie case for excuse, which would prevail unless the buyer proved that the seller was the superior risk bearer. In that case, excuse should be denied and the buyer left to market-oriented remedies. If because of inadequate market remedies, the buyer is entitled to specific performance, however, a dilemma arises. If the decree is denied because the seller has established a prima facie case for excuse, *e.g.*, hardship, the buyer will be left with no effective remedy. If the decree is granted because the seller, although establishing a prima facie case for excuse, is the superior risk bearer, normal flexibility is impaired because of an efficiency reason not appropriate to the transaction involved. The appropriate response for the court is to press aggressively for an agreed modification or to impose an adjustment as a condition to equitable relief. A different model of efficiency attuned to the long-term supply contract should be substituted for that underlying the "superior risk bearer" analysis. In long-term contracts, at least, the gains to be derived from postcontingency adjustments and completion of the exchange could outweigh the cost of the occasional judicial imposition of adjustments without consent.[109]

109. *Cf.* Kronman, *supra* note 10, at 483-89 (judicial distribution of resources without consent may be justified by the long range benefit to the parties and those similarly situated).

In a recently reported decision, Aluminum Co. of America v. Essex Group, Inc., ___ F. Supp. ___, 29 U.C.C. Rep. (W.D. Pa. 1980), Alcoa, after unsuccessful efforts to reach an agreed adjustment with Essex, sought: 1) a declaratory judgment that Alcoa did not assume the risk of specified risk events, primarily inflation, under U.C.C. § 2-615; and, 2) if excuse were granted, the remedy of reformation rather than rescission of the contract. On the issue of liability, the trial court held that Alcoa was excused because of variations from an agreed cost index that were "unforeseeable in a commercial sense" and made performance "as agreed" impracticable. The estimated loss over the life of the long-term supply contract was $60,000,000. On the issue of remedy, the trial court concluded that rescission was not appropriate and that the price term should be reformed by the court "in the light of the circumstances which disrupted it." The court stated that rescission following excuse would grant one party (Alcoa) a "windfall" gain in the current market and deprive the other (Essex) of assured sources of supply and other advantages purchased under the contract. Rather than simply shifting gains and losses around under the remedy of rescission, the court concluded that in a partially performed long-term supply contract, the price adjustment was needed "to protect the fair expectations of the parties and to prevent unjust enrichment." Rejecting the "hoary maxim" that a court will not make a contract for the parties for what he called the "new spirit" of contract law, Judge Teitelbaum minimized the dangers of "gap" filling in partially performed contracts where there was accurate "hindsight" information and stressed the prospect that judicially imposed adjustments would provide "desirable practical incentives" for the parties to negotiate adjustments over the life of the contract. Since the court did not order the buyer, Essex, to perform, Essex could, presumably, refuse to perform the reformed contract and force Alcoa to seek appropriate remedies for breach of contract. Essex's appeal from this decision is pending before the United States Court of Appeals for the Third Circuit as this article goes to press.

The Alcoa case is the first decision under U.C.C. § 2-615 both to grant excuse and to impose an adjustment without the consent of both parties. It is, however, the other side of the coin discussed in this article, namely, if the supplier is *not* excused under U.C.C. § 2-615, should the court grant specific performance to the buyer without an adjustment of the contract? Where the supplier has not assumed the risk by agreement, I have argued that an adjustment should be made. More importantly, I have argued that both considerations of fairness and allocative efficiency support specific enforcement of the contract as adjusted. Even if the supplier is liable, there is room in the system of remedies for adjustment of losses and gains not explicitly allocated by the parties. The buyer, however, may always withdraw its request for specific performance, thereby thwarting any design of the court to see that the exchange is completed as adjusted. Thus, as Judge Teitelbaum clearly saw, the major issue on both sides of the coin is whether a court imposed adjustment will induce the loser to perform the contract as adjusted or induce both parties to reach agreed modifications and devise techniques for adjustment in the future. In that case, the major role of the court would be, upon request by one of the parties, to monitor the arrangement for excessive, unilateral exercises of power as time passes and change occurs. For helpful discussion, see B. NUSSBAUM, INJUNCTIONS AND OTHER EQUITABLE RELIEF IN COMMERCIAL DISPUTES (1976). *See also* Goetz & Scott, *supra* note 92.