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Commercial Impracticability: A Textual and Economic Analysis of Section 2-615 of the Uniform Commercial Code‡

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I. Introduction

Section 2-615(a) of the Uniform Commercial Code ("U.C.C."), titled "Excuse by Failure of Presupposed Conditions," provides that failure by parties to a contract to perform their obligations is not a breach when performance is rendered impracticable by a contingency the non-occurrence of which was a basic assumption on which the contract was made.[1] This section, the modern successor to common law doctrines of impossibility of performance and frustration of purpose, is the subject of a growing body of litigation[2] and an abundance of legal scholarship.[3]

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[1]Section 2-615(a) of the Uniform Commercial Code (1978 Official Text) 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 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.

[2]*See infra* notes 37-100 and accompanying text.

[3]*See* 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: Excuse For Nonperformance of Contractual Obligations in the Light of Economic Theory*, 20 Hastings L.J. 1393 (1969); Black, *Sales Contracts and Impracticability in a Changing World*, 13 St. Mary's L.J. 24 (1981); Cosway, *Sales—A Comparison of the Law in Washington and The Uniform Commercial Code*, 36 Wash. L. Rev. 50 (1961); Duesenberg, *Sales, Bulk Transfers, and Documents of Title*, 31 Bus. Law. 1533 (1976); Duesenberg, *"Impossibility": It Isn't Good Code Language*, 1 J. L. & Com. 29 (1981); Duesenberg, *Exiting from Bad Bargains Via U.C.C. Section 2-615:*

By and large, the litigation has resulted in opinions which interpret section 2-615(a) restrictively and limit severely the circumstances under which it serves as a basis for excuse. The scholarly articles are generally critical of this trend.

The existing literature and judicial opinions suffer from four deficiencies. First, they rarely advance an interpretation of section 2-615(a)

An Impractical Dream, 13 U.C.C. L.J. 32 (1980); Eagen, *The Westinghouse Uranium Contracts: Commercial Impracticability and Related Matters*, 18 Am. Bus. L.J. 281 (1980); Farnsworth, Brickell & Chawaga, *Relief for Mutual Mistake and Impracticability*, 1 J. L. & Com. 1 (1981); Harrison, *A Case for Loss Sharing*, 56 S. Cal. L. Rev. 573 (1983); Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 Com. L.J. 75 (1974); Henszey, *U.C.C. Section 2-615 — Does "Impracticable" Mean Impossible?*, 10 U.C.C. L.J. 107 (1977); Huffmire, *Section 2-615 and Corporate Accountability*, 13 U.C.C. L.J. 256 (1981); Hurst, *Freedom of Contract In An Unstable Economy: Judicial Reallocation of Contractual Risks Under U.C.C. Section 2-615*, 54 N.C. L. Rev. 545 (1975); Jacobs, *Legal Realism or Legal Fiction? Impracticability Under the Restatement (Second) of Contracts*, 87 Com. L.J. 289 (1982); Jennings, *Commercial Impracticability — Does It Really Exist?*, 2 Whittier L. Rev. 241 (1980); Murray, *A Postscript: Ruminations and Presentations About Impracticability and Mistake*, 1 J. L. & Com. 59 (1981); Prance, *Energy Contract Planning: Allocating the Risks and Consequences of Commercial Impracticability*, 3 Hastings Int'l & Comp. L. Rev. 435 (1980); Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Saw*, 18 Duq. L. Rev. 551 (1980); Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things — The Doctrine of Impossibility of Performance*, 23 Rutgers L. Rev. 419 (1969); Schmitt and Wollschlager, *Section 2-615 "Commercial Impracticability": Making the Impracticable Practicable*, 81 Com. L.J. 9 (1976); Schwartz, *Sales Law and Inflations*, 50 S. Cal. L. Rev. 1 (1976); Sirianni, *The Developing Law of Contractual Impracticability and Impossibility*, 14 U.C.C. L.J. 30 (1981); Sommer, *Commercial Impracticability — An Overview*, 13 Duq. L. Rev. 521 (1975); Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 Nw. U.L. Rev. 369 (1981); Speidel, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management*, 32 S.C.L. Rev. 241 (1980); Spies, *Article 2: Breach, Repudiation and Excuse*, 30 Mo. L. Rev. 225 (1965); Squillante and Congalton, *Force Majeure*, 80 Com. L.J. 4 (1975); Tannenbaum, *Commercial Impracticability Under the Uniform Commercial Code: Natural Gas Distributors' Vehicle for Excusing Long-Term Requirements Contracts?*, 20 Hous. L. Rev. 771 (1983); Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 Notre Dame Law. 203 (1979); White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life?*, 22 Washburn L.J. 1 (1982); Note, *U.C.C. Section 2-615: Excusing the Impracticable*, 60 B.U.L. Rev. 575 (1980); Note, *The Economic Implications of the Doctrine of Impossibility*, 26 Hastings L.J. 1251 (1975); Note, *The Doctrine of Impossibility of Performance and the Foreseeability Text*, 6 Loy. U. Chi. L.J. 575 (1975); Note, *U.C.C. Section 2-615: Sharp Inflationary Increases in Cost As Excuse From Performance of Contract*, 50 Notre Dame Law. 297 (1974); Note, *The Role of Foreseeability In Allocation of Risk Under U.C.C. 2-615, Excuse by Failure of Presupposed Conditions*, 21 S. Tex. L.J. 441 (1980); Note, *Frustration As An Agricultural Buyer's Excuse Under U.C.C. Section 2-615*, 11 U.C.D. L. Rev. 351 (1978); Note, *Labor Strife and U.C.C. 2-615: One Strike and You're Out?*, 14 U.C.D. L. Rev. 669 (1981); Note, *U.C.C. Section 2-615: Defining Impracticability Due to Increased Expense*, 32 U. Fla. L. Rev. 516 (1980); Note, *Commercial Impracticability As a Contractual Defense*, 47 U.M.K.C. L. Rev. 650 (1979); Comment, *Commercial Impracticability and Intent in U.C.C. Section 2-615: A Reconciliation*, 9 Conn. L. Rev. 266 (1977); Comment, *Contractual* solely or primarily on the strength of the language of the statute; many of the opinions and articles dwell instead on the language and concepts of the common law. Second, while many opinions and commentaries deal at length with the official comments to section 2-615(a), they pay scant attention to other evidence of Professor Llewellyn's[4] intent which militates in favor of a broad and expansive interpretation of section 2-615(a). Third, the judicial opinions only infrequently consider the operation of section 2-615(a) in light of the U.C.C.'s mandate for a liberalization of the commercial law. Finally, almost none of the existing material attempts to reconcile fundamental economic analysis with the language of the statute.

The purpose of this Article is to review the existing opinions and then to formulate an interpretation of section 2-615(a) that is true to the language of the statute, consistent with the U.C.C.'s general policies and the drafters' intent, and which is supported by basic microeconomic theory.

There are other tasks this Article does not attempt. First, it does not treat other sections of Article 2 which deal with commercial impracticability (sections 2-613, 2-614, 2-616, and in Mississippi only, 2-617). Second, the scope of this Article is confined to subsection (a) of section 2-615. Third, it does not deal with appropriate remedies following a finding that section 2-615(a) may properly be invoked; a number of creative pieces deal with this subject, including the suggestion in the

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Excuse Based On a Failure of Presupposed Conditions, 14 Duq. L. Rev. 235 (1975); Comment, *Sections 2-615 and 2-616 of the Uniform Commercial Code: Partial Solutions to the Problem of Excuse*, 5 Hofstra L. Rev. 167 (1976); Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 From The Common Law*, 72 Nw. U.L. Rev. 1032 (1978); Comment, *Relief from Burdensome Long-Term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment*, 47 Mo. L. Rev. 79 (1982); Comment, *Crop Failure and Section 2-615 of the Uniform Commercial Code*, 22 S.D.L. Rev. 529 (1977); Comment, *Uniform Commercial Code Section 2-615: Commercial Impracticability From the Buyer's Perspective*, 51 Temp. L.Q. 518 (1978); Comment, *The International Uranium Cartel: International Economic Contingencies and Contractual Excuse Under Section 2-615 of the Uniform Commercial Code*, 14 Tex. Int'l L.J. 277 (1979).

[4]Professor Karl Llewellyn was the principal drafter of U.C.C. Article 2 on Sales. The U.C.C. was developed and drafted under the joint auspices of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Professor Llewellyn was also the "Chief Reporter" of the Editorial Board, the drafting body of this joint undertaking whose efforts produced this comprehensive piece of commercial legislation. Mr. William A. Schnader, another principal drafter of the Code and past President of the National Conference of Commissioners on Uniform State Laws, remarked regarding the choice for the Chief Reporter's position that

> [t]here was no difficulty in finding a "Chief Reporter." The outstanding man in the United States to undertake this task was Professor Karl N. Llewellyn of the Columbia University Law School. Not only was Professor Llewellyn a student of commercial law as it appeared in the law books, but he was the type of

official comments that the court may split the parties' losses.[5] Finally, this Article does not propose that states amend the language of section 2-615(a). Such a proposal is neither practical nor necessary; an appropriate interpretation of the language of section 2-615(a) is possible with no change to its text.

II. Common Law History

Scholars in this area routinely commence with a bow to the English and American case law preceding the Uniform Commercial Code. Because others have done so completely,[6] this Article's treatment of pre-Code developments is cursory.

The saga begins in 1647 with the English decision of *Paradine v. Jane*,[7] which enunciated the rule that contractual promises were absolute, and in no circumstances would a court excuse nonperformance. There is some question whether the law was as strict as that formulation suggests — even in 1647.[8] In any event, the famous 1863 opinion in

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> law professor who was never satisfied unless he knew exactly how commercial transactions were carried on in the market place. He insisted that the provisions of the Code should be drafted from the standpoint of what actually takes place from day to day in the commercial work rather than from the standpoint of what appeared in statutes and decisions.

Schader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. Miami L. Rev. 1, 4 (1967). *See also* Twining, Karl Llewellyn and the Realist Movement 270-340 (1973) for a more detailed examination of Professor Llewellyn's role in the history and drafting of this monumental piece of legislation. *See also* Corbin, *A Tribute To Karl Llewellyn*, 71 Yale L.J. 805 (1962), and Gilmore, *In Memoriam: Karl Llewellyn*, 71 Yale L.J. 813 (1962), for two personal reflections on Professor Llewellyn and his influence on the development and drafting of the Code, written respectively by Professors Corbin and Gilmore shortly after Professor Llewellyn's death.

[5]U.C.C. § 2-615 (1978) Official Comment 6 reads:

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

See Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 Nw. U.L. Rev. 369 (1981). *See also* Harrison, *A Case for Loss Sharing*, 56 S. Cal. L. Rev. 573 (1982).

[6]*See, e.g.*, Schlegel, *Of Nuts, and Ships, And Sealing Wax, Suez, And Frustrating Things — The Doctrine of Impossibility Of Performance*, 23 Rutgers L. Rev. 419 (1966); *see also* Posner & Rosenfield, *Impossibility and Related Doctrines In Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83 (1977).

[7]82 Eng. Rep. 897 (K.B. 1647) (Aleyn 26).

[8]*See* Schlegel, *supra* note 6, at 420; *see also* Posner & Rosenfield, *supra* note 6, at 97.

Taylor v. Caldwell[9] considerably relaxed the doctrine of absolute liability. In that case, a promoter contracted with a music hall owner for the use of the hall. The owner was unable to perform because the hall burned to the ground before the first scheduled performance. The court disallowed the promoter's claim for breach on the theory that the continued existence of the hall was an implied condition precedent to the defendant's duty to perform.

The doctrine of implied conditions eventually found its way into American jurisprudence. In *Mineral Park Land Co. v. Howard*,[10] a contractor promised to remove gravel which in large part was found, after the date of contracting, to be below water level and thus prohibitively expensive to extract. The contractor did not remove the submerged gravel. In the suit for breach, the court reasoned that the continued existence of the gravel was an implied condition to the duty to perform, and that the difficulty of removing it made the gravel, as a practical matter, nonexistent. The court therefore excused the contractor's nonperformance. The doctrine of impossibility also appeared in the first Restatement of Contracts, which defined impossibility to include "not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."[11]

Possibly in response to the fictional nature of the implied condition analysis, courts also developed the doctrine of frustration of purpose, beginning with the famous English coronation cases of 1903.[12] This doctrine applies in circumstances where performance, although still possible, will not effect the parties' mutual intent.

The Uniform Sales Act[13] embodied neither the impracticability nor the frustration doctrine. Thus, section 2-615 of the Uniform Commercial Code represented the first codification of these concepts in this country. However, section 2-615 has since had a pervasive influence; its impact is evident in the language of the Second Restatement of Contracts[14] and

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[9]122 Eng. Rep. 309 (Q.B. 1863).

[10]172 Cal. 289, 156 P. 458 (1916).

[11]Restatement of Contracts § 454 (1932).

[12]*See* Krell v. Henry, 2 K.B. 740 (1903). *See also* Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944).

[13]Prior to the enactment and adoption of the U.C.C., "most commercial transactions [had] been regulated by a number of Uniform Laws prepared and promulgated by the National Conference of Commissioners on Uniform State Laws." The Uniform Sales Act was one such uniform law regulating many commercial sales transactions. General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute to the Uniform Commercial Code 1978 Official Text.

[14]Restatement (Second) of Contracts § 261 (1979). That section states:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render

in the recently-drafted United Nations Convention on Contracts for the International Sale of Goods.[15]

III. The Goals of an Interpretation of Section 2-615

A. *Interpretation Should Be Consistent with the Language of the Statute*

The premier canon of statutory construction is that the interpretation should be true to the language of the statute.[16] In stark contrast, very few judicial interpretations are wholly consistent with the language of section 2-615(a); most focus only on selected portions of the section and a few ignore the language entirely. As will be demonstrated,[17] some opinions discuss the meaning of "contingency," and a great number discuss the meaning of "impracticable," both of which appear in the statute. However, almost no cases have carefully analyzed the words "the non-occurrence of which was a basic assumption on which the contract was made." Instead, many decisions focus on the words "unforeseen" or "unforeseeable," even though these words appear nowhere in the text of the statute. The word "unforeseen" appears only in official comments 1 and 4 to section 2-615, and the word "unforeseeable" is entirely absent.

B. *Consistency with the Intent of the Drafters*

A second goal of statutory interpretation is that the interpretation be consistent with the intent of the drafter.[18] While the drafter's intent is not always easily ascertained, there is evidence that Professor Llewellyn had in mind a considerably broader scope for section 2-615(a) than the courts have permitted.

The most obvious manifestation of Llewellyn's intent appears in the tenor of the official comments to section 2-615. Taken together, they consistently advance a broad reading of the statute. For example, official comment 2 notes that "[t]he present section deliberately refrains from any effort at an exhaustive expression of contingencies and is to be

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that performance is discharged, unless the language or the circumstances indicate the contrary.

[15]United Nations Conference on Contracts for the International Sale of Goods, Article 79. 834 U.N.T.S 169, U.N. Doc. A/Conf. 97/18 (1980).

[16]This is usually stated as the "plain-meaning" rule. *See* Sutherland, Statutory Construction § 46.01 (1973).

[17]*See infra* notes 37-100 and accompanying text.

[18]*See* Sutherland, Statutory Construction § 48.12 (1973), regarding the appropriateness of reference to the official comments in interpreting the U.C.C.

interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose."[19] Official comment 3 states in the second sentence that "[t]he additional test of commercial impracticability (as contrasted with 'impossibility,' 'frustration of performance' or 'frustration of the venture') has been adopted in order to call attention to the commercial character of the criterion chosen by the Article."[20]

Official comments 5 and 6 embody Llewellyn's most dramatic departure from the past with the suggestion that a party claiming excuse turn over rights to the buyer (comment 5), and with the notion of loss-splitting (comment 6). Official comment 7 notes that "[t]he failure of conditions which go to convenience or collateral values rather than to the commercial practicability of the main performance does not amount to a complete excuse. However, good faith and the reason of the present section and of the preceding one may properly be held to justify and even to require any needed delay involved in a good faith inquiry seeking a readjustment of the contract terms to meet the new conditions."[21]

Official comment 10 states:

> Following its basic policy of using commercial practicability as a test for excuse, this section recognizes as of equal significance either a foreign or domestic regulation and disregards any technical distinctions between "law," "regulation," "order" and the like. Nor does it make the present action of the seller depend upon the eventual judicial determination of the legality of the particular governmental action. The seller's good faith belief in the validity of the regulation is the test under this Article and the best evidence of his good faith is the general commercial acceptance of the regulation.[22]

Finally, official comment 11 advocates a liberalization of the law with respect to allocation by noting that "[s]ave for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller."[23]

These excerpts are, of course, comments only, and do not carry the weight of statutory text. Nonetheless, it is evident that Professor Llewellyn intended the excuse defense to be available in a far greater range of circumstances under section 2-615(a) than contemplated previously. This is clear from the expansion of "triggering" devices to include impracticability, the sweeping away of technical distinctions concerning which

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[19]U.C.C. § 2-615 (1978), Official Comment 2.
[20]*Id.* at official comment 3.
[21]*Id.* at official comment 7.
[22]*Id.* at official comment 10.
[23]*Id.* at official comment 11.

laws and regulations are adequate to excuse nonperformance, and the grant of "every reasonable business leeway" to the allocating seller.

In a noteworthy article,[24] Professor Spies confirms this hypothesis. Professor Spies had access to Llewellyn's handwritten notes at the University of Chicago, and those notes support the inference in the official comments that the scope of "excuse" protection was intended to be expanded broadly in section 2-615(a). Indeed, after discussing the genesis of section 2-615(a), Professor Spies stated:

> Assuming that the provision is commercially justifiable and that it is inspired by cases which are the more commercially sound, it is nevertheless difficult to envision its potential range of operation. For one thing, the very definition of "presupposed conditions" may become controversial: what result where technological change debases every expectation of the buyer's need for or the seller's expectation of supplying the subject matter? The examples given in the [official comments] suggest that the conditions intended to be covered must be something more prosaic, although the cases cited in [Llewellyn's unpublished notes] suggest that Professor Llewellyn was seeking the widest possible application of this section.[25]

Instead, Professor Spies noted that section 2-615(a) also apparently intended to sanction the parties' "exemption" clauses, and one reasonable inference to draw from this sanction is that Llewellyn intended through section 2-615(a) to afford like protection in cases where no explicit clause existed.[26]

As further evidence of the sweeping change which section 2-615(a) was intended to effect, Professor Cosway stated:

> The important point is, though, that the broad concept of *impracticability* as an excuse staggers the imagination of anyone accustomed to the limited excuses now recognized. A disservice to the Code results from seeking an equivalence to things past. It will remain for the courts to give specificity to this word, but they must strive not to be limited by the older decisions.[27]

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[24]Spies, *Article 2: Breach, Repudiation And Excuse*, 30 Mo. L. Rev. 225 (1965).

[25]*Id.* at 255.

[26]*Id.* A number of authors have tried their hand at such clauses in print. *See* Duesenberg, *"Impossibility": It Isn't Good Code Language*, 1 J. L. & Com. 29 (1981). *See also* Prance, *Energy Contract Planning: Allocating the Risks and Consequences of Commercial Impracticability*, 3 Hastings Int'l & Comp. L. Rev. 435 (1980). Certainly, if Llewellyn's intent was to provide in section 2-615(a) protection akin to that in clauses such as these articles suggest, section 2-615(a) should be given the broadest possible interpretation.

[27]Cosway, *Sales — A Comparison of the Law in Washington and the Uniform Commercial Code*, 36 Wash. L. Rev. 50, 91 (1961).

C. Ratification of Commercial Practice and Liberalization of Law

Section 1-102 of the Uniform Commercial Code states that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies."[28] In subparagraph (2), the same section notes that the underlying purposes and policies of the Act are "(a) to simplify, clarify and modernize the law governing commercial transactions; [and] (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties . . . ."[29]

This liberal intent has been honored, by and large, in a number of other areas where the drafters of the Code made sweeping changes. In the area of contract formation, for example, sections 2-204 and 2-207 represent a dramatic departure from pre-Code law and facilitate considerably the finding that a contract exists.[30] The rationale for these liberal sections is that they reflect commercial reality; that is, business people entering into contracts do not know or care about, for example, the mirror image rule, and do not wish to be bound by it or be the beneficiary of it.[31] Sections 2-204 and 2-207 simply ratify commercial practice so that the law will be consistent with it.

While there are a number of cases in which courts have misinterpreted those sections,[32] these sections have not met with the widespread hostility accorded section 2-615(a). In fact, section 2-615(a) is, or should be, no different. Like the sections on formation, it simply attempts to make the law consistent with commercial reality and the commercial reality is (or at least the drafters thought it was) that business people view themselves as being excused from the duty to perform a contract in a considerably wider range of circumstances than the law has historically recognized. Section 1-102 therefore calls for a considerably more liberal reading of section 2-615(a) than the courts have granted to date.

Finally, the limited empirical research with respect to section 2-615 suggests that the section, as interpreted and applied, is considerably more restrictive than normal business practices routinely followed. Unfortunately, the research is confined to study of the practices of chemical companies in matters of allocation, and not with respect to the basic triggering contingencies which permit section 2-615(a) to take effect. The

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[28]U.C.C. § 1-102 (1978).

[29]*Id.*

[30]Section 2-204 allows for the finding of a contract where, under pre-Code law, the contract could fail for indefiniteness. Section 2-207 concerns what had commonly been referred to as the "battle of the forms" problem and upholds the finding of contracts even though the terms of the acceptance do not mirror those of the offer.

[31]*See, e.g.*, Comment 2 to Section 2-207, which states: "Under this article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract."

[32]The most notorious is Roto-Lith Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962).

research nonetheless suggests that business executives would accord section 2-615 considerably greater latitude than have the courts to date.[33]

D. Economic Analysis

In an address to a conference of teachers of contract law in 1981, the late Professor Grant Gilmore issued a call for "an economic analysis nonproliferation treaty."[34] Notwithstanding this most eminent authority, the doctrine of commercial impracticability is ideally suited to the application of economic theory. As Posner and Rosenfield view the interrelation of economics to contract theories, every impracticability case presents the basic problem of deciding who should bear the loss resulting from an event which has rendered performance by one party unprofitable. If the parties' contract does not allocate this loss explicitly, contract law should do so in the fashion that the parties themselves would have adopted had they negotiated the point. Because the object of voluntary exchange is to increase efficiency, the parties would have agreed to the most efficient allocation of the risk. Therefore, if the purpose of contract law is to enforce the desires (known or hypothesized) of the parties, the proper criterion for allocating the risk is that of economic efficiency. Indeed, if the rules are not efficient, the parties will contract around them.[35]

Posner and Rosenfield further argue that if "impracticability" is to be defined consistent with economic efficiency, the risk of loss should be placed upon the party best able to prevent the loss or insure against it. Rephrasing this concept in the terminology of section 2-615(a), the court should declare a promisor's performance "impracticable" if the promisee could less expensively than the promisor have prevented or insured against the loss resulting from nonperformance.[36]

Significantly, a few decisions have attempted this analysis without using the economist's vocabulary.[37] Also, Professor Speidel has begun an attempt, which Posner and Rosenfield did not, to integrate economic analysis with the textual mandates of section 2-615(a), although the focus of Professor Speidel's work clearly lies elsewhere.[38]

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[33] White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life?*, 22 Washburn L.J. 1 (1982).

[34] Kelso, *The 1981 AALS Conference on Teaching Contracts: A Summary and Appraisal*, J. Legal Educ. 616, 642 (1982).

[35] *See* Posner & Rosenfield, *Impossibility And Related Doctrines In Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83, 86-89 (1977).

[36] *Id.* at 91-92.

[37] *See* Transatlantic Financing Corp. v. United States, 363 F.2d 312, 319 (D.C. Cir. 1966).

[38] *See* Speidel, *Excusable Nonperformance In Sales Contracts: Some Thoughts About Risk Management*, 32 S.C.L. Rev. 241, 254-71 (1980).

The use of economic efficiency as a criterion for allocation of risk is, of course, not novel. But economic analysis is a powerful and compelling tool in an area where the parties' *ex ante* intent is to increase efficiency, and parties are free to contract around an unacceptable risk allocation imposed by law, provided the economic analysis is not inconsistent with such traditional criteria as the language of the statute and the intent of its drafter.

IV. Uniform Commercial Code Case Development

Many commentators believe that the courts have gutted section 2-615(a), affording relief by excusing performance in only the most extreme circumstances.[39] A review of the decisions supports this conclusion and dramatizes how far the decisions have strayed from the bold vision of section 2-615(a) advanced by Llewellyn and the early commentators. This section reviews and comments upon some of those decisions.[40]

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[39] *See, e.g.*, Duesenberg, *"Impossibility": It Isn't Good Code Language,* 1 J. L. & Com. 29 (1981).

[40] Several cases will be excluded from discussion in this section because these decisions were based upon considerations other than the courts' interpretation of section 2-615(a).

These include cases where relief for commercial impracticability was granted or denied based upon express language in the contracts — in short, where the parties have chosen to supplant section 2-615 and the courts have honored that choice. *See* Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l, 719 F.2d 992 (9th Cir. 1983); Gulf Oil Corp. v. Fed. Power Comm'n, 563 F.2d 588 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978), *petition for cert. dismissed*, 435 U.S. 911 (1978); Tennessee Valley Auth. v. Westinghouse Elec. Corp., 69 F.R.D. 5 (E.D. Tenn. 1975); Intermar, Inc. v. Atlantic Richfield Co., 364 F. Supp. 82 (E.D. Pa. 1973); Gold Kist, Inc. v. Stokes, 138 Ga. App. 482, 226 S.E.2d 268 (1976); Swift Textiles, Inc. v. Lawson, 135 Ga. App. 799, 219 S.E.2d 167 (1975). This approach is consistent with the language of the Uniform Commercial Code which provides in section 1-102(3) that "[t]he effect of provisions of this Act may be varied by agreement . . . ." In fact, the opening line of section 2-615 states that the section applies "[e]xcept so far as a seller may have assumed a greater obligation . . . ." Professor Hawkland argues persuasively that the seller is also free to assume contractually a lesser obligation. *See* Hawkland, *supra* note 3.

A second group of decisions denied relief where the contingency that was the basis for the claim was attributable to the party invoking section 2-615(a) for relief. *See* RothSteel Prod. v. Sharon Steel Corp., 35 U.C.C. Rep. Serv. (Callaghan) 1435 (6th Cir. 1983); Jennie-O Foods, Inc. v. United States, 580 F.2d 400 (Ct. Cl. 1978); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975). This point is discussed further in the text, but it can be noted that it is axiomatic that a party should not be entitled to benefit from or claim excuse on the basis of its own misdeeds.

A third set of opinions denied section 2-615(a) relief because such relief was requested in a motion for summary judgment and there remained unresolved issues of fact. *See* Zidell Explorations, Inc. v. Conval Int'l, Inc., 37 U.C.C. Rep. Serv. (Callaghan) 466 (9th Cir. 1983); Mishare Constr. Co., Inc. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 310 N.E.2d 363 (1974); Michigan Bean Co. v. Senn, 93 Mich. App. 440, 287 N.W.2d 257 (1979); Lipsett Indus. Corp. v. Barth Smelting & Refining Corp., 17 U.C.C. Rep.

A. The Easy Cases

A few cases in which the court has granted the seller relief involve objective impossibility in which a court would excuse nonperformance under any standard articulated subsequent to *Taylor v. Caldwell*.[41] In the earliest case, *Low's Ezy Fry Potato Co. v. J.A. Wood Co.*,[42] the seller promised to sell three-inch potatoes from a specified crop to the buyer. The crop produced no three-inch potatoes, through no fault of the seller. Under an articulated theory of implied condition, the court excused the seller's nonperformance and denied the buyer's claim for breach. In *Goddard v. Ishikawajima-Harima Heavy Industries Co.*,[43] the defendant-seller contracted to manufacture boats for sale to the plaintiff-buyer. The defendant's only manufacturing facility was completely destroyed by fire, and the court summarily denied the plaintiff's claim for breach, citing section 2-615(a) without discussion.[44]

Serv. (Callaghan) 406 (N.Y. Sup. Ct. 1975); Gay v. Seafarer Figerglass Yachts, Inc., 14 U.C.C. Rep. Serv. (Callaghan) 1335 (N.Y. Sup. Ct. 1974); Glassner v. Northwest Lustre Craft Co., Inc., 39 Or. App. 175, 591 P.2d 419 (1979).

The remaining excluded decisions are those in which agricultural sellers have claimed excuse because of crop failure. These decisions unanimously draw upon the first paragraph of official comment 9 to section 2-615 which states:

> The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.

U.C.C. § 2-615, comment 9 (1978). These cases thus hold that nonperformance is excused under section 2-615(a) or section 2-613 if the seller has contracted to sell crops grown on designated land and a contingency destroys those crops. On this basis, the courts have granted relief in three cases, *see* Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652 (Miss. 1975)(section 2-617 case); Duinavant Enter., Inc. v. Ford, 294 So. 2d 788 (Miss. 1974); Campbell v. Hostetter Farms, Inc., 380 A.2d 463 (Pa. Super. 1977), and denied relief in seven, *see* Ralston Purina Co. v. McNabb, 381 F. Supp. 181 (W.D. Tenn. 1974); Ralston Purina Co. v. Rooker, 346 So. 2d 901 (Miss. 1977); Bunge Corp. v. Miller, 381 F. Supp. 176 (W.D. Tenn. 1974); Simo Grain Co. v. Oliver Farms, Inc., 530 S.W.2d 256 (Mo. App. 1975); Bliss Produce Co. v. A.E. Albert & Sons, Inc., 35 A.D. 742, 20 U.C.C. Rep. Serv. (Callaghan) 917 (N.Y. App. Div. 1976); Deardorff-Jackson Co. v. Nat'l Produce Distrib., Inc., 26 A.D. 1309, 4 U.C.C. Rep. Serv. (Callaghan) 1164 (N.Y. App. Div. 1967); Colley v. Bi-State, Inc., 586 P.2d 908 (Wash. App. 1978). One can criticize the opinions in the seven denials for failure to go beyond the language of official comment 9 and inquire whether, under the contractual analysis discussed in the text that follows, the seller might not still be entitled to relief. Such inquiry is, however, beyond the scope of this Article.

[41]122 Eng. Rep. 309 (Q.B. 1863).

[42]26 Agric. Dec. 583, 4 U.C.C. Rep. Serv. (Callaghan) 483 (1967).

[43]29 A.D.2d 754, 287 N.Y.S.2d 901 (1968).

[44]*See also* Process Supply Co., Inc. v. Tunstar Foods, Inc., 38 Agric. Dec. 583, 4 U.C.C. Rep. Serv. (Callaghan) 483 (1967), where the seller made a later delivery of potatoes to the buyer suing for breach because the defendant's delivery truck was forced off the

B. Courts' Reliance on Pre-Code Law

A second group of seller victories is considerably less clear in its focus. While none of the decisions in this group involves a case of outright impossibility, none of the decisions articulates an expansive interpretation of section 2-615(a). In *SCA International, Inc. v. Garfield & Rosen, Inc.*,[45] a suit for nonpayment, the defendant counterclaimed for the plaintiff's failure to deliver imported shoes. The plaintiff argued that it was unable to deliver the shoes from its Italian manufacturer because of floods in Italy. It is implicit in the court's opinion that the delay was excused by the floods, although the court never made that point explicit or explained its reasoning. The court did, however, find that the seller had breached the contract, but only awarded nominal damages to the defendant.[46]

In *Mansfield Propane Gas Co. v. Folger Gas Co.*,[47] a buyer against whom a seller had invoked section 2-615(a) claimed to be entitled to a preferential allocation under section 2-615(b) because this buyer, unlike the seller's other customers, had a written contract. This court denied the claim, but implicit in the denial was the court's recognition that the seller's cutback was justified under section 2-615(a). It is not clear that the buyer even contested that threshold point.[48]

There are two noteworthy cases in this seller victory category

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road by the police because of bad weather conditions. The court granted the seller's request and excused non performance under section 2-615(a). In another case, Waldinger Corp. v. Ashbrook-Simon-Hartley, Inc., 564 F. Supp. 970 (C.D. Ill. 1983), the defendant failed to perform a contract to build a pump to specifications furnished by a designer chosen by the plaintiff. The defendant established that the pump was impossible to build with those specifications. The defendant plead section 2-615(a) to the plaintiff's claim for breach and won.

[45] 337 F. Supp. 246 (D. Mass. 1971).

[46] While this case is included under the subsection on "sellers' victories," technically, the case should be considered as only a quasi-seller victory because the seller-plaintiff in the action was found in breach of the contract as alleged in defendant's counterclaim. However, the defendant was only awarded nominal damages for the breach for failing to prove the extent of damages caused by the breach.

[47] 231 Ga. 868, 204 S.E.2d 625 (1974).

[48] *See also* Foster Wheeler Corp. v. United States, 513 F.2d 588 (Ct. Cl. 1975), where the plaintiff contracted to perform a project which later became literally impossible. The contractor was not arguing section 2-615(a) to a claim of breach, but instead argued that it was entitled to some compensation from the government for what it had done. The court granted relief and implied in its opinion that the duty to perform further was discharged by the impossibility.

In the last case, Olson v. Spitzer, 257 N.W.2d 459 (S.D. 1977), the buyer sued the seller for failure to deliver a combine. The trial court, affirmed on appeal, found that the contract explicitly excused the defendant from delivering if combines were not available, and that that clause in conjunction with section 2-615(a) afforded the seller relief. On appeal, the court said in dicta that section 2-615(a) alone would have sufficed to excuse performance.

in which the courts have discharged the seller. In *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*,[49] Eastern sued McDonnell Douglas for losses it incurred as a consequence of the seller's late delivery of DC-9 commercial airliners. The defendant offered a number of reasons for the late delivery, including that it was pressured by the government, both informally and under the Defense Production Act priority system, into delaying output of commercial jetliners in order to hasten production of planes for the Air Force to use in Vietnam. McDonnell Douglas argued that this informal action qualified under the "excusable delay" clause in the contract to discharge its duty of timely delivery. The defendant-seller's arguments were unsuccessful at trial but successful on appeal. The court's opinion mentioned section 2-615(a) but placed greater reliance on the contract clause.

The last, and by far the most remarkable, of the seller victory cases is *Aluminum Company of America v. Essex Group, Inc.*[50] Under the contract between Alcoa and Essex, Essex promised to deliver alumina to Alcoa, and Alcoa promised to convert the alumina to molten aluminum and return it to Essex. The price charged by Alcoa for the conversion service was established by a formula, part of which was fixed for the fifteen-year life of the contract and part of which escalated over time with changes in the Wholesale Price Index. The plaintiff's costs of operation that were intended to be recaptured under the escalated price provisions of the contract far outstripped increases in the Wholesale Price Index, such that plaintiff's costs of performance exceeded the price under the contract.

Alcoa first argued that the duty to perform was discharged because both parties operated under a mutual mistake of fact in entering the contract, that is, that the plaintiff's escalating costs would change consistently with changes in the Wholesale Price Index. The court accepted this argument, an argument which must surely have been prompted by the Alcoa attorneys' survey of the limited relief historically provided by section 2-615(a).

Alcoa's second claim — commercial impracticability — also met with a favorable response, although the court saw the contract as one for the rendition of services governed not by the Uniform Commercial Code but by the Restatement of Contracts. The court held that the non-occurrence of the discrepancy between the Wholesale Price Index and Alcoa's costs was a basic assumption on which the parties had entered into the contract.

The court's findings in the area of relief were even more novel, as the court in essence ordered a loss splitting arrangement by which Alcoa

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[49] 532 F.2d 957 (5th Cir. 1976).
[50] 499 F. Supp. 53 (W.D. Pa. 1980).

would bear any future cost increases resulting from risks of the type it had agreed to assume under the contract, and Essex would bear the rest. In so splitting the loss, the court followed a suggestion in official comment 6 to section 2-615, but one which finds no support in the text or in any previous (or subsequent) decision.

Of the two landmark seller relief cases, *Eastern Airlines* is somewhat tainted because of the court's reliance on the contract provision; only *Alcoa* represents a clear break from the past. The bleak reality therefore emerges that the number of cases in which relief has been granted according to section 2-615(a) is small, and that the circumstances under which relief has been accorded are little different, if at all, from those in which relief was granted prior to section 2-615(a)'s enactment.

C. Relief Denied Under Section 2-615

A survey of the opinions in which relief has not been granted lends further weight to this conclusion. At the outset, there are certain cases which appear to be correctly decided by any modern standard. In *Center Garment Co., Inc. v. United Refrigerator Co.*,[51] a seller of acetate failed to deliver to the buyer when the defendant's contemplated source of supply failed. The defendant's attempted invocation of section 2-615(a) failed, in part because it was not clear that the source had been specified in the contract, and it was even less clear that the defendant had attempted to procure from other sources.[52]

In another case, *In re Westinghouse Electric Corp. Uranium Contracts Litigation*,[53] the defendant-uranium supplier breached its contract with the plaintiff-utility to remove spent nuclear fuel. The court rejected the defendant's claims of impracticability (because performance was not unduly expensive) and unforeseen contingency (because disposition of

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[51] 369 Mass. 633, 341 N.E.2d 669 (1976).

[52] *See also* Nora Springs Cooperative Co. v. Brandau, 247 N.W.2d 744 (Iowa 1976), where the plaintiff-buyer of corn argued that it was excused from its duty to purchase by the unavailability of rail cars to transport the corn. The court held that a buyer could invoke section 2-615(a), but that in this case the buyer had failed to prove that transport was unavailable at all, much less that alternatives would have been impracticably expensive. Fratelli Gardino S.P.A. v. Caribbean Lumber Co., Inc., 447 F. Supp. 1337 (S.D. Ga. 1978), *aff'd*, 587 F.2d 204 (5th Cir. 1979), also involved a claim of failure of transportation, here by a seller, which the court rejected because the plaintiff did not prove the assertion. Another case, Frank B. Bozzo, Inc. v. Electric Weld Division, 283 Pa. Super. 35, 423 A.2d 702 (1960), involved a breach by a seller of a contract to supply steel mesh. The seller argued that it had been cut back by its source and that the court should therefore excuse performance under section 2-615(a). The court rejected the argument because the contract nowhere specified the seller's source of supply because it appeared that the seller did have enough material to supply this buyer at an earlier time but had used it for other purposes, and because other sources of supply were available.

[53] U.C.C. Rep. Serv. (Callaghan) 930 (E.D. Va. 1981).

nuclear waste was so speculative at the time of contracting that none of the contingencies which ultimately befell the seller could be said to have been beyond its contemplation). While the court's findings on impracticability and unforeseen contingencies could be challenged individually, the contract between the parties made it utterly clear that Westinghouse was aware of the manifold risks it was taking by venturing into this unknown area, and it was prepared to assume those risks in order to secure the sale. In short, the parties unmistakably allocated the risks to Westinghouse.

The remaining "seller loss" opinions are roughly divisible into decisions in which the courts ruled that the seller's increased costs were not sufficient to render performance "impracticable," as contrasted with decisions in which the court rejected the seller's claim of a "contingency" because the disabling event was in some fashion foreseeable or foreseen by the party seeking relief. Some of the decisions involve both elements.

1. Increased Cost Not Rendering Performance Impracticable. — The "increased cost" cases are not by themselves startling and probably represent no departure from the result that would have obtained before section 2-615(a) was enacted. For that reason alone, however, they present vividly the considerable gap between section 2-615(a)'s promise and its performance as interpreted by the courts. The cases are open to criticism not only on that ground, but also because they articulate no principled basis for deciding where to draw the line of "impracticability."

In one case, *Transatlantic Financing Corporation v. United States*,[54] the plaintiff ship operator contracted to carry grain from the United States to Iran in 1956. The closing of the Suez Canal necessitated the ships taking a longer route than that originally contemplated. The operator sued the shipper for its extra expense. This is not a classic commercial impracticability case because the plaintiff did not invoke commercial impracticability as a defense to a claim for breach, but instead as a basis for extra remuneration. *Transatlantic Financing* is not even literally a section 2-615(a) case because the U.C.C. was not in force at that time in the jurisdiction. The court nonetheless relied heavily on the phraseology of section 2-615(a), and the case has stood as something of a landmark ever since. The court ultimately ruled that an increased cost of approximately $44,000 did not render performance "impracticable" in a contract where the contract price was $305,000.[55]

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[54]363 F.2d 312 (D.C. Cir. 1966).

[55]In accord, and not citing to section 2-615(a), is Natus Corp. v. United States, 371 F.2d 450 (Ct. Cl. 1967), where a government contractor pled impracticability because of increased cost. The court denied relief with the assertion that it would be granted only where performance "*would be economically unrealistic*." *Id.* at 457 (emphasis added). In Eastern Airlines v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975), Gulf failed to sustain its burden of proving impracticability because it did not know and could not prove

Hancock Paper Company v. Champion International Corporation[56] presents an unusual set of facts in which the seller sued the buyer for goods sold and the buyer argued that its inability to pay was excused by section 2-615(a) because, upon reselling the goods purchased from seller, the buyer lost money in a depressed market. The court made light work of the buyer's claim; significantly, the buyer offered no compelling proof of its loss.

Returning to a common fact pattern, the defendant in *Luria Brothers & Co. v. Pielet Brothers Scrap Iron & Metal, Inc.*[57] attempted to excuse its failure to deliver scrap metal under section 2-615(a), arguing that the contemplated source had failed and that it would be prohibitively expensive to resort to other sources. The court denied relief, although once again there is scant information as to the increased cost the defendant actually suffered.[58]

One last such case is *Louisiana Power & Light Co. v. Allegheny Ludlum Industries, Inc.*,[59] in which the seller failed to deliver condenser tubing to the buyer because, as argued, its performance had become commercially impracticable because of rising costs resulting in a thirty-eight percent excess of cost over price under the contract. The court held that this was insufficient to trigger section 2-615(a), noting also that the division producing the condenser tubing continued to make a profit. As in *Gulf Oil*, the overall profits of the defendant attempting to invoke 2-615(a) prejudiced the defendant's claim. However, there does not appear to be any support for this analysis of examining overall profitability in the text of section 2-615(a); in contrast, section 2-615 focuses on whether performance "as agreed" and "under a contract" is impracticable.

At one level, the cost overrun cases in which relief has been denied are not troublesome. There do not appear to be any cost overruns of the magnitude of the ten-fold increase sufficient for relief in *Mineral Park Land Company v. Howard*,[60] and it appears that in the most

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its alleged increased costs, all at a time when corporate profits from all of the company's operations were at record highs. The court also said, in dicta, that the Arab oil embargo of 1972 prompting the alleged cost increase was foreseeable at the time the contract was executed and that this too would have barred relief. *See Aluminum Company of America*, 449 F. Supp. at 76, where the court attacked the reasoning employed by the *Eastern Airlines* court.

[56] 424 F. Supp. 285 (E.D. Pa. 1976).

[57] 600 F.2d 103 (7th Cir. 1979).

[58] A similar result (and lack of data) occurs in Alamo Clay Products, Inc. v. Gunn Tile Company of San Antonio, Inc., 597 S.W.2d 388 (Tex. Civ. App. 1980). The defendant-seller was also unsuccessful in Bernina Distributors, Inc. v. Bernina Sewing Machine Co.,646 F.2d 434 (10th Cir. 1981), where the increased cost of performance was due to the devaluation of the dollar (but again no specific numbers were given).

[59] 517 F. Supp. 1319 (E.D. La. 1981).

[60] 172 Cal. 289, 156 P. 458 (1916).

egregious of cost overrun cases, *Alcoa v. Essex*,[61] the court recognized commercial impracticability and granted relief.

Conversely, however, the cost overrun cases make no vivid departure from prior law as they arguably should. Worse still, they have virtually no precedential value because it is utterly unclear at which point the court will draw the line of "impracticability" and decide where the seller's discomfort is sufficient. This is clearly contrary to any notion that the cases should enhance the statute's certainty and clarity as an aid to private settlement and negotiation.

2. "Unforeseen," "Unforseeable," and "Unforeseeability." — The most troublesome opinions of all are those in which the courts have denied sellers relief because the contingency rendering performance impracticable was not, in the court's eyes, unforeseen or unforeseeable. These opinions illustrate well the often ludicrous results that occur when the courts make their most troublesome and common analytical mistake, that of requiring "unforeseeability" of the contingency in any form as one of the tests for seller's relief. The requirement is impossible to satisfy under any reasonable reading of "unforeseen" or "unforeseeable," because few things are "unforeseen" and nothing is "unforeseeable."

Presumably, this is not the intent expressed in section 2-615(a), as no variation of the word "unforeseen" or "unforeseeable" occurs in the text of the statute at all, and the only references in comments 1 and 4 are to the word "unforeseen," which is considerably narrower in scope than "unforeseeable." The word "unforeseeable" appears nowhere in the text or the comments. The other noteworthy point about these opinions is that they rarely refer to the language of the statute dealing with "contingencies the non-occurrence of which was a basic assumption" on which the contract was made.

In *United States v. Wegematic Corporation*,[62] the defendant promised to sell the government a computer for $231,800. The defendant ultimately reneged, citing technical difficulties which it claimed would take over $1,000,000 to correct. The court suggested that the possible inability to develop the technology had been foreseeable and that the plaintiff assumed the risk of such inability. While the case is laudable in attempting to answer the Posner and Rosenfield inquiry of who is best able to prevent or insure against the loss, the court's conclusion that the promisor assumed the risk is completely unsupported, certainly when compared to the much more complete analysis of a similar point in the *Westinghouse* case.[63]

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[61]499 F. Supp. 53 (W.D. Pa. 1980). *See supra* text accompanying note 50.

[62]360 F.2d 674 (2d Cir. 1966).

[63]*See supra note 53 and accompanying text.*

In *Security Sewage Equipment Co. v. McFerren*,[64] the court declared a contractor in breach when the contractor did not install a sewer system in a residential development. The contractor had been unable to obtain the necessary governmental permit. The court said that only a contingency which was "unforeseen and unusual" would discharge the contractor.[65] There are many flaws in this opinion. First, if failure to obtain a permit must be "unforeseen" to constitute an excuse, there will never be an excuse because an experienced contractor must always foresee that a permit may not issue. Second, the court's conclusion that the contractor "assumed the risk" is factually unsupported and relies instead on citations from Corbin's treatise, Corpus Juris Secundum, the 1932 edition of Williston, and four non-Code cases, the most recent of which was written in 1960.[66] Finally, and most important, can anyone reasonably argue that in a modern construction project the failure to secure the necessary building permit is not a "contingency the non-occurrence of which was a basic assumption on which the contract was made"?

In *Maple Farms, Inc. v. The City of Elmira School District*,[67] the plaintiff-seller of milk sought a declaratory judgment that its performance under a contract became commercially impracticable when the market price of milk had risen twenty-three percent between the time of contracting and the time for performance. The court denied relief, finding that this contingency was "not totally unexpected"[68] and that the essence of a fixed price contract was to place the risk of advances in price on the seller.

This analysis is troublesome on two counts. First, if a contingency must be "totally unexpected" to trigger section 2-615(a), a court will rarely, if ever, turn to that section, a result that is contrary to the statute's language and legislative history. Likewise, to interpret a fixed price contract as one which unalterably puts the risk of all cost advances on the seller seems utterly to emasculate section 2-615(a), and there is no support in the text of the statute for such a holding. Moreover, there was little support in the facts of this case for concluding that the parties intended the fixed price term to effect such an allocation.[69]

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[64] 14 Ohio St. 2d 251, 237 N.E.2d 898 (1968).

[65] *Id.* at 256, 237 N.E.2d at 901.

[66] *Id.* The four cases cited by the court are Shore Inv. Co. v. Hotel Trinidad, Inc., 158 Fla. 682, 29 So. 2d 696 (1947); Hein v. Fox, 126 Mont. 514, 254 P.2d 1076 (1953); Thorton v. Arlington Independent School District, 332 S.W.2d 395 (Tex. Civ. App. 1960); Fischler v. Nicklin, 51 Wash. 2d 518, 319 P.2d 1098 (1958).

[67] 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (1974).

[68] *Id.* at 1087, 352 N.Y.S.2d at 789.

[69] *See also* Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974), in which the plaintiff-buyer sued the defendant-seller for breach of a contract to sell potash. The defendant argued that it had closed its U.S. potash mine and was now producing the plaintiff's potash from a Canadian mine and that Canadian regulations required it to sell that potash at a minimum price in excess of the contract price. The

In *Publicker Industries, Inc. v. Union Carbide Corp.*,[70] the plaintiff-buyer sued the defendant-seller of ethanol for failure to deliver. The defendant argued that its failure to perform was excused under the explicit language of the contract and also under section 2-615(a) because it had suffered a cost increase of just under one hundred percent as a result of the Arab oil embargo of 1972 which raised prices of ethylene, one of the primary ingredients of ethanol. The court held that such a cost increase did not render performance impracticable and also that the existence of a cap on the price escalator in the contract meant that although the parties foresaw that costs would increase, the risk of *any* increase in cost, whether or not captured by the escalator, was contractually allocated to the seller. The court also stated in dicta that the Arab oil embargo was not a contingency of the sort required by section 2-615(a).[71]

This is now a familiar pattern. The court stated that, as does a fixed price, a cap on a price escalator conclusively speaks to risk allocation, a conclusion with no factual support which also largely negates section 2-615(a). Moreover, the court's conclusion that the Arab embargo of 1972 and the subsequent quadrupling of crude oil prices did not qualify under the "contingency" language is precisely the kind of harsh view that contradicts the legislative history of the section.

In *Heat Exchangers, Inc. v. Map Construction Corp.*,[72] the court considered the defendant's difficulty in obtaining parts needed for performance not to be a contingency excusing nonperformance within the contemplation of section 2-615(a), in part because the contractor acknowledged supply difficulties during the formation of the contract. From this acknowledgment and from the fact that the defendant failed to contract for an exculpatory clause, the court concluded that the contract allocated the risk of all supply difficulties to the seller.[73]

This case is typical; the Code's "contingency" requirement becomes an inquiry into "foreseeability" that metamorphosizes into one of allocation of risk. An event that is foreseeable or actually foreseen during the contract formation period is deemed then to be a risk that the parties allocated to the party victimized by the contingency if there is no clause specifically addressing it. While this is arguably what the parties intended by their silence, it is equally arguable that the parties

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court denied relief, holding that performance was merely more burdensome, and moreover, that the seller should bear the risk of the price regulations because Canadian potash sales in the past had been subject to government regulation. As in the two prior cases, the claim that there was a conscious allocation of risk had no factual support, and absent such support the sweep of the holding is sufficient to negate section 2-615(a) entirely.

[70]17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975).

[71]*Id.* at 992.

[72]368 A.2d 1088 (Md. Ct. Spec. App. 1977).

[73]*Id.* at 1094-95.

intended *no* contractual allocation and that the parties, in typical commercial fashion, chose to be silent in hopes that the problem would not arise. This Article's quarrel with the courts in these cases is not that the parties could not have intended their silence as an allocation, but that the courts assume so with almost no evidence. This ignores the Code's history, Llewellyn's intent, and the common commercial phenomenon that difficult questions are often intentionally left unresolved in contracts, with no intent that the silence constitute an allocation of risk.

In *Iowa Electric Light and Power Co. v. Atlas Corp.*,[74] the defendant contracted to sell uranium oxide to the plaintiff for four years. The plaintiff sued for equitable relief following several delayed deliveries, and the defendant counterclaimed for reformation in light of the sevenfold increase in the market price of uranium oxide which had not been mirrored in the contract price.

The court granted the seller no relief. The court noted the language of the statute and then went on to this most unfortunate articulation of the Iowa law:

> In *Nora Springs*, *supra*, the Iowa Supreme Court noted that excuse may be available where "increased cost is due to some unforeseen contingency which alters the performance". . . . Before reaching the question of impracticability then, the court must consider whether the non-occurrence of contingencies complained of were at the heart of the contract, that is, were they foreseeable.[75]

In articulating a standard of "foreseeability," the court misread *Nora Springs* (where the standard was "foreseen"), ignored the language of Article 2, and guaranteed (as it later found) that the seller would receive no relief because, alas, everything is foreseeable.

3. The Most Troublesome of the "Unforeseen" Interpretations and Its Progeny. — The remaining cases in this category are even more discouraging than those just discussed, in part because the earliest of them occurred in 1978, when there was considerable scholarship about the alleged shortcomings of section 2-615(a) and the failure of courts properly to effect the purpose of its drafters. This Article discusses these cases in detail immediately below. The Article later re-analyzes these cases under a proposed revised analysis.

In *Barbarossa and Sons, Inc. v. Iten Chevrolet, Inc.*,[76] the plaintiff-buyer contracted with the defendant, a Chevrolet dealer, for a specially-

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[74] 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979).

[75] *Id.* at 134.

[76] 265 N.W.2d 655 (Minn. 1978).

manufactured truck which could be used to transport and lay sewer pipe. The defendant ordered the truck from General Motors. General Motors was initially late in responding to the order and then cancelled it. When the plaintiff sued the defendant for breach, the defendant argued discharge under section 2-615(a). The court held first that the General Motors cancellation was not a contingency the non-occurrence of which was a basic assumption on which the contract was made.[77] The court then said,

> [The] second requirement of [section 2-615], similar to the common-law impossibility defense, concerns the determination of whether the risk of the given contingency was so unusual or unforeseen and would have such severe consequences that to require performance would be to grant the promisee an advantage for which he could not be said to have bargained in making the contract.[78]

The court held that the inability to secure the truck from General Motors was foreseen by Iten because it did not use its standard form contract for this order. While the standard form contract contained an "escape" clause (Iten was not liable if General Motors did not fill the order), the Iten-Barbarossa contract did not. The court concluded that "General Motors' possible cancellation of this order was one of those varieties of foreseeable risks which the parties have tacitly allocated to the seller-promisor by its failure to provide against it in its contract."[79]

In defense of the court's opinion, it is certainly possible that the "escape" clause was intentionally omitted from this custom-drafted contract as a means of expressly allocating that risk to Iten. It is equally possible, however, that the contract had to be drafted from scratch because of the unusual nature of the vehicle, and, therefore, the omission was an oversight. There was at least one other important oversight in the document: it contained no delivery date, despite the parties' clear understanding that the truck had to be delivered by April 1 to be useful to the buyer. Alternatively, the parties may intentionally have chosen not to address the possibility.

Additionally, the opinion suffers from the muddy analysis and faulty reasoning common to these cases. The court shifts with abandon from "foreseeable" to "foreseen" and imparts a wholly fictitious "second requirement" to section 2-615(a) based on the common law defense of impossibility, notwithstanding that official comment 3 to section 2-615(a) states quite clearly that the drafters used "impracticability" in a conscious attempt to escape the narrow confines of "impossibility."

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[77] *Id.* at 659.
[78] *Id.*
[79] *Id.* at 660.

Moreover, the court points to Iten's unsuccessful attempts to secure a truck from another dealer, after learning that General Motors had cancelled the order, as further evidence that the parties did not envision General Motors as the sole source of supply.[80] This conclusion ignores the fact that Iten searched for the truck at the buyer's request[81] and ignores the commercial reality that a seller would of course "scramble" in this fashion to accommodate an unhappy buyer. To use Iten's behavior against it, as the court did, also does little to encourage business accommodations in cases like this — which is contrary to the underlying purpose of the U.C.C.

The last and most fundamental objection to the decision is that it simply fails to satisfy common sense. The buyer ordered a new vehicle from a Chevrolet dealer. Could anybody seriously wonder where the Chevrolet dealer was going to get the vehicle? To say that General Motors' failure is *not* a "contingency the non-occurrence of which was a basic assumption" of the contract is a bolt from the blue, a conclusion which can be charitably described only as startling.

Following *Barbarossa*, in *Missouri Public Service Co. v. Peabody Coal Co.*,[82] the defendant-seller of coal pleaded section 2-615(a) to the plaintiff-buyer's claim for breach. The increase in the cost of production of coal which the defendant claimed as an excusing factor was caused at least in part by the 1972 Arab oil embargo, and although the contract contained numerous price escalators (and no cap as in *Publicker*), the cost so outran the escalator that performance was extremely unprofitable for the seller.

The court denied relief to the seller for two apparent reasons. First, the court dwelled at length on the extensive price escalator provisions, and the opinion implies that the court viewed these escalators as evidence that the parties had contractually allocated the risk of all cost increases to the seller.[83] In reality, such a holding simply continues the "seller loses" pattern, as such risks are also considered to have been allocated to the seller when the price is fixed (*Maple Farms*) or subject to an escalator with a cap (*Publicker*).

The decision's second disappointing, but not surprising, feature is its treatment of the Arab oil embargo of 1972. The court stated, "Such possibility was common knowledge and had been thoroughly discussed and recognized for many years by our government, media, economists and business, and the fact that the embargo was imposed during the term of the contract here involved was foreseeable."[84]

It is doubtful that the possibility of the embargo was so substantial

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[80] *Id.* at 657.

[81] *Id.*

[82] 583 S.W.2d 721 (Mo. Ct. App. 1979), *cert. denied*, 444 U.S. 865 (1979).

[83] *Id.* at 728.

[84] *Id.*

as to be a part of the parties' risk allocation thinking in 1967; the embargo was "foreseeable" five years in advance of the event only if one ascribes the broadest possible meaning to the word, that is, only if everything is considered foreseeable. This case neatly illustrates the seller's dilemma. The statutory test is whether there was a contingency the non-occurrence of which was a basic assumption on which the contract was made. The court asks instead whether the contingency was "foreseeable" and then defines "foreseeable" so broadly as to include every possible contingency.

In *Robberson Steel, Inc. v. J.D. Abrams, Inc.*,[85] the plaintiff-general contractor sued the defendant-steel fabricator for failure to deliver steel for the plaintiff's project. The defendant argued excuse under section 2-615(a) because the mill of its steel supplier had broken down. The court submitted the question to a jury, which found that an equipment breakdown ocurrence was a contingency the non-occurence of which was a basic assumption on which the contract was made. The trial court, affirmed on appeal, rendered a judgment notwithstanding the verdict, because in its view steel mill breakdowns were a contingency which the "parties could reasonably have foreseen and it was one of that variety of risks which the parties tacitly assigned to the promisor by their failure to provide for it explicitly."[86] This line of thinking is directly descended from *Paradine v. Jane*[87] and presents a new trap for the unwary seller. If relief is available only for contingencies which are contractually addressed, then there is nothing left of section 2-615(a), which exists to deal with contingencies as to which the contract is silent. Even more than others, this opinion displays a fundamental failure to understand the implications of the statute.

The fourth case is *Sunflower Electric Cooperative, Inc. v. Tomlinson Oil Co., Inc.*,[88] in which the defendant contracted to sell natural gas to the plaintiff from a specified field that subsequently failed. The plaintiff sued for breach, the defendant argued section 2-615(a), and, at trial, the defendant won. The case was reversed on appeal for the usual reasons; the court stated, "[H]aving concluded that the lack of reserves was foreseeable to [defendant], we also conclude that [defendant] assumed the risk that such would prove to be the case."[89] The court concluded that the defendant-seller had assumed the risk because, as the reader can now guess, the contract was silent. The court said that "if the event was foreseeable the parties must make provision for it in the contract or be bound."[90] And because everything is foreseeable, both

[85] 582 S.W.2d 558 (Tex. Civ. App. 1979).
[86] *Id.* at 564.
[87] 82 Eng. Rep. 897 (K.B. 1647) (Aleyn 26).
[88] U.C.C. Rep. Serv. (Callaghan) 1462 (Kan. Ct. App. 1981).
[89] *Id.* at 1476.
[90] *Id.* at 1475.

in reality and also in the decisions, the seller bears the risk of all unspecified contingencies, and section 2-615 is once again nullified. It is quite remarkable that both this court and the court in *Robberson* could not step back from their handiwork enough to realize that their opinions deny section 2-615(a) the only utility it was intended to have, or ever could have — to provide for excuse when the contract is silent.

In *Record Corp. v. Logan Construction Co., Inc.*,[91] a subcontractor failed to deliver steel gates on time to the general contractor Logan because the subcontractor's supplier had gone on strike. Logan sued Record for damages caused by the delay. Record's section 2-615(a) argument fell on deaf ears. The court first noted that "there seems to be a suggestion in Comment 1 that there is a test of foreseeability involved in such a circumstance."[92] The court then compounded its error by adopting the flawed reasoning of *Robberson* and *Sunflower*:

> While Record has asserted an uninterrupted supply of extruded bronze from Anaconda since 1968, this by itself would not render a strike by Anaconda employees as unforeseeable. As pointed out . . . , we live in a union-conscious society. The use of a strike as a collective bargaining tool is not a rarity, and it would have been a simple matter to have provided for such a contingency in the contract as an excuse for a delay in performance.[93]

The final case is *Bende & Sons, Inc. v. Crown Recreation, Inc.*,[94] in which the defendant failed to perform a contract to sell boots to its customer because the boots were destroyed in a train wreck while in transit from the manufacturer to the defendant. The buyer sued for breach; the defendant attempted, without success, to invoke section 2-615(a). In a tour de force of misunderstanding, the court gave the following reasoning for rejecting the defendant's argument, reasoning which, to this author, is in error at every important point:

> Section 2-615 of the Code . . . provides an alternative excuse for non-performance. The Code reflects the common-law standard of impracticability [first error], and, as the official comment makes clear, requires that the impracticability be caused by 'unforeseen supervening circumstances not within the contemplation of the parties at the time of contract.' . . . In short, the defendant must demonstrate either that (1) the contingency that made performance commercially impracticable was not foreseeable [second error] at the time of contracting, or (2) the contract contains specific, exculpatory language excusing non-

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[91] U.C.C. Rep. Serv. (Callaghan) 1579 (Pa. D. & C.3d 1982).

[92] *Id.* at 1583.

[93] *Id.* at 1584.

[94] 548 F. Supp. 1018 (E.D.N.Y. 1982).

> performance under certain circumstances . . . . The foreseeability requirement does not entail contemplation of a specific contingency; rather, it is sufficient that the contingency that eventually occurred could have been foreseen as a real possibility that would affect performance [third error]. . . . Although it does not appear that Bende and Kiffe ever contemplated a train derailment (the "specific contingency"), common sense dictates that they could easily have foreseen such an occurrence [fourth error]. . . . Inasmuch as I find that the derailment was not unforeseeable, there is no excuse for non-performance under section 2-615 unless there is specific, exculpatory language in the contract [fifth error]. . . .[95]

This, then, is section 2-615(a)'s current unhappy ending. Twenty-one years before this opinion, Professor Cosway wrote that "the broad concept of *impracticability* as an excuse staggers the imagination of anyone accustomed to the limited excuses now recognized."[96] The *Bende* opinion, however, staggers the imagination for a different reason; the case is nothing less than a judicial repeal of section 2-615.

These cases illustrate well the rampant confusion over the proper interpretation of section 2-615(a). The distorted standards of "unforeseen" and "unforeseeable" deny section 2-615(a) any effect. Moreover, to deny relief for any contingency not contractually specified utterly flies in the face of section 2-615, the very purpose of which is to provide relief when the contract is silent.

V. A Proposed New Standard

This Article next sets forth a proposed new interpretation of section 2-615(a) which is true to the language of the statute, responsive to shortcomings in the existing decisions, and supported by basic microeconomic theory. This Article proposes that the courts, in analyzing section 2-615(a), take the following analytical steps in the order presented. The analysis is somewhat cursory, but it will subsequently be applied to a number of the cases previously discussed.

A. Contractual Allocation

The courts' first inquiry should be whether the parties have contractually allocated the loss resulting from the contingency in question. The courts should not, however, accept silence as evidence of such an allocation, a notorious and unfortunate characteristic of existing opinions. Similarly, the courts should not conclude that the price term of the contract, standing alone, is such an allocation of risk.

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[95] *Id.* at 1021-22.

[96] *See supra* note 27.

A central axiom of Article 2 is that the parties are free, within certain limits, to structure their relationship as they see fit. This is recognized first in section 1-102(3), which provides that the effect of provisions "of this Act may be varied by agreement . . . ."[97] Section 1-102(4) states that the parties have this freedom whether or not the language of an individual section so indicates, for example, by including the words "unless otherwise agreed."[98] This freedom to agree is explicit in section 2-615 itself, where the opening line states "[e]xcept so far as a seller may have assumed a greater obligation . . . ."[99] In his excellent article, Professor Hawkland has noted that this language permits the seller to assume a greater *or a lesser* obligation; that is, a contingency clause in the contract may give the seller less or more protection than does section 2-615(a).[100] It seems equally clear that a contingency clause in a contract may extend protection to a buyer, which section 2-615 does not do by its terms.[101]

The notion that the parties may contract out of section 2-615(a) is consistent not only with other provisions of the Code, but also with the large number of decisions that have honored such contractual provisions.[102]

It should finally be noted that, under Article 2, the parties' agreement may be found not only in the writings, if any exist, but also in oral understandings (subject to section 2-202 on parol evidence), and the relevant course of performance, course of dealing, and usage of trade.[103]

B. Performance As Agreed

Assuming that the parties have not agreed on how the loss resulting from a contingency should be allocated, the next question is whether "performance as agreed" has been rendered impracticable. The court should use these words as a vehicle to determine precisely what the parties contracted for. This interpretation is supported and underscored by the comment dealing with contracts to sell agricultural output from specified pieces of land,[104] and the relevant cases.[105] Conversely, the

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[97]U.C.C. § 1-102(3) (1978).

[98]U.C.C. § 1-102(4) (1978).

[99]U.C.C. § 2-615 (1978).

[100]*See* Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 Com. L.J. 75 (1974).

[101]*See, e.g.*, Nora Springs Cooperative Co. v. Brandau, 247 N.W.2d 744 (Iowa 1974).

[102]*See, e.g.*, Eastern Airlines, Inc. v. McDonnell Douglas Corporation, 532 F.2d 957 (5th Cir. 1976). Contracting out of section 2-615 is also economically efficient. *See* Posner & Rosenfield, *Impossibility and Related Doctrines In Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83, 89 (1977).

[103]*See, e.g.*, U.C.C. §§ 1-205 and 2-208 (1978).

[104]*See* U.C.C. § 2-615, official comment 9 (1978).

[105]*See supra* note 40.

failure of one source of supply should not excuse a seller where the contract is not tied to that source explicitly or implicitly.

C. Contingency

The court's third requirement is to find that a "contingency" has occurred. Defined most broadly, a contingency could be specified as any event whatsoever. There is even an argument that an event within the control of the party attempting to invoke section 2-615(a) would qualify as a contingency; the argument is that where the drafters intended to exclude events within a party's control, they did so explicitly as in section 2-613 (Casualty to Identified Goods), which refers to "casualty without fault of either party . . . ."[106] Absent such a specific inclusion, the control of the party over the event should not be important.

This interpretation is surely too broad. A contrary and better argument is that the drafters could have used the word "event" instead of "contingency" if they wished the culpability of the invoking party to be of no moment.

A better definition of contingency, therefore, is an event reasonably beyond the control of the party attempting to invoke section 2-615. This definition implies that the party seeking relief may not be responsible for the event and must have made reasonable attempts to prevent the losses flowing from it.

D. Basic Assumption

The fourth step requires a court to find that the non-occurrence of the contingency was a "basic assumption on which the contract was made." The "basic assumption" language is simply an attempt to separate the wheat from the chaff, that is, to exclude from the scope of section 2-615(a) peripheral contingencies affecting performance of the contract. Such a separation certainly involves judicial line-drawing. But drawing lines is what courts and triers of fact exist to do and are most suited to do, and they would be no less competent drawing lines here than they would be elsewhere. Moreover, if all the opinions addressed the "basic assumption" issue on its own terms, and without substituting other language and tests, there would soon exist an instructive body of precedent useful to courts and practitioners alike.

E. Impracticability

The fifth and last step of the analysis is to find that the contingency, the non-occurrence of which was a basic assumption of the contract, has rendered performance impracticable. This is the place to introduce

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[106]U.C.C. § 2-613 (1978).

economic analysis. The court should find that performance has been rendered impracticable, and should discharge the promisor, when it can determine that the promisee is the superior bearer of the particular risk in question and in the particular circumstances of the transaction. The superior risk bearer will be the party who is better able to prevent the loss or insure against it.[107] A court should adopt this standard because it is economically efficient and because economic efficiency is appropriately the goal of an interpretation of a statute which regulates economic exchange and one which the parties may contract around if they wish.[108]

Posner and Rosenfield identify four steps to this analysis. The first step is to determine which party could, at lower cost, prevent the loss. The second, third, and fourth steps focus on who can less expensively insure against the loss. The second step is to determine which party is better positioned to predict the contingency. The third step is to determine which party could better predict how much loss would flow from the contingency. The final step is to determine which party could less expensively insure against the loss, either by market insurance or through self-insurance.

F. Foreseeability

A central thesis of this Article is that no variation of the word "foresee" should be part of the analysis at any point in the five steps set forth above. An abandonment of the standard of foreseeability by the courts would represent a dramatic but beneficial departure from the past. The element of foreseeability has taken on an enormous role in section 2-615(a) litigation, and has, in effect, emasculated the statute. The effect has been to deny relief to most parties seeking it and to leave the case law in an utter state of disorder; the only consistency in the opinions is that the seller almost always loses.[109] This is at odds with the language of the statute itself, where no variation of the word "foresee" ever appears, and with Llewellyn's basic intent to enhance the scope of protection.[110]

The specter of foreseeability has appeared at many analytical junctures in the decisions, and this Article will deal with them individually to set forth in greater detail the nature of the proposed change. The first analytical step is that a court should allocate the risk of loss

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[107]Posner & Rosenfield, *Impossibility and Related Doctrines In Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 91 (1977).

[108]*Id.* at 89. *See also supra* note 35 and accompanying text.

[109]This is not wholly original. *See* United States v. Von's Grocery Co., 384 U.S. 270 (1966) (Stewart, J., dissenting), where Justice Stewart noted, regarding a line of suits brought by the government under the Clayton Act, that "the Government always wins." *Id.* at 301.

[110]*See supra* notes 23-25 and accompanying text.

according to the parties' agreement, if there has been an agreement. There are opinions which hold that a contract with a fixed price,[111] or one with a price escalator subject to a cap,[112] or one with a price escalator subject to no cap,[113] are all contracts which explicitly allocate the risk of all cost increases to the seller. The articulated theory is that the parties "foresaw" increasing costs and nonetheless did or did not put a cap on the contract prices, thus illustrating their intent that, come what may, the seller would be bound to perform regardless of cost and regardless of differences between the contract price and market price.

This conclusion is overly simplistic and flawed on three counts. First, as a simple factual matter, the fact that the parties put a cap on the contract price (or chose an escalator with no cap) does not mean, standing alone, that they "foresaw" that costs or market prices might rise. Second, even if the parties "foresaw" increasing costs or market prices, it does not necessarily mean that there was no point at which they would have agreed before the fact, if asked, to increase the contract price. Finally, the fact that a risk of increasing costs or market prices is foreseeable or even foreseen is utterly distinct from whether the parties thought it was likely and intended their contractual language to cover it. In short, no price term is, by itself, determinative of what the parties foresaw, much less of what risks they contractually allocated.

Of course, a court might determine, on the basis of extensive evidence, that a price clause in a contract was in fact the shorthand used by the parties to allocate every price and cost risk to the seller. However, almost none of the opinions is based on evidence of this magnitude, and absent such evidence, no clause standing alone is probative of such an allocation.

These comments apply also to the court's analysis of performance "as agreed." The court should use all of the tools at its disposal to determine the parties' agreement. The court should not, however, hide behind notions of "foreseeability" to conclude without further evidence that silence constituted an assumption of a risk merely because the risk concerned an event which could have been foreseen (i.e., was foreseeable) at formation of the contract.

The "foreseeability" goblin has caused the greatest damage in the determination of what is a contingency. Courts have held a number of events not to be "contingencies" because they were foreseeable.[114] The

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[111] *See, e.g.*, Maple Farms, Inc. v. City School District of the City of Elmira, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (1974).

[112] *See, e.g.*, Publicker Industries, Inc. v. Union Carbide Corp., 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975).

[113] *See, e.g.*, Missouri Public Service Co. v. Peabody Coal Company, 583 S.W.2d 721 (Mo. Ct. App. 1979), *cert. denied*, 444 U.S. 865 (1979).

[114] *See, e.g.*, Bende & Sons, Inc. v. Crown Recreation, Inc., 548 F. Supp. 1018 (E.D. N.Y. 1982), where the court found a destruction of the contracted for goods by result

threshold objection to these conclusions is that the courts should, at least, use the narrower "foreseen" language of official comments 1 and 4, instead of the much broader "foreseeable" concept which has no support in the language of either the statute or the official comments.

The second objection to "foreseeable" is that if an event fails to be a contingency because it is "foreseeable," then no event in the world is a contingency because every event in the world is foreseeable. This could not have been the drafters' intent. Similarly, if an event fails to be a "contingency" because it was "foreseen," this again is a test which can and has been used to emasculate section 2-615. The fact that a risk was foreseen does not necessarily mean that the parties decided in their contract who would bear the loss resulting from the risk; the express determination of risk is the standard that the language of the statute requires.

A few decisions take the "contingency" analysis to the remarkable length of saying that because the contingency was "foreseeable" or "foreseen," the parties could have protected against the event explicitly; the fact that the parties did not means that they intended the party on whom the loss initially falls to bear it.[115] To uphold such an argument utterly vitiates section 2-615. The argument states that the only way one can have protection is to list each and every event which will discharge the duty to perform. That could not have been the drafters' intent because section 2-615, by its terms, applies when the contract is silent.

There is no place in a court's analysis for notions of "foreseen" or "foreseeable." A court should adhere to the language of the contract, the language of the statute and the comments, and any other evidence properly available to determine the parties' agreement. But when the contract, even as broadly defined, is silent, then the court should resort to section 2-615 free of any notions of foreseeability. This change would serve two purposes. First, it would make the operation of section 2-615 clearer, to the greater benefit of future parties. Second, it would make the operation of section 2-615 somewhat more generous to sellers, consistent with its purpose and with the intent of the drafters.

VI. Reanalyzing Several of the Old Decisions

It is instructive to test this hypothetical analysis on a number of recent cases in which the court has denied a seller section 2-615(a) relief.

The first case to be so analyzed is *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*,[116] a 1978 Minnesota decision. To review the facts, the

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of a train derailment in shipment not to be a contingency. *See supra* notes 94-95 and accompanying text.

[115] *See, e.g.*, Bende & Sons, Inc. v. Crown Recreation, Inc., 548 F. Supp. 1018 (E.D.N.Y. 1982).

[116] 265 N.W.2d 655 (Minn. 1978).

plaintiff-buyer contracted with the defendant-seller, a Chevrolet dealer, for the defendant to deliver to the plaintiff a specially-manufactured truck. The defendant ordered the truck from General Motors. General Motors first accepted the order, then said that delivery of the truck would be late, and ultimately cancelled the order entirely, saying that it was no longer making trucks of that kind. The plaintiff sued the defendant for breach, and the defendant pleaded excuse under section 2-615(a). The defendant lost, as the court reasoned that General Motors' cancellation was not "a contingency the non-occurrence of which was a basic assumption" on which the contract was entered into, and moreover, that the cancellation by General Motors was a foreseen risk. In support of this conclusion, the court stated that the defendant attempted to procure such a truck from other dealers once General Motors cancelled the order. It noted also that some of the defendant's contracts contained a clause, absent in the instant case, stating that the dealer was not liable for nondelivery if General Motors cancelled. There was no evidence why the "escape" clause was not included in the contract with Barbarossa.

Under the proposed analysis, one would first ask whether the parties had contractually allocated the risk that General Motors would fail to perform. The better answer is no. The only evidence in favor of a contrary finding is that there was no "escape" clause in the contract. However, there was no evidence as to why the clause had been removed, or whether it was included in all, or only some, of the defendant's other dealings. It is difficult to believe that the removal of the clause was a knowing assumption of the risk by the dealer; after all, there was no other place that the dealer could possibly get such a vehicle if not from the manufacturer, given its customized nature. Whether or not the parties did allocate the risk to the dealer, there is not sufficient evidence in the opinion to support such a finding.

The next question is whether the contingency affected performance "as agreed." Assuming that the contract implicitly specified a source of supply (General Motors), performance as agreed was affected. This assumption certainly seems reasonable in a contract with a Chevrolet dealer.

The third question is whether General Motors' cancellation constituted a "contingency" that was beyond the reasonable control of the dealer. The answer is yes, inasmuch as the dealer apparently made good faith efforts to get General Motors to perform and to find an appropriate vehicle in other dealers' hands once General Motors had advised Iten that it would not perform.

The fourth inquiry is whether General Motors' performance was a "basic assumption"; again, it is reasonable to conclude that General Motors' performance was a basic assumption on which Chevrolet dealers entered into contracts, even if it was "foreseeable" that General Motors would not perform from time to time.

The most difficult question is whether the contingency rendered performance "impracticable." Posner and Rosenfield instruct us to ask whether either party could have prevented General Motors' nonperformance; the answer is no. The final question is which party was in the better position to insure, meaning one must determine which party could more readily estimate the probability of the occurrence, which party could more readily calculate the loss in the event of breach, and which party could "insure," either by itself or in the market, at a lower cost.

Iten was possibly in a better position to estimate the probability of General Motors' failure to perform, although the point is arguable. In any event, it seems clear that the buyer could have better estimated the loss resulting from the contingency.

The insurance analysis is deceptive. The buyer could have insured in the market against nondelivery or could have self-insured by ordering a second truck from another manufacturer, only at great expense. Presumably, it is cheaper for the dealer to self-insure by raising all product prices to cover losses such as the buyer's. There is, however, another form of self-insurance which is cheapest of all, and which the buyer here used: the buyer kept his old truck and used it for the entire building season, although some repairs were needed and although the truck presumably was less productive than a new one would have been.

On balance, then, it seems that the buyer was in a better position to insure, which would mean that the seller should have been discharged. Even if the court did not reach this conclusion on the practicability issue, the above analysis would be considerably clearer and of much greater precedential value than the opinion in the case.

The second case for re-analysis is *Missouri Public Service Company v. Peabody Coal Company.*[117] The seller suffered increases in the cost of coal greatly in excess of what had been projected and what was recaptured in the contract's price escalator provisions. The seller argued that its duty to deliver coal was thus rendered commercially impracticable. The court did not rule on whether the cost increase was so substantial as to render performance impracticable. It did, however, rule that the 1972 Arab oil embargo which caused the increase in all energy prices, including the price of coal, was foreseeable when the contract was entered into in 1967, and for that reason the court denied relief.

Under the hypothetical analysis, the first step would be to inquire whether the parties had allocated the risk of the cost increase caused by the embargo. The court answered affirmatively, implying that the parties' agreement to price escalation provisions evidenced the contractual allocation of all cost and price risks to the seller. This conclusion is overbroad. The fact that courts reach the same conclusion when there

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[117] 583 S.W.2d 721 (Mo. Ct. App. 1979), *cert. denied*, 444 U.S. 865 (1979).

is a fixed price, as in *Maple Farms*, or an escalator with a cap, as in *Publicker*, proves that no price provision, standing alone, establishes whether the parties contractually allocated the risk of the massive cost increase prompting the litigation. Accordingly, in the absence of other proof, the more reasonable conclusion, and one wholly consistent with commercial reality, is that the parties either never thought such an increase would occur or chose not to deal with it in the contract.

The second question is whether performance, as agreed, has been affected, which it clearly has. The third question is whether the cost increases were caused by a contingency. Given the broad range and scope of all energy price increases in the period in question, it is fair to conclude that the prices of coal rose for reasons beyond the seller's control.

The fourth question is whether a rise in prices of this magnitude was a contingency the non-occurrence of which was a basic assumption on which the contract was made. The common sense answer in this, and all of the "increased cost" cases, is yes. No party, buyer or seller, enters into a contract on the basic assumption that one side or the other will, at some point during the life of the contract and for a sustained period of time, incur such enormous losses as a consequence of performance.

The most difficult question is whether performance was rendered impracticable. The Posner and Rosenfield analysis is directly on point here as a similar, but not identical, fact pattern forms the basis for one of their hypotheticals.[118]

Assuming that neither party could have prevented the contingency, the analysis turns to the three-pronged "better insurer" question. It seems doubtful that either party at the time of contracting (1967) could have predicted these kinds of increases better than the other, especially because this is the kind of case where the buyer is likely to be as knowledgeable as the seller.

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[118]Posner & Rosenfield, *Impossibility and Related Doctrines In Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 94 (1977). Posner and Rosenfield's hypothetical is as follows:

> Let C be a large and diversified business concern engaged in both coal mining and the manufacture and sale of large coal-burning furnaces. C executes contracts for the sale of furnaces to D, E, F, etc. in which it also agrees to supply coal to them for a given period of time at a specified price. The price, however, is to vary with and in proportion to changes in the consumer price index.
>
> A few years later the price of coal unexpectedly quadruples and C repudiates the coal-supply agreements arguing that if forced to meet its commitments to supply coal at the price specified in its contracts it will be bankrupted. Each purchaser sues C seeking as damages the difference between the price of obtaining coal over the life of C's commitment and the contract price. C argues that the rise in the price of coal was unforeseeable and ought to operate to discharge it from its obligations.

With regard to the parties' respective abilities to forecast the consequences for contract performance, it is again a draw; the seller can better forecast the consequences to the seller (depending on the excess of its commitments over its resources), and the buyer can better assess losses to the buyer (which are a function of the availability of other coal, other fuels, and changes in demand).

The transaction costs of self-or market insurance for the seller are lower. Posner and Rosenfield suggest that one method, albeit attenuated, of such insurance is for shareholders to diversify their portfolio.[119] While both the buyer's and seller's shareholders can diversify, the seller can self-insure directly by mining reserves or making purchase commitments such that it is covered for the entire amount it owes all buyers. Moreover, it can do this in advance, knowing that it must perform. The buyer may also "hedge" in advance, but the cost of doing so is wasted if the seller performs.

In sum, then, Posner and Rosenfield argue that in this case no discharge should be permitted. This is what the court found, although its analysis is open to the criticisms as previously set forth.[120]

The third case is *Robberson Steel, Inc. v. J.D. Abrams, Inc.*,[121] a 1979 Texas case. There the plaintiff-general contractor sued the defendant-steel supplier for failure to deliver steel to the plaintiff for its building. The defendant pled commercial impracticability because its steel source had been closed by a mill breakdown. In a special verdict, the jury found that the breakdown at the defendant's steel source was a contingency rendering performance impracticable, the non-occurrence of which was a basic assumption on which the contract was made. The court rendered judgment notwithstanding the verdict for the plaintiff, and was upheld on appeal, on the theory that breakdowns were a contingency the parties could have foreseen and should have provided for if relief was intended.

Under the proposed analysis, the first inquiry would be whether the risk of the breakdown had been specifically allocated; no evidence in the opinion suggests that it was. The next question would be whether performance "as agreed" had been affected. Under the new analysis, this inquiry might require further research. It would need to be determined whether the defendant contracted to get steel from a specific source (one affected by the breakdown) or whether the contract was not implicitly or explicitly "source specific" such that if the source contemplated by the defendant failed, the plaintiff could reasonably argue that the defendant was bound to procure the steel from other sources.

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[119]*Id.* at 92, 95.
[120]*See supra* text accompanying notes 85-87.
[121]582 S.W.2d 558 (Tex. Civ. App. 1979).

The third question is whether the breakdown was a "contingency" beyond the control of the party invoking section 2-615. In a sense, it is always within a party's control to avoid a breakdown, because the party need only provide constant maintenance. That view is extreme, however, and not relevant here as the breakdown affected the defendant's supplier, not the defendant.

The fourth question, whether the non-occurrence of the breakdown was a basic assumption underlying the contract, is easily answered in the affirmative, as the jury found.

Turning to the question of impracticability, the first step required by Posner and Rosenfield is to determine who could better have predicted the breakdown. One would generally choose the party closer to the supplier (here the defendant), although this may be a case where both parties were equally able, or unable, to do so. On the second issue, it seems that the plaintiff could far better have predicted the loss resulting from the contingency than the defendant.

Which party can self-insure or insure in the market at lower cost? No clear answer flows from the contingency itself; it seems unlikely that either party could at reasonable expense have lined up an alternative steel supplier as a form of self-insurance. Similarly, the transaction cost of inflating bids to cover such losses would have been equally expensive to both.

It may well be, however, that the general contractor, unlike the subcontractor, can specify in its contract with the owner that the time for completion will be extended as necessary to account for any delays resulting from equipment failure to the general contractor, subcontractors, or suppliers. Similarly, the general contractor may routinely purchase contractor's all-risk insurance against such losses. In either of these cases, the court should find the subcontractor's duty discharged, as did the jury, but not the court, in *Robberson*.

The fourth case is *Sunflower Electric Cooperative, Inc. v. Tomlinson Oil Co., Inc.*,[122] a 1981 Kansas case. Here the defendant contracted to sell natural gas to the plaintiff from a particular field. When the field failed, the defendant delivered no natural gas. The plaintiff sued for breach, and the defendant argued section 2-615(a). The defendant won at trial, but the decision was reversed on appeal.

While the appellate court agreed that performance was objectively impossible, the court said that "[h]aving concluded that the lack of reserves was foreseeable to [the defendant], we also conclude that [the defendant] assumed the risk that such would be the case."[123] This is a textbook example of the difficulty the foreseeability analysis raises. If the defendant assumes all foreseeable risks, then the defendant assumes

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[122] 32 U.C.C. Rep. Serv. (Callaghan) 1462 (Kan. Ct. App. 1981).
[123] *Id.* at 1476.

all risks, because all risks are foreseeable whether or not they are foreseen. If this had been the intent of the drafters of the Code, this result would be fair; in reality, however, this analysis utterly nullifies section 2-615. Presumably, this was not Professor Llewellyn's plan.

The better analysis would start, again, by asking whether one party or the other had assumed the risk that the field would be exhausted. The inquiry would be difficult in this case because there was some evidence in the record to suggest that the field was faltering at the time the contract was made. The better analysis should, however, require greater proof than this to conclude that the seller had assumed the risk.

The second inquiry is whether performance "as agreed" was rendered impracticable; here it clearly was, given that the contract specifically referred to the field in question. The third question is whether or not a "contingency" was involved, which it apparently was; there was no suggestion that the defendant could have done anything to stimulate production from the field. The fourth question is whether failure of the field was a contingency the non-occurrence of which was a basic assumption of the contract. Freed of the confines of discredited "foreseeability" analysis, this question must be answered affirmatively.

On the fifth and last issue of impracticability, the first analytical point is that neither side could have prevented the contingency. To determine the superior insurer, one asks first who could better have determined the probability of the field's failure; the answer here is clearly the seller. Then one must resolve who could better have predicted the resulting loss; as almost always, the answer is the buyer. Finally, in determining who can self or market insure at lower cost, the greater likelihood is the seller, for the reasons discussed in the analysis of *Peabody Coal*. This is as speculative here as in *Peabody*, because neither decision contains the facts on which to base a sound analysis.

The fifth case, *Record Corp. v. Logan Construction Co., Inc.*,[124] a 1982 Pennsylvania decision, is not unlike *Robberson*. A subcontractor failed to deliver iron gates on time to the general contractor because the subcontractor's supplier was on strike. The general contractor sued for breach, and the subcontractor attempted to invoke section 2-615(a). The court held that commercial impracticability was no excuse, stating that a strike qualified under section 2-615(a) only where it was unforeseeable, and that even though the subcontractor had received supplies from this supplier for eleven straight years, we nonetheless live in a "union-conscious society," which means that the strike could have been foreseen and the subcontractor could and should have provided for this risk by contract.[125]

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[124] 34 U.C.C. Rep. Serv. (Callaghan) 1579 (Pa. D. & C.3d 1982).
[125] *Id.* at 1584.

Under the proposed analysis, one would first ask whether the parties allocated the risk of this strike; given the past labor history involved, the answer is clearly no. The next question would be whether performance "as agreed" was impracticable. The answer is yes because the contract between the plaintiff and the defendant made specific reference to the supplier in question.

The third question is whether the strike was a "contingency," a question which should be answered affirmatively. The fourth question is whether the non-occurrence of the contingency was a basic assumption of the contract. The answer is also yes; this was not a peripheral matter.

Turning to impracticability, one first notes that the subcontractor could not have prevented the strike. Second, the subcontractor might have been better positioned to predict its probability, although that seems questionable. The general contractor would certainly have been in a better position to predict its effect.

As in *Robberson*, the analysis of who could self or market insure would depend on facts not given in the opinion. If the general contractor would have been the better insurer, discharge would be the correct result.

The final case is *Bende & Sons, Inc. v. Crown Recreation, Inc.*,[126] a 1982 New York case. The defendant contracted to sell boots to the plaintiff. The boots were manufactured in Korea, sent to the United States by ship, and brought from the West Coast to the East Coast by train, where the plaintiff was to purchase them and trans-ship them to its African customer. The boots were destroyed in a train wreck in Nebraska. When the defendant failed to deliver, the plaintiff successfully sued for breach. The defendant's attempt to argue a section 2-615(a) excuse failed because the train wreck was "foreseeable."

Hypothetically, the first inquiry is whether this particular risk was allocated; there is no reason to suggest it was. The second inquiry would be whether performance "as agreed" was rendered impracticable. The answer is clearly yes, inasmuch as the boots in question were not available on the open market, but had instead been specially-manufactured for this contract. Obviously, the train wreck was a contingency, and its non-occurrence was a basic assumption of the contract. The last and difficult question is the one of impracticability. Assuming that neither side could have prevented the contingency, the "superior insurer" question arises. As usual, probably neither side could have better predicted the probability of an accident, although the buyer could presumably have better predicted the resulting loss.

Who can insure at lower cost is not answerable on the facts of the contingency given in the opinion, and the answer might turn ultimately on the form of the buyer's and seller's business enterprises or on their size.

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[126]548 F. Supp. 1018 (E.D.N.Y. 1982).

As these six cases demonstrate, the proposed analysis would have the following effect. First, the analysis is true to the language of the statute. Second, the analysis avoids the debilitating effect of reliance on the concept of foreseeability. Third, the court's inquiry would usually be determinative of which party was better able to insure against the loss. It is difficult to undertake this analysis with these opinions, in part because these points were not considered at the time the cases were argued and there is usually little evidence on point. However, the determination with respect to impracticability would not be inordinately difficult where the parties had been called upon to demonstrate the appropriate facts. Fourth, the resulting analysis would be precedentially useful because all courts would undertake the same analysis and the analysis provides a principled basis for interpreting the statute. Finally, the analysis produces results somewhat more favorable to the seller than has been the case to date. This shift in results is consistent with the intent of section 2-615(a).

VII. Conclusion

The courts have, in effect, emasculated section 2-615(a) of the Uniform Commercial Code. This result is at odds with the drafters' intent, with the language of the statute itself, and often with the language of the comments. What is more, the courts usually make no attempt to arrive at an economically rational solution, which is the appropriate goal of statutory interpretation in these circumstances.

There exists an economically efficient analysis which is true to the language of the statute, the drafters' intent, and the language of the comments. The courts should henceforth use this analysis in determinations of the meaning of section 2-615(a) of the Uniform Commercial Code.