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Sales Contracts and Impracticability in a Changing World.

Thomas Black

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SALES CONTRACTS AND IMPRACTICABILITY IN A CHANGING WORLD

THOMAS BLACK*

I. Introduction	247
II. General Judicial Reflections on Section 2-615	248
III. Effect of Specific Excuse Provisions in Sales Contracts	251
A. <i>Force Majeure</i> Clauses	251
B. Specified Damages Clauses	254
C. Other Specific Clauses	256
IV. Rights and Duties of Buyers	257
A. Section 2-615	257
B. Section 2-616	258
V. Effect of Section 2-613 Upon Buyers and Sellers	260
VI. Specific Factors Asserted As Excuses	263
A. The "Energy Crisis"	263
B. Increased Costs and Rising Prices	267
C. Government Interference	274
D. Failure of Suppliers and/or Supplies	278
E. Strikes and Labor Disputes	282
F. Crop Failure	283
G. Miscellaneous Excuses	285
VII. Conclusion	288

I. INTRODUCTION

The Uniform Commercial Code was born in balmy days.¹ Food

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1. For an fictionalized account of the inception of the Uniform Commercial Code [hereinafter referred to as the Code or UCC], see Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967). In brief, this article reveals that the UCC was officially promulgated in 1951 and was first introduced in state legislatures in 1953. See *id.* at 7-8. The Code has since been enacted in all states (with the sole exception of Louisiana), as well as the District of Columbia, and the Virgin Islands. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 1 (2d ed. 1980).

and crops were in abundance, and clouds of war were tiny white specks floating in a clear blue sky. Undoubtedly, one of the least important provisions under consideration by the drafters of the Code was section 2-615, excusing performance of contracts in the event of unforeseen disaster.² Current times are less secure. Today, in addition to the ever present four horsemen of the apocalypse, we have OPEC, runaway inflation, oppressive taxation, a demanding third world, and hostilities threatened in every time zone. These are, indeed, times when the circumstances surrounding a contract's formation and those existing at the time for its performance can be expected to change drastically. Consequently, lawyers today must be keenly aware of the provisions and pitfalls of section 2-615 in order to protect their clients with carefully and laboriously drafted *force majeure* clauses.³

This article is a review of the significant cases decided in UCC jurisdictions since 1973, the year when the pernicious power and influence of OPEC became generally known. It will be noted how these cases have construed and applied section 2-615, as well as that section's related provisions, section 2-613⁴ and section 2-616.⁵ Also discussed herein is the construction given *force majeure* clauses and the manner in which courts have dealt with specific failures of contract performance due to the energy crisis, inflation, and assorted other common causes.

II. GENERAL JUDICIAL REFLECTIONS ON SECTION 2-615

Section 2-615 provides for excuse by failure of presupposed conditions as follows:

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

2. U.C.C. § 2-615 (1972 version). Hereinafter, UCC provisions will be mentioned in the text by article and section without further citation. All Code references herein are to the 1972 official text.

3. "*Force majeure*" is defined as a contract clause excusing performance when all or part of a contract has been rendered unperformable by causes beyond the control of the parties when such nonperformance could not have been avoided by the exercise of due care. See BLACK'S LAW DICTIONARY 581 (5th ed. 1979).

4. Section 2-613 concerns the effect of casualty to identified goods. See U.C.C. § 2-613.

5. Section 2-616 deals with the procedures, rights, and duties resulting from a claim of excuse under section 2-615. See U.C.C. § 2-616.

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

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

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.⁶

The functional requirements of the foregoing section are (1) that "performance as agreed has been made impracticable," (2) that such impracticability be the result of "the occurrence of a contingency," and (3) that the non-occurrence of such contingency "was a basic assumption on which the contract was made."⁷ These requirements for excuse are formally exacted by the courts.⁸

The comments to section 2-615 indicate that the term "impractical" was intended to loosen the rigidity of the common law requirement of impossibility of performance.⁹ The inescapable impression gained from reading cases construing section 2-615, however, is that the courts have not fulfilled the expectations of the Code drafters, but have tended instead to retain the rigidity of

6. U.C.C. § 2-615.

7. *Id.*

8. Cases often track the language of these Code-stated requirements. Many cases contain general language to the effect that the following three requirements must be met before a seller is excused from performance under the UCC: "(1) a contingency must occur, (2) performance must thereby be made 'impractical,' and (3) the non-occurrence of the contingency must have been a basic assumption on which the contract was made." *E.g.* *Luria Bros. v. Piolet Bros. Scrap Iron & Metal*, 600 F.2d 103, 111 (7th Cir. 1979); *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974); *Heat Exchangers, Inc. v. Map Constr. Corp.*, 368 A.2d 1088, 1091 (Md. Ct. Spec. App. 1977).

9. *See* U.C.C. § 2-615, Comment 3 (Code's test of commercial impracticability distinguished from common law tests of impossibility, frustration of performance, and frustration of venture).

pre-Code law.¹⁰ This intransigence is seldom articulated in opinions, but it distinctly emerges from the decisions.

In one case, the court recognized that "the Code abandons the old rule of impossibility of performance or act of God and substitutes for it the rule of commercial impracticability."¹¹ Despite this assertion, the court denied the section 2-615 defense because performance by the defendant was not shown to have been *impossible*.¹² Similarly, another court recognized that "[t]he Uniform Commercial Code provision governing excuse of performance has replaced the common-law requirement of impossibility of performance by a less stringent standard of commercial impracticability."¹³ The court goes on, however, to construe the Code's contingency requirement as "similar to the common-law impossibility defense," and cites as support for denying the defense "cases defining and applying a similar common-law test of impossibility of performance" ¹⁴

Another court looked to Williston's 1938 edition of *Contracts* for aid in construing the Code term "impracticability."¹⁵ Quoting Williston, the court determined that impracticability concerns " 'some extreme or unreasonable difficulty, expense, injury, or loss involved, rather than that it is scientifically or actually impossible.' "¹⁶ The court again quotes Williston to explain the Code's contingency requirement as follows: " 'The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.' "¹⁷

In a less general vein, one court correctly recognized that the allocation provisions of section 2-615(b) operate defensively and do not create rights to an allocation in a buyer whose seller has termi-

10. This complaint is detailed in 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, 218 (1979).

11. *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974).

12. *See id.* at 294.

13. *Barbarossa & Sons v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 658 (Minn. 1978).

14. *Id.* at 659.

15. *See Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 310 N.E.2d 363, 367 (Mass. 1974).

16. *Id.* at 367.

17. *Id.* at 367.

nated in accordance with specific contract provisions.¹⁸ Moreover, when goods are not subject to allocation, such as "one used John Deere combine," and full performance is impracticable, the seller is not obligated by section 2-615(b) to propose a modified performance.¹⁹ A defense of excuse for non-performance based either on section 2-613 or section 2-615, or both, normally cannot be asserted under a general denial, as it is an affirmative defense and must be specifically pled.²⁰ Pleading excuse as an affirmative defense, however, has been held to satisfy the notice requirement of section 2-615(c) so as to entitle a seller to a ruling on the applicability of the defense.²¹

Obviously, section 2-615 and related provisions can best be understood by reference to more specific problems as they arise in commercial transactions.

III. EFFECT OF SPECIFIC EXCUSE PROVISIONS IN SALES CONTRACTS

A. *Force Majeure Clauses*

Force majeure clauses can be extremely useful tools for protecting contracting parties against both the expected and the unexpected. The most valuable case involving a *force majeure* clause is *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*²² The excusable delay clause in that case, which appears to be typical, provided as follows:

Seller shall not be responsible nor deemed to be in default on account of delays in performance of this Agreement due to causes beyond Seller's control and not occasioned by its fault or negligence, including but not being limited to civil war, insurrections, strikes, riots, fires, floods, explosions, earthquakes, serious accidents, any act of government, governmental priorities, allocation regulations or orders affecting materials, equipment, facilities or completed aircraft, failure to obtain Federal Aviation Agency Airworthiness and Type Certificate or Certificates, acts of God or the public enemy, failure of transportation, epidemics, quarantine restrictions, failure of vendors (due to causes similar to those within the scope of this clause) to

18. See *American Oil Co. v. Columbia Oil Co.*, 567 P.2d 637, 639-40 (Wash. 1977).

19. See *Olson v. Spitzer*, 257 N.W.2d 459, 463 (S.D. 1977).

20. See *Semo Grain Co. v. Oliver Farms, Inc.*, 530 S.W.2d 256, 258 (Mo. Ct. App. 1975).

21. *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 437-38 (S.D. Fla. 1975).

22. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976).

perform their contracts or labor troubles causing cessation, slow-down, or interruption of work, provided such cause is beyond Seller's control.²³

Briefly stated, the facts in *McDonnell Douglas* were that in a series of contracts covering the years 1965 through 1968 McDonnell Douglas agreed to manufacture and sell to Eastern Air Lines approximately 100 jet planes for approximately one-half billion dollars. McDonnell Douglas breached the contract in that 90 of the contracted planes were delivered a total of 7,426 days late. Relying upon section 2-615, as well as upon the above quoted *force majeure* clause, McDonnell Douglas asserted that its concurrent commitment to the United States during the Vietnam War excused its prompt performance.

The district court disposed of McDonnell Douglas's defense with a whipsaw approach. As to any contingencies not specifically included in the clause, the district court apparently took the position that the *force majeure* clause totally superceded section 2-615 and that excuse for unforeseen contingencies under section 2-615 was waived by McDonnell Douglas in agreeing to this clause.²⁴ The district court further held that, as to contingencies mentioned in the contract, only those which were not "reasonably foreseeable" at the time the contract was made would excuse performance.²⁵ The combined effect of the trial court's action was not only to read section 2-615 out of the contract with respect to contingencies not mentioned in the *force majeure* clause, but also to read the section 2-615 requirement of unforeseeability into the contract with respect to contingencies specifically mentioned in the *force majeure* clause. This holding effectively transformed the *force majeure* clause into a counterproductive provision.

The court of appeals did not agree. It held that "there is no basis for the trial judge's conclusion that McDonnell Douglas waived the protections of section 2-615 and that its contract excuses are narrower than those available under the doctrine of commercial im-

23. *Id.* at 963-64 n.6.

24. *See id.* at 988. The district court instructed the jury that an excusable delay must be the result of "one or more of the listed events in the excusable delay clause in the contracts, or . . . a similar cause beyond the defendant's control . . ." *Id.* at 988.

25. *See id.* at 989-90. The district court's view in this regard seems completely untenable, because by the very act of mentioning a contingency in the contract, the parties affirm its foreseeability.

practicability."²⁶ Therefore, contingencies not specifically mentioned in the *force majeure* clause, but which satisfied the requirements of section 2-615, were available to McDonnell Douglas as excuses for non-performance.

The court of appeals agreed with the district court that the Code requirement of unforeseeability be read into the general contingencies mentioned in the *force majeure* clause by phrases such as "causes beyond [seller's] control."²⁷ It did not agree, however, that the requirement of unforeseeability was appropriate as to contingencies specifically mentioned in the contract. The court's view on unforeseeability is expressed as follows:

The rationale for the doctrine of impracticability is that the circumstance causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern However, because the purpose of a contract is to place the reasonable risk of performance on the promisor, he is presumed, in the absence of evidence to the contrary, to have agreed to bear any loss occasioned by an event which was foreseeable at the time of contracting Underlying this presumption is the view that a promisor can protect himself against foreseeable events by means of an express provision in the agreement.²⁸

Therefore, when the promisor has anticipated a particular event by specifically providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable.

In the course of its opinion, the court stated that "the Uniform Commercial Code has ostensibly eliminated the need for such [*force majeure*] clauses" ²⁹ Ironically, the court's view as to the effect of foreseeable events included in *force majeure* clauses, as contrasted with that of the district court, illustrates the continuing need for such clauses.

The same need is illustrated by an earlier federal district court case involving a contract to supply gasoline.³⁰ The contract provided that performance would be excused if default occurred by

26. *Id.* at 989.

27. *Id.* at 991.

28. *Id.* at 991-92.

29. *Id.* at 991.

30. *See Intermar, Inc. v. Atlantic Richfield Co.*, 364 F. Supp. 82 (E.D. Pa. 1973).

reason of "compliance with any government order, requisition or request."³¹ Such a request occurred during the life of the contract, but the buyer claimed that the seller was obligated to allocate in accordance with section 2-615(b). The court noted "the contract specifically provides for the very contingency here involved," and "[t]o hold that Section 2-615 prohibits an express provision excusing performance in the event of a specified contingency would change the meaning of the section."³²

On the other hand, *McDonnell Douglas* apparently has rendered *force majeure* clauses expressed in general terms valueless if they neither add to, nor detract from, section 2-615. For example, in *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*,³³ the contract provided: "The Seller shall not be liable for failure or delay in shipments or completion of a shipment . . . when such failure or delay is caused by . . . the operation of statutes or law, interference of civil or military authority or other causes of like or different kind beyond the control of the seller."³⁴ Noting this provision, the court thereafter ignored it and decided the case against the seller under the terms in section 2-615.³⁵

B. Specified Damages Clauses

One type of clause to be avoided by both sellers and buyers is a clause agreeing to pay specified damages (usually reduced as compared to general Code remedial provisions) in the event of non-performance. Such a clause can be construed as an assumption of a greater obligation than that provided by section 2-615, which applies only "[e]xcept so far as a seller may have assumed a greater obligation"³⁶ Illustrative is *Gold Kist, Inc. v. Stokes*,³⁷ wherein the contract specified "if the producer is unable to deliver the quantity contracted for *solely because of reasons beyond his*

31. *Id.* at 97.

32. *Id.* at 99. *But cf.* *Terry v. Atlantic Richfield Co.*, 140 Cal. Rptr. 510, 510-11 (Ct. App. 1977) (*force majeure* clause in gasoline requirements contract allowing allocation in event of shortages ignored by court in favor of § 2-615(b) allocation provision).

33. 508 F.2d 283 (7th Cir. 1974).

34. *Id.* at 293.

35. *See id.* at 293 (citing § 2-615 and comments thereto to find performance burdensome to seller but not excused).

36. *See* U.C.C. § 2-615.

37. 226 S.E.2d 268 (Ga. Ct. App. 1976).

control, the measure of damages for failure to deliver is the difference between contract and market price on the day of breach."³⁸ A fire occurred, which destroyed the contract goods before risk of loss had passed to the buyer, and the seller relied upon section 2-615. The court held against the seller, stating:

Fire which destroys the seller's factory (or, in this case, his storage bin) along with goods not identified to the contract (which these were not), and which thereby renders performance impossible, may be assumed to be a contingency the nonoccurrence of which was a basic assumption on which the contract was made But this provision will not apply where the seller has assumed a greater obligation An affirmative provision in the contract that the seller agrees to pay stipulated damages upon the occurrence of an event making performance impossible necessarily implies that a breach of contract under those conditions is conceded, and places upon the seller a greater obligation than might otherwise exist.³⁹

As the court indicated, in the absence of the specified damages clause, the seller would have had a persuasive section 2-615 argument.⁴⁰

Similarly, in *Swift Textiles, Inc. v. Lawson*,⁴¹ the contract excused the seller "for delays caused by act of God, fire, war, riot, strikes, floods, embargo, car shortage or quarantine . . . ,"⁴² but then went on to provide:

If for any reasons except those mentioned above, the seller fails to make shipment or delivery within the time specified in the contract, the buyer may cancel the contract for the portion within default, or may buy in open market cotton equal to that contracted for, in either case the market difference to be adjusted between the buyer and seller, with one-quarter cent per pound penalty against the

38. *Id.* at 270 (emphasis added).

39. *Id.* at 270; accord *Mansfield Propane Gas Co. v. Folger Gas Co.*, 204 S.E.2d 625, 628 (Ga. 1974) (to avoid duty of allocation under § 2-615, contract must contain affirmative provision seller will perform contract even though contingencies permitting allocation may occur).

40. See *Gold Kist, Inc. v. Stokes*, 226 S.E.2d 268, 270 (Ga. Ct. App. 1976); cf. *Goddard v. Ishikawajima-Harima Heavy Indus. Co.*, 287 N.Y.S.2d 901 (App. Div. 1968) (where no specified damages clause in contract alleged, seller's performance excused when his plant destroyed by fire).

41. 219 S.E.2d 167 (Ga. Ct. App. 1975).

42. *Id.* at 169.

seller.⁴³

The seller failed to perform due to rising costs. This may or may not have provided an excuse, but the court sidestepped this issue by holding that the seller had "assumed a greater obligation."⁴⁴ By virtue of the holding in *McDonnell Douglas*, the specific *force majeure* clause did not waive section 2-615 as to unmentioned contingencies, and, had the damage clause been omitted, the seller could at least have had the excuse considered.

C. Other Specific Clauses

Frequently at issue in section 2-615 cases are price escalation clauses, which will be considered more fully in connection with cases involving rising costs. In one such case, the seller had agreed to supply all of the buyer's requirements of propane gas.⁴⁵ The "energy crisis" made it "impracticable" for the seller to satisfy all the buyer's requirements and still deliver to his other customers, so it proposed an allocation under section 2-615(b). The buyer contended that, by entering into the "requirements contract," the seller had "assumed a greater obligation" than that provided in section 2-615.⁴⁶ The court rejected the buyer's contention, stating: "[I]n order for there to be an exception to and an exemption from the rule of allocation applicable to a contract of sale, such a contract must contain an affirmative provision that the seller will perform the contract even though the contingencies which permit allocation might occur."⁴⁷

In another case, a merger clause provided that the contract for the sale of cotton represented the entire agreement between the parties, thus precluding access to section 2-615.⁴⁸ The court correctly held the clause did not cancel the availability of section 2-615 to excuse the seller's performance.⁴⁹

43. *Id.* at 170.

44. *See id.* at 171; U.C.C. § 2-615. The "greater obligation" assumed by the seller in this case was a contractual duty to both reimburse and pay a penalty to the buyer should the seller default for any reason, thus forcing the buyer to cover on the open market. *See Swift Textiles, Inc. v. Lawson*, 219 S.E.2d 167, 171 (Ga. 1975).

45. *Mansfield Propane Gas Co. v. Folger Gas Co.*, 204 S.E.2d 625 (Ga. 1974).

46. *Id.* at 627.

47. *Id.* at 628.

48. *Dunavant Enterprises, Inc. v. Ford*, 294 So. 2d 788 (Miss. 1974).

49. *See id.* at 791.

In summary, whether the narrow construction the courts are placing on section 2-615 is correct or incorrect, the cautious drafter of sales contracts will include *force majeure* and other specific clauses, in an attempt to protect clients against both the expected and the unexpected. As long as a *force majeure* clause is not unconscionable or against public policy it will be given judicial effect, even though some of the contingencies excusing performance would not be sufficient to excuse performance under section 2-615. In other words, the courts have not construed section 2-615 as usurping the parties' right to make reasonable contracts.

IV. RIGHTS AND DUTIES OF BUYERS

A. Section 2-615

Section 2-615, by its literal terms, excuses only sellers from performance of their contracts.⁵⁰ Comment 9 to section 2-615, however, strongly implies an intent to excuse the performance of a buyer who meets the impracticability and contingency requirements expressed in the provision.⁵¹ This comment led the Supreme Court of Iowa, in *Nora Springs Cooperative Co. v. Brandau*,⁵² to state that "[w]hile the section expressly mentions *sellers*, the explanations in Comment 9 make it evident the provision should also be equally applicable to buyers."⁵³ This concession did not assist the buyer, however, for the court went on to hold that "there was insufficient evidence to show circumstances constituting an impossibility sufficient to excuse plaintiff's nonacceptance of the grain."⁵⁴

In a later case from Wyoming, a buyer of bull semen alleged excuse due to cancellation of orders from his customers.⁵⁵ The trial

50. See U.C.C. § 2-615.

51. See *id.*, Comment 9. This comment states:

[W]here the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement sub-contract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

Id.

52. 247 N.W.2d 744 (Iowa 1976).

53. *Id.* at 748.

54. *Id.* at 748.

55. *Meuse-Rhine-Ijssel Cattle Breeders v. Y-Tex Corp.*, 590 P.2d 1306, 1308 (Wyo. 1979).

court's summary judgment in favor of the buyer was reversed on appeal, but only after the appellate court had expressly applied section 2-615 to the circumstances.⁵⁶

There are apparently no cases applying section 2-615 to excuse a buyer's performance. As noted above, the provision has been applied only to withhold such excuse. A more direct manner of bringing buyers into the statute is illustrated by the Mississippi version of section 2-615, which makes specific provisions for buyers in its statute.⁵⁷

B. Section 2-616

Section 2-616 provides significant protection to a buyer who "receives notification of a material or indefinite delay or an allocation justified under [section 2-615]."⁵⁸ If the prospective deficiency sub-

56. *Id.* at 1309; accord *Hancock Paper Co. v. Champion Int'l Corp.*, 424 F. Supp. 285, 290 (E.D. Pa. 1976) (court presumed § 2-615 applicable to buyer's claim of impracticability of performance but found rising market prices an insufficient excuse thereunder), *aff'd mem.*, 565 F.2d 151 (3d Cir. 1977).

57. MISS. CODE ANN. § 75-2-615 (1972). The Mississippi statute 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 nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c), or failure to take delivery as provided for under the contract on the part of a buyer who complies with paragraph (d), 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 nonoccurrence 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

(d) *The buyer* must notify the seller seasonably that there will be a delay or total inability to take delivery, and where practicable, state the contingency which has occurred causing such delay or inability.

Id. (emphasis added).

58. Section 2-616 sets out the procedure to be followed when a party receives notice of a claim of excuse and provides:

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

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

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

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

stantially impairs the value of the whole contract to the buyer, he may terminate the contract or accept the modification proposed by the seller. A failure to timely respond amounts to a termination.⁵⁹ Thus, in a case like *McDonnell Douglas*, upon receiving notification from McDonnell Douglas that the jet planes would be substantially late in delivery, Eastern had the option to accept the proposed delay or to terminate the contract.⁶⁰ Under the same provision, a buyer notified of a proposed allocation under section 2-615(b) can scan the market for substitute goods, and then reject or accept the proposal in accordance with his economic benefit.

Section 2-616 has received no significant judicial scrutiny. In *McDonnell Douglas*, McDonnell Douglas argued that when it notified Eastern of its inability to timely perform Eastern was required to make an election under section 2-616(2), and that by its silence Eastern terminated the contract and thus was precluded from maintaining an action based upon the contract.⁶¹ The court rejected this argument because the parties had both performed and negotiated subsequent to McDonnell Douglas's first delay. Under these circumstances the court believed "[a] seller cannot employ this thirty-day termination provision to deprive an unwary buyer of his U.C.C. rights and remedies. Such an approach would frustrate section 2-616's purpose of protecting the buyer confronted with a claim of excuse under section 2-615."⁶² The court's handling of this issue lines up somewhere between judicial repeal of the rather definite language of section 2-616(2) on the one hand, and cautious application on the other. In either event, a cautious approach to section 2-616(2) is probably more realistic than relying on the literal language of the section, since under normal business

respect to any deliveries affected.

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

U.C.C. § 2-616.

59. *Id.*

60. See *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976).

61. The option of termination available to the buyer in such a case could have an adverse effect upon the seller. For instance, if the goods are peculiar to the buyer's needs and are not readily salable to others, and if the seller is excusably delayed under section 2-615 circumstances, the buyer, upon notification of such delay, has the right to terminate the contract, thus leaving the seller high and dry with unsalable goods.

62. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 989 n.91 (5th Cir. 1976).

practices a buyer's silence upon receipt of notification of delay or of a proposed allocation is generally more indicative of acceptance than of a desire to terminate the contract. A decision to terminate would normally be overtly, and usually vociferously, communicated.

In *American Oil Co. v. Columbia Oil Co.*,⁶³ the court upheld the seller's attempted termination of the contract primarily on the basis of a contract provision specifically allowing such termination. The court supplemented this holding, however, with a reference to section 2-616, apparently believing that a buyer's failure to accept the seller's proposed allocation terminated the contract.⁶⁴

There appear to be no cases wherein a buyer has expressly terminated a contract upon receipt of notification of a section 2-615 delay or allocation by the seller and the seller has subsequently contested the buyer's right to do so. It will take a clash of this kind to fully test the judicial response to section 2-616.

V. EFFECT OF SECTION 2-613 UPON BUYERS AND SELLERS

Another Code provision available to relieve both buyers and sellers faced with disaster is section 2-613.⁶⁵ Because it applies only to goods that are required by the contract for performance and that were identified when the contract was made, section 2-613 is essentially limited to "unique goods," *i.e.*, goods that cannot be matched elsewhere. The provision also terminates at the time the risk of loss passes to the buyer, and applies only in the absence of fault by either party. In situations where the section does apply, the contract may be avoided if the loss is total. If the loss is merely partial, the provision gives the buyer the option of either avoiding the entire contract or of accepting the goods with due allowance from the contract price for the partial loss.⁶⁶

63. *Id.* at 989 n.91.

64. 567 P.2d 637 (Wash. 1977).

65. *See id.* at 640 n.2. Courts occasionally use section 2-616 to judicially cancel contracts that the parties are found to have effectively abandoned. *See Goddard v. Ishikawajima-Harima Heavy Indus. Co.*, 287 N.Y.S.2d 901 (App. Div. 1968).

66. Section 2-613 deals with casualty to identified goods. This section provides: [W]here the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324) then

Section 2-615, in most instances, shares the requirement of uniqueness of its related provision, section 2-613; if the contract goods are available elsewhere, and thus not unique, performance will not be commercially impracticable. Section 2-613, unlike section 2-615, however, applies to any casualty, whether foreseen or not, and also is expressly available to buyers.⁶⁷ On the other hand, section 2-615 is a much broader provision. The purview of section 2-615 extends far beyond casualty to goods and can apply to goods that are not unique. The overlapping of the two provisions is very apparent in crop failure cases, which will be discussed more extensively below.

Section 2-613 was discussed in detail by the Supreme Court of Nebraska in a case involving the sale of a John Deere combine which the court found to be unique.⁶⁸ The combine was sold to the plaintiff in 1974, giving it some eleven years of wear and tear, and was damaged en route to the buyer's place of business. It was then returned to the seller who, after failing in his attempt to repair the combine, sold it for salvage. The buyer sued the seller for his loss of a bargain, and the seller raised section 2-613 defensively. The main issue concerned assigning the burden of proof under the section 2-613 requirement of absence of fault by either party. The plaintiff-buyer had offered proof of the contract, the breach by the seller, the absence of fault on the buyer's part, and damages under section 2-613. The buyer did not, however, offer evidence of fault on part of the seller. A lower court had determined that this absence of evidence of the fault of either party justified the avoidance of the contract for the seller under section 2-613. The Supreme Court of Nebraska reversed, assigned the burden of proof to the defendant-seller, and concluded the burden of proof must rest on the party invoking the protection of section 2-613.⁶⁹

(a) if the loss is total the contract is avoided; and

(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

U.C.C. § 2-613.

67. *See id.* § 2-613(b).

68. *Carlson v. Nelson*, 285 N.W.2d 505 (Neb. 1979). The court's finding that the combine was unique is implied in the decision; as the court noted, the issue of fault was the only section 2-613 condition in dispute in the case. *See id.* at 510.

69. The court determined:

A better, although less authoritative, example of the uniqueness requirement of section 2-613 is found in a small claims proceeding from Kings County, New York wherein a necklace held by the seller in "layaway" was stolen.⁷⁰ The necklace was described in the opinion as "a necklace of gold filagree beads, uniformly interspersed with pearls and coral beads."⁷¹ The defendant testified that he had only one such necklace in his store and that no replacement was available. The plaintiff-buyer, by her own statements, indicated that the necklace was "unique in its beauty and was similar to no other necklace that she had seen."⁷² The value of the necklace had appreciated substantially between the time the layaway began and the time of the theft, and, as observed by the court, "therein lies the principle bone of contention between the

It would defeat the implicit purpose of section 2-613, U.C.C., if it were construed to enable a defendant to take advantage of an absence of evidence as to his fault to limit damages for nonperformance. Yet this would be the practical effect of requiring the plaintiff buyer in this case to prove that the damage was not caused by the defendant's fault. Under the posture of the case before us, it was incumbent upon the defendant seller to prove the damage occurred without his fault if he wished to have the benefit of the damage limitation provision in section 2-613, U.C.C.

Id. at 510; *cf.* *Salinas v. Flores*, 583 S.W.2d 813 (Tex. Civ. App.—San Antonio 1979, writ dismissed). In *Salinas*, a Texas court refused a buyer's request to avoid a contract under section 2-613 after the contract watermelons were totally destroyed. Although the watermelons were still on the defendant's land, relief was denied because the risk of loss had passed to the buyer under a trade custom which dictated that after the sale "all further care which the watermelons require is the responsibility of the buyer, including watering, cultivating, harvesting and transporting, and that after the contract of sale is entered into the buyer has total control over the goods." *Id.* at 815.

One statement made by the court in its opinion in the combine case cannot go unchallenged. It states that "[s]ection 2-613, U.C.C., deals with a situation, loss, or damage to the property which it is reasonable to assume the parties did not contemplate when they contracted." *Carlson v. Nelson*, 285 N.W.2d 505, 509 (Neb. 1979). This statement is simply erroneous. Foreseeability of contingencies is not an issue in section 2-613 cases. It is probable that the court's statement reflects a confusion of section 2-613 with section 2-615, which does purport to apply only to situations the parties did not contemplate when they contracted. *See, e.g., Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 134 (N.D. Iowa 1978) (court must determine foreseeability issue before approaching impracticability issue), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441 (S.D. Fla. 1975) (foreseeability of contingency removes same from scope of section 2-615); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 725-26 (Mo. Ct. App. 1979) (central to concept of commercial impracticability is requirement of "supervening, unforeseen event" going to heart of agreement).

70. *Conway v. Larsen Jewelers, Inc.*, 429 N.Y.S.2d 378 (Civ. Ct. 1980).

71. *Id.* at 380.

72. *Id.* at 380.

parties.”⁷³ The buyer wanted “a duplicate necklace or the value thereof in the market at the time of its theft.”⁷⁴ The seller sought to avoid the contract under section 2-613 and to return to the buyer the \$265.00 plaintiff had paid on the necklace. The court, finding the necklace unique, the risk of loss on the seller, and an absence of fault, adopted the seller’s view.⁷⁵

The requirement of uniqueness is taken seriously by the courts. Another lower New York court refused to apply section 2-613 to a contract for the sale of “dowels” which the court described as “a round wooden rod or stick and interchangeable The defendant admitted that it could have replaced the dowels by purchasing them in the open market.”⁷⁶ Similarly, section 2-613 invariably is held inapplicable in crop failure cases, unless the contract specifies the very land from which the crop is to be derived, thus making the crop unique.⁷⁷

VI. SPECIFIC FACTORS ASSERTED AS EXCUSES

A. *The “Energy Crisis”*

The energy crisis⁷⁸ has contributed to the difficulty of contract performance not only in a direct manner, by creating oil shortages, but also indirectly, by accelerating inflation, creating shortages in oil-related products and supplies, increasing the role of government in oil-related commercial transactions, crippling some transportation facilities, and in numerous other ways. The present section deals only with those cases wherein a seller expressly and specifically assigns the energy crisis as an excuse for nonperformance or partial performance of a contract.

73. *Id.* at 380.

74. *Id.* at 380.

75. *Id.* at 380.

76. *Valley Forge Flag Co. v. New York Dowel & Moulding Import Co.*, 395 N.Y.S.2d 138, 139 (Civ. Ct. 1977).

77. *See Bunge Corp. v. Recker*, 519 F.2d 449, 450-51 (8th Cir. 1975); *Ralston Purina Co. v. McNabb*, 381 F. Supp. 181, 182 (W.D. Tenn. 1974); *Colley v. Bi-State, Inc.*, 586 P.2d 908, 910-11 (Wash. Ct. App. 1978); R. ANDERSON, *UNIFORM COMMERCIAL CODE* 2-615:21, at 311 (2d ed. 1971).

78. The “energy crisis” in the context of this article means the repercussions caused by the Arab oil embargo and the dramatic OPEC oil price increases beginning around 1973. For a discussion of events leading up to the oil crisis, see *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 433-34 (S.D. Fla. 1975).

The energy crisis cases have overwhelmingly favored buyers. *Eastern Air Lines, Inc. v. Gulf Oil Corp.*,⁷⁹ involved a contract dated June 27, 1972, by which Gulf agreed to supply jet fuel to Eastern at prices linked to Platts Oilgram Service, which turned out to be based on "old oil prices" instead of the new inflationary OPEC oil prices. When the contract became burdensome, Gulf claimed impracticability under section 2-615. The testimony concerning Gulf's knowledge of threatened OPEC oil price increases indicated that, by 1969, "the handwriting was on the wall."⁸⁰ The court overruled Gulf's claim of impracticability, but went on to state that even if performance were impracticable, Gulf could not prevail because "the so-called energy crises were reasonably foreseeable at the time the contract was executed."⁸¹

The record [was] replete with evidence as to the volatility of the Middle East situation, the arbitrary power of host governments to control the foreign oil market, and repeated interruptions and interference with the normal commercial trade in crude oil. Even without the extensive evidence present in the record, the court would be justified in taking judicial notice of the fact that oil has been used as a political weapon with increasing success by the oil-producing nations for many years, and Gulf was well aware of and assumed the risk that the OPEC nations would do exactly what they did.⁸²

Another federal district court exhibited an identical attitude in *Iowa Electric Light and Power Co. v. Atlas Corp.*⁸³ In that case, the Arab oil embargo and OPEC cartel were assigned as collateral excuses for the seller's claim of impracticability under section 2-615 after the seller failed to perform a contract to supply uranium concentrate.⁸⁴ The court held these conditions were foreseeable and, having so found, refused to consider whether the conditions rendered the seller's performance impracticable. The seller was

79. 415 F. Supp. 429 (S.D. Fla. 1975).

80. *Id.* at 433. The court began its disposition of Gulf's claim with a call for strict construction. Past cases, it said, "offered little encouragement to those who would wield the sword of commercial impracticability" and the consequent difficulty of performance "must be more than merely onerous or expensive. It must be positively unjust to hold the parties bound." *Id.* at 438.

81. *Id.* at 441.

82. *Id.* at 441-42.

83. 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

84. *Id.* at 134.

found to have been in a position to protect itself from the consequences of the energy crisis and, by its failure to do so, assumed the risk of these consequences.⁸⁵

Cases which place such conclusive emphasis on the foreseeability of the conditions rendering performance difficult or impracticable dramatically illustrate the need for carefully drafted *force majeure* clauses either mentioning the energy crisis as an excuse for default or delay or containing price escalation clauses linked to an index that accurately reflects the consequences of the energy crisis.

In *Missouri Public Service Co. v. Peabody Coal Co.*,⁸⁶ the seller reneged on a contract to supply coal to a public utility and claimed as excusing factors "the 1973 oil embargo, runaway inflation and the enactment of new and costly mine safety regulations."⁸⁷ This contract was negotiated on December 22, 1967, much earlier than the June, 1972 contract in *Gulf Oil*,⁸⁸ the 1973 contract in *Iowa Electric Light and Power*,⁸⁹ and long before the energy crisis became acute. The court, however, denied that the Arab oil embargo constituted an excuse, stating "[t]he other claim made by Peabody alleged to bring it within the doctrine of 'commercial impracticability,' is the Arab oil embargo. Such a 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."⁹⁰

Many factors other than the energy crisis contributed to the court's holding in *Publicker Industries, Inc. v. Union Carbide Corp.*⁹¹ The court denied the seller's claim that it was excused from performing a contract to supply ethylene, a petroleum derivative, but an alternative reason given by the court was that it

85. See *id.* at 140.

86. 583 S.W.2d 721 (Mo. Ct. App. 1979).

87. *Id.* at 723.

88. See *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 432 (S.D. Fla. 1975).

89. See *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 131 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

90. *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 728 (Mo. Ct. App. 1979). It would be interesting, although impossible at this late date, to obtain an accurate poll to determine how many coal companies and public utility companies were aware in December 1967 of the impending Arab oil crisis.

91. 17 U.C.C. REP. SERV. 989 (E.D. Pa. 1975).

doubted that, in July of 1972, when the contract was negotiated, the energy crisis was not foreseen by all parties.⁹²

Comment 4 to section 2-615, which indicates an oil embargo could constitute a viable excuse,⁹³ is given lip service in many cases,⁹⁴ but is given serious consideration in *Gay v. Seafarer Fiberglass Yachts, Inc.*⁹⁵ On November 20, 1973, the seller in *Gay* agreed to build for the buyer a fiberglass yacht containing materials that became unexpectedly expensive, according to the seller, due to the energy crisis. The court, relying upon Comment 4, denied the buyer's motion for summary judgment, stating: "To the extent that defendant asserts that the rise in cost is attributable to the oil and energy shortage, he raises issues of fact which preclude granting the motion for summary judgment."⁹⁶

In *Mansfield Propane Gas Co. v. Folger Gas Co.*,⁹⁷ the court, without elaboration or apparent argument by counsel, simply assumed the energy crisis excused a seller of propane gas from performance unless that seller had contractually assumed a greater burden.⁹⁸

Despite its crippling effect upon commerce generally, the energy crisis has not been a successful reason for excusing nonperform-

92. *See id.* at 993. The primary basis for the court's decision in favor of the buyer was a specific contract clause placing a ceiling on contract price increases resulting from a rise in the cost of a petroleum product used in producing ethylene. Since foreseeable increases in the cost of the ingredient up to the amount of the ceiling fell on the buyer, the court concluded any increases beyond the ceiling (such as those which did occur) must have been intended to fall on the seller. *See id.* at 992.

93. *See* U.C.C. § 2-615, Comment 4. The comment reads as follows:

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

Id.

94. *See, e.g.,* Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 74 (W.D. Pa. 1980); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 438 (S.D. Fla. 1975); Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721, 726 (Mo. Ct. App. 1979).

95. 14 U.C.C. REP. SERV. 1335 (N.Y. Sup. Ct. 1974).

96. *Id.* at 1337.

97. 204 S.E.2d 625 (Ga. 1974).

98. *See id.* at 627-28.

ance of contracts, primarily because the courts have viewed it as a foreseeable event. It is suggested that the passage of time will render the energy crisis even a less viable source of excuse.⁹⁹ Certainly no contract entered into at the present time or in the recent past could be claimed to be without contemplation by the parties of projected oil shortages and oil price increases.

B. *Increased Costs and Rising Prices*

Sellers often assign unexpected increases in costs as reasons to excuse performance of contracts under section 2-615. Because the contract formula used to predict inflationary trends sometimes fails in its purpose, these unexpected increases occur even when the contract contains an escalation clause.¹⁰⁰ As already noted, unexpected cost increases are often related to the energy crisis primarily because one substantial factor in runaway inflation is the OPEC oil price increases. In such a case, the courts look first to the magnitude of the cost increase, to determine whether it renders performance impracticable, and then to the surrounding circumstances, to determine whether the energy crisis (or other cause of the cost increase) was truly unexpected and unforeseeable.

Typically, the trend of the court decisions has been to reject increased costs and rising prices as grounds to excuse performance of contracts.¹⁰¹ This is in line with the primary message of Comment

99. Compare *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 728 (Mo. Ct. App. 1979) (energy crisis rejected as excuse for performance under contract dated December 1967) with *Gay v. Seafarer Fiberglass Yachts, Inc.*, 14 U.C.C. REP. SERV. 1335, 1337 (N.Y. Sup. Ct. 1974) (court found claim of energy crisis as excuse of performance under November 1973 contract presented fact question for jury).

100. See, e.g., *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 56, 59 (W.D. Pa. 1980) (contract price for molten aluminum to escalate in direct proportion to Wholesale Price Index-Industrial Commodities; plaintiff claims \$75,000,000 loss on contract); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 433 (S.D. Fla. 1975) (cost of "West Texas Sour" crude oil chosen as price index for contract to supply fuel; 40% rise in price of crude oil during life of contract not reflected in index); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 723 (Mo. Ct. App. 1979) (contract to supply coal specified Industrial Commodities Index be used as price adjustment index; seller claiming \$3,400,000 loss on contract).

101. See, e.g., *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 440 (S.D. Fla. 1975) (escalating price of crude oil did not constitute excuse); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 728 (Mo. Ct. App. 1979) (increased production costs failed as excuse); *Maple Farms, Inc. v. City School Dist.*, 352 N.Y.S.2d 784, 788 (Sup. Ct. 1974) (increased price of supplies insufficient as excuse).

4 to section 2-615.¹⁰² The qualifying language in Comment 4, recognizing that certain severe contingencies which cause a substantial increase in costs are contemplated as excuses by the section, has been strictly construed by the courts. The reluctance of the courts to extend excuse beyond the Comment's language is evidenced by the following cases.

In *Gulf Oil*, the court took the position that the foreseeability of an event such as the energy crisis forecloses all recourse to section 2-615, regardless of the resulting increase in costs and burden upon the seller.¹⁰³ The court in *Iowa Electric Light & Power*, exhibited this same attitude. The contract price for uranium concentrate ranged from \$7.10 to \$8.45 per pound and the seller proved that his costs were up to \$17.40 per pound, with real and projected losses in the millions. The court stated that "[w]here the occurrences complained of are in some degree foreseeable . . . it becomes unnecessary to reach the question of how much increase constitutes impracticability."¹⁰⁴ The basis for this attitude in both cases is that the seller, having foreseen the catastrophe, was capable of protecting itself contractually and, having failed to do so, could not be protected by section 2-615.¹⁰⁵

In *Missouri Public Service Co. v. Peabody Coal Co.*,¹⁰⁶ the seller seriously misjudged the cost of obtaining the coal required under the contract to the extent that at the time of the trial it had suffered approximately 3.4 million dollars in losses under the contract.¹⁰⁷ The court, in holding the seller to the contract, relied not so much on the foreseeability of the energy crisis, although this was a factor in its decision, but more upon evidence showing that

102. U.C.C. § 2-615, Comment 4.

103. *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441 (S.D. Fla. 1975).

104. *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 135 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

105. *See id.* at 135; *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441 (S.D. Fla. 1975). These decisions are supported by the language in Comment 8 to section 2-615. "[T]he exemptions of this section do not apply where the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances." *See* U.C.C. § 2-615, Comment 8.

106. 583 S.W.2d 721 (Mo. Ct. App. 1979).

107. *See id.* at 723. Not all of this loss was claimed to be attributable to rising costs, however. *See id.* at 723.

experienced merchants had hammered out a bargain and should be held to it. One of the causes of the seller's miscalculations was its use of the Industrial Commodities Index, published by the United States Department of Labor, instead of the Consumer Price Index. The evidence showed that during negotiations the seller had originally proposed use of the Consumer Price Index, which the buyer rejected, so the seller had counter-offered with the Industrial Commodities Index. Thus, the mistake emanated from the seller's own suggestion. The court also considered, over the objection of the seller, the seller's financial condition, experience in the production of coal, resources, and availability of coal reserves.¹⁰⁸

Similarly, in *Publicker Industries, Inc. v. Union Carbide Corp.*,¹⁰⁹ the court observed that the inclusion of a specific price escalation provision in the contract indicated that the buyer was assuming the risk of foreseeable cost increases and, therefore, "that the risk of a substantial and unforeseen rise in its costs would be borne by the seller."¹¹⁰

The courts take the same strict attitude toward excusing performance in cases where rising costs are not so closely related to the energy crisis. A principal case in this category is *Maple Farms, Inc. v. City School District*,¹¹¹ involving a contract to supply raw milk to a school district for the school year 1973-74. By December of 1973 the price of raw milk had increased by twenty-three percent, and the seller was projecting a loss of \$7,350.55 if the contract were performed as written. Relief under section 2-615 was requested by the seller, but was denied by the court. The court denied relief because the extent of the rising costs was not "totally unexpected" and "the very purpose of the contract was to guard against fluctuation of price of half-pints of milk as a basis for the school budget."¹¹²

An interesting argument arose from an inflationary background in *Bradford v. Plains Cotton Cooperative Ass'n*,¹¹³ a suit filed by several sellers to invalidate a number of "forward contracts" to

108. *See id.* at 726.

109. 17 U.C.C. REP. SERV. 989 (E.D. Pa. 1975).

110. *Id.* at 992.

111. 352 N.Y.S.2d 784 (Sup. Ct. 1974).

112. *Id.* at 789-90. The price the previous year had risen ten percent. *See id.* at 789. It was also determined the seller had extensive experience in the field. *See id.* at 790.

113. 539 F.2d 1249 (10th Cir.), *cert. denied*, 429 U.S. 1042 (1976).

supply cotton.¹¹⁴ Here, the price of cotton rose substantially between the time the contracts were entered into and the time of performance. The impracticability alleged by these sellers was not that they would lose by performance — in fact, they would receive approximately the profit they anticipated when the contracts were entered into — but that performance would prevent them from enjoying the greater profits being enjoyed by their peers who had not entered into forward contracts. The court, as it had to do,¹¹⁵ denied all relief.¹¹⁶

One should not get the impression, however, that the courts have completely closed the door on sellers whose long term contracts are made burdensome by inflation. In *Maple Farms*, the court suggested that “conceivably” a point could be reached “at which an increase in price of raw goods above the norm would be so disproportionate to the risk assumed as to amount to ‘impracticality’ in a commercial sense”.¹¹⁷ In *Publicker*, the court was not impressed with the cost increases borne by the seller, but did imply that increases over 100% might make performance impracticable,¹¹⁸ and, in *Gay*, the court indicated that any substantial cost increase attributable to the energy crisis would present a jury question on impracticability.¹¹⁹ Even in *Gulf Oil*, the court pointed out grave deficiencies in Gulf’s proof of losses in that some of the costs included “intra-company profits, moving from the left-hand to the right-hand,” while Gulf’s overall performance in 1973-74 were its best years ever.¹²⁰ Cases of genuine hardship caused by truly un-

114. A “forward contract” is described by the court as one “whereby the grower agrees to sell cotton grown on designated acreage during a certain crop year for delivery after harvesting.” *Id.* at 1251. The contracts are designed to protect a grower against a price decline, but when the cotton price rises, the grower *misses out* on the potentially increased profits. *See id.* at 1251.

115. Although, surprisingly, the district court had granted the relief sought by the growers. *See id.* at 1251.

116. *See id.* at 1256; *cf.* *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 92 (W.D. Pa. 1980) (“severe out of pocket losses should be essential to the award of relief [from impracticable contracts]”).

117. *Maple Farms, Inc. v. City School Dist.*, 352 N.Y.S.2d 784, 790 (Sup. Ct. 1974).

118. *Publicker Indus., Inc. v. Union Carbide Corp.*, 17 U.C.C. REP. SERV. 989, 992 (E.D. Pa. 1975).

119. *Gay v. Seafarer Fiberglass Yachts, Inc.*, 14 U.C.C. REP. SERV. 1335, 1337-38 (N.Y. Sup. Ct. 1974).

120. *See Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441 (S.D. Fla. 1975).

foreseeable events are by no means foreclosed by this opinion.

These bits and pieces alone would give little hope to sellers. Viewed as precursors, however, of the recent case of *Aluminum Co. of America v. Essex Group, Inc.*,¹²¹ they can be read as initiating a trend toward judicial recognition that the ills of runaway inflation cannot be cured by old-fashioned medication.

Aluminum Co. of America involved a contract,¹²² dated December 26, 1967, under which Essex would deliver alumina to Alcoa, Alcoa would convert it to molten aluminum, and then return it to Essex for further processing into aluminum-ware products. This was another case wherein the parties provided for inflation with an escalation clause which turned out to be unrealistic. The contract index for non-labor costs was the Wholesale Price Index - Industrial Commodities (WPI-IC). This index did not accurately reflect the inflationary effect of "OPEC actions to increase oil prices and unanticipated pollution control costs."¹²³ The result was that by 1978 the WPI-IC had increased 209.4%, but Alcoa's non-labor costs had increased by 574.2%; Alcoa had lost 3.4 million in 1977, 8.6 million in 1978 and was projecting a total loss of 75 million throughout the life of the contract, which was to end in 1988.¹²⁴ Alcoa's suit was to modify and reform the contract, and the court granted essentially the relief sought. The conclusion to the lengthy opinion probably best reveals the attitude of the court, which the court describes as "the new spirit of commercial law."¹²⁵ The primary characteristic of this "new spirit" is a recognition that inflation may upset the "basic equivalence" of agreements, particularly long-term agreements, and that "[c]ourts will increasingly have to attend to problems like the present one."¹²⁶ If courts do not appro-

121. 499 F. Supp. 53 (W.D. Pa. 1980).

122. The court found the contract to be in the nature of a service contract or toll-conversion contract rather than a contract for the sale of goods, thus taking the case out of the purview of the UCC *See id.* at 84. The case is significant here, however, because the court compares common-law principles to the UCC and discusses several UCC cases. Moreover, the court in applying the common-law standard of "impossibility" was implying a stricter standard than the "commercial impracticability" of § 2-615. *Id.* at 76-77; *accord* *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974) (Code substitutes commercial impracticability for common law requirement of impossibility).

123. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 58 (W.D. Pa. 1980).

124. *Id.* at 56-59.

125. *Id.* at 89.

126. *Id.* at 92.

priately respond, the result will be that corporate businessmen will not enter into long-term contracts.¹²⁷ Thus, when the *essential* factor of *severe out of pocket* losses is present, the courts should modify contracts in accordance with the parties' original intent, based upon the following factors: "(1) the parties' prevision of the problems which eventually upset the balance of the agreements and their allocation of the associated risks; (2) the parties' attempts at risk limitation; (3) the existence of severe out of pocket losses and (4) the customs and expectations of the particular business community."¹²⁸

The court observed that the original purpose of Alcoa in entering into the contract was "to achieve a stable net income of about 4¢ per pound of aluminum converted,"¹²⁹ and the intent of Essex was "to assure itself of a long-term supply of aluminum at a favorable price."¹³⁰ By virtue of rampant inflation in the price of aluminum, Alcoa had incurred and was facing the huge losses described above, while Essex had essentially gotten out of the aluminum-ware business and was selling the molten aluminum it acquired for 36.35¢ from Alcoa at a market price of 73.313¢, yielding it a gross profit of 37.043¢ per pound.¹³¹

In the argument over the impracticability of Alcoa's performance, Essex cited many of the cases discussed above.¹³² The court dismissed these cases stating that "[e]ach is distinguishable from the present case in the absolute extent of the loss and in the proportion of loss involved."¹³³ This distinction undoubtedly would not impress Atlas, whose projected multi-million dollar losses resulting from its contract with Iowa Electric were held not to make

127. *Id.* at 89-90.

128. *Id.* at 92.

129. *Id.* at 58.

130. *Id.* at 58.

131. *Id.* at 59.

132. Cited in *Aluminum Co. of America v. Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966); *Iowa Electric Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975); *Publicker Industries, Inc. v. Union Carbide Corp.*, 17 U.C.C. REP. SERV. 989 (E.D. Pa. 1975) and *Maple Farms, Inc. v. City School District*, 352 N.Y.S.2d 784 (Sup. Ct. 1974).

133. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 74 (W.D. Pa. 1980).

performance impractical;¹³⁴ nor would it impress the Peabody Coal Company which at the time of its trial had lost in excess of three million dollars.¹³⁵ The court distinguished *Publicker* not only with respect to the the degree of loss, but also by the fact that the Publicker contract was made after the substantial price increase of 1971, whereas the Alcoa contract antedated the 1971 price increase.¹³⁶

Although the court found "that the risk of a wide variation between these values [WPI-IC and Alcoa's costs] was unforeseeable in a commercial sense and was not allocated to Alcoa in the contract," it surmised that foreseeability of such a variation "would not preclude relief under the doctrine of impracticability."¹³⁷ The court expressly rejected the notion espoused in *Gulf Oil* that impracticability of performance is not relevant when the conditions are foreseeable.¹³⁸

The portion of the opinion relating to "frustration of purpose"¹³⁹ is interesting here for the sake of comparison with other cases. The court recognized that Alcoa's " 'principal purpose' in making the contract was to earn money," and then queried whether "the law will grant relief for the serious frustration of this kind of purpose, *i.e.* for the conversion of an expected profit into a serious loss."¹⁴⁰ The question was answered affirmatively. Frustration of purpose is not expressed in Article 2, but its essential elements are contained in section 2-615. In holding that the conversion of a profit motive into a substantial loss entitles a party to be excused from full performance, the court casts doubt on many of its predecessor cases, particularly *Iowa Electric Light & Power* and *Peabody Coal Co.* The distinction exists only in the magnitude of million dollar

134. See *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 140 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

135. See *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 727-28 (Mo. Ct. App. 1979).

136. See *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 74 (W.D. Pa. 1980); *Publicker Indus., Inc. v. Union Carbide Corp.*, 17 U.C.C. REP. SERV. 989, 989 (E.D. Pa. 1975).

137. *Id.* at 76.

138. *Id.* at 75-76. See the discussion of the *Gulf Oil* theory in the text preceding notes 81 and 82, *supra*.

139. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 76-78 (W.D. Pa. 1980).

140. *Id.* at 76.

losses incurred by the sellers — a distinction between gigantic losses and super gigantic losses.¹⁴¹

According to the best information available, *Alcoa* was settled after oral argument before the court of appeals, but prior to the issuance of an appellate opinion.¹⁴² The opinion of the district court is at present only tentative authority, but will undoubtedly be cited by sellers in future litigation and will eventually be scrutinized by higher authority. If the case is followed, there is indeed a "new spirit of commercial law." If it is rejected in favor of cases like *Peabody Coal* and *Iowa Electric Light & Power*, the prediction by the court in *Alcoa* of the demise of long-term contracts will probably be fulfilled.

C. Government Interference

Section 2-615(a) ventures away from the general terms of "performance . . . made impracticable by . . . a contingency the non-occurrence of which was a basic assumption," to mention one specific factor, "compliance in good faith with any applicable foreign or domestic governmental regulation or order."¹⁴³ Perhaps because of this, the few cases wherein government interference has been asserted as a factor causing delay or default in performance recognize only a governmental action directly affecting the performance of the contract as an excuse.

In *McDonnell Douglas Corp.*,¹⁴⁴ wherein McDonnell Douglas, in 1965, contracted to supply commercial passenger jets to Eastern, but did not meet the contract schedule, one of the principal grounds for excuse presented by McDonnell Douglas was government interference with both it and its suppliers, requiring that priority be given to military orders during the Vietnam War. The evidence strongly supported the contention that the government was

141. Compare *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 140 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980) (seller alleging loss in excess of 2.5 million dollars) and *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 723 (Mo. Ct. App. 1979) (seller claiming 3.4 million dollar loss) with *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 59 (W.D. Pa. 1980) (seller projecting 75 million dollar loss under contract).

142. Telephone interview with representative of Eckert, Seamans, Chesin & Mellott, Pittsburg, Pennsylvania, attorneys for Alcoa (July 29, 1981).

143. See U.C.C. § 2-615.

144. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976).

“jawboning”¹⁴⁵ the industry and threatening restrictive action in the absence of voluntary compliance with governmental priority requests. Eastern contended that mere jawboning, in the absence of formal, technical orders, did not excuse delay because McDonnell Douglas was not technically required to comply with the informal requests.¹⁴⁶ The court concluded that, so long as McDonnell Douglas and its suppliers were complying with the government’s procurement policies in good faith, the situation excused McDonnell Douglas under its *force majeure* clause,¹⁴⁷ under the common law of impossibility,¹⁴⁸ and under section 2-615.¹⁴⁹

In *Intermar, Inc. v. Atlantic Richfield Co.*,¹⁵⁰ Atlantic Richfield (Arco) cut down on its contractual obligation to supply gasoline to Intermar in conformance with an area-wide allocation program. The uncontradicted testimony showed that the allocation program was developed at the request of the United States Department of Interior and would have been enforced had Arco not complied voluntarily.¹⁵¹ The case was decided for Arco on the basis of a clause in the contract that excused non-performance caused by “compliance with any government order, requisition or request,”¹⁵² but there is little doubt that in the absence of this provision, the court, nevertheless, would have excused performance under section 2-615.¹⁵³

145. “Jawboning” is defined as:

The role of the President in applying pressures on businessmen, labor leaders, and other key economic decision makers to make their behavior compatible with national economic goals The threat of more stringent government action vis-a-vis affected companies and groups usually undergirds its effective use. Its most frequent use has been in trying to limit price and wage rises during periods of inflation without resorting to government controls.

J. PLANO & M. GREENBERG, *THE AMERICAN POLITICAL DICTIONARY* 311 (4th ed. 1976). The *McDonnell Douglas* court discusses the government’s application of this procedure to Eastern in its opinion. See *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 980-87 (5th Cir. 1976).

146. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 992, 995 (5th Cir. 1976).

147. *Id.* at 994. The contract excused “ ‘any act of government, governmental priorities, allocations, or orders affecting materials.’ ” *Id.* at 992.

148. *Id.* at 994.

149. *Id.* at 996.

150. 364 F. Supp. 82 (E.D. Pa. 1973).

151. See *id.* at 98, 100-01.

152. *Id.* at 98 (emphasis added).

153. Cf. U.C.C. § 2-615, Comment 10. “[G]overnmental interference cannot excuse un-

To rise to an excuse under section 2-615, however, the governmental action must amount to a genuine deterrent and not just an added burden to performance. This is illustrated by *McLouth Steel Corp. v. Jewell Coal & Coke Co.*,¹⁵⁴ where the buyer, McLouth, brought suit to enforce performance of a contract by seller, Jewell, to supply coal at an agreed price beginning in 1961 and continuing for fifteen years, with an additional fifteen-year term at the buyer's option. The case reminded the court "of stories from the Klondike gold rush of partners who willingly shared danger, cold and starvation in the search for gold and then fought (sometimes to the death) for sole possession of the gold strike with which fortune favored them."¹⁵⁵

The contract had been negotiated when "the coal industry was greatly depressed The parties lived under the contract without major dispute until coal once more became king of the energy producers of the United States and its value went up in multiples. Then, suddenly, McLouth wanted to buy more coke than it had ever bought and Jewell wanted to supply much less. Each, as might be guessed, found reasons."¹⁵⁶

One of the reasons found by Jewell was an order of the Virginia Air Pollution Control Board requiring Jewell to cease and desist operating its Plant Number One, and Jewell argued that its Plant Number Two might be similarly affected by Virginia's air pollution standards.¹⁵⁷ Jewell claimed this action excused its performance under its contract's *force majeure* clause, which mentioned "any action by governmental authority . . . preventing performance of this agreement in accordance with its terms,"¹⁵⁸ and further claimed excuse under section 2-615. The court reversed and remanded a judgment in favor of McLouth based upon a finding that the contract was ambiguous, but agreed with the district court that Jewell was not excused under any theory, since there was no final order by the Virginia authorities and no certainty in the record

less it truly 'supervenes' in such a manner as to be beyond the seller's assumption of risk."
Id.

154. 570 F.2d 594 (6th Cir. 1978), *cert. dismiss'd*, 439 U.S. 801 (1979).

155. *Id.* at 597.

156. *Id.* at 597.

157. *Id.* at 600.

158. *Id.* at 598.

that there would be one in the future.¹⁵⁹ Presumably, if the Virginia Air Pollution Control Board had effectively shut down Jewell's operation, the court would have reached a different result, or at least would have given the matter more attention.

A similar case is *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*,¹⁶⁰ wherein Texas Gulf Sulphur (TGS) contracted in November 1969 to supply potash to Neal-Cooper unless prevented from doing so by statute or law.¹⁶¹ The contract price ranged from 21¢ to 23¢ per unit. TGS operated two potash mines, one in Moab, Utah and one at Allan, Saskatchewan. It closed its Moab mine in January 1970, and immediately thereafter the Canadian government established a minimum price of 33.75¢ per unit for potash produced in Saskatchewan. The court recognized that performance may have become burdensome for TGS, but held that it was not excused from performance. It observed that TGS had two substitute sources for potash, its Moab mine and the open market.¹⁶² This is not comparable to the predicament of McDonnell Douglas,¹⁶³ which had no way of simultaneously complying with the government jawboning and fulfilling the Eastern contract. McDonnell Douglas's performance was not merely burdensome; it was impossible.

Accordingly, to excuse performance, governmental action must be found to affect performance directly, and not indirectly through increased costs or manner of performance.¹⁶⁴

D. *Failure of Suppliers and/or Supplies*

Often the seller is an intermediary, or a processor or assembler

159. *Id.* at 608.

160. 508 F.2d 283 (7th Cir. 1974).

161. *Id.* at 286.

162. *Id.* at 293-94.

163. *See Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976).

164. *See, e.g., Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 134-35 (N.D. Iowa 1978) (seller blamed rising costs on unexpected federal environmental and occupational safety regulations; excuse denied), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 723, 728 (Mo. Ct. App. 1979) (increased costs blamed on "the enactment of new and costly mine safety regulations"; excuse denied); *Process Supply Co. v. Sunstar Foods, Inc.*, 27 U.C.C. REP. SERV. 122, 124, 126 (U.S.D.A. 1979) (seller's trucks ordered off highway by state highway police due to unexpected weather conditions; excuse accepted).

of the goods, and is thus required to procure the goods and supplies from outside sources. If these sources fail so as to impair the seller's ability to perform, the seller may attempt to claim excuse under section 2-615. The courts have not been lenient with sellers who raise this defense.

Courts have tended to turn sellers down on two general grounds. The first is based on the foreseeability of a supply problem. The absence of an escape clause presumptively indicates an intention to place the risk of supply failure on the seller. An illustrative case is *Barbarossa & Sons v. Iten Chevrolet, Inc.*¹⁶⁵ Iten contracted to sell a Chevrolet truck to Barbarossa and, in turn, ordered the truck from the manufacturer, General Motors. After several delays, General Motors cancelled the order because its suppliers failed. The court rejected Iten's section 2-615 defense because the evidence clearly indicated that General Motors' default was foreseeable, and that, despite this knowledge, Iten omitted its standard escape clause from the contract.¹⁶⁶

In *Deardorff-Jackson Co. v. National Produce Distributors, Inc.*,¹⁶⁷ the seller failed to deliver the contract amount of potatoes, giving as his reason a shortage of potato seed. The court found that the seller knew of this shortage when the contract was signed and thus denied the claimed excuse.

Another such case is *Heat Exchangers, Inc. v. Map Construction Corp.*,¹⁶⁸ where the seller failed to deliver custom-made air conditioners to an apartment construction site as required by the contract. The seller raised section 2-615 as a defense to a breach of contract suit by the buyer (who was constructing the apartment) claiming, among other excuses, a failure of its supplier of component parts. The court affirmed a judgment for the buyer noting that "Heat acknowledged supply difficulties" before entering into the contract and "failed to provide an exculpatory clause in the contract," factors which led to a conclusion "that the risk of its occurrence tacitly was assigned to Heat by reason of the failure explicitly to provide against it in the contract."¹⁶⁹

165. 265 N.W.2d 655 (Minn. 1978).

166. *Id.* at 659.

167. 447 F.2d 676 (7th Cir. 1971).

168. 368 A.2d 1088 (Md. Ct. Spec. App. 1977).

169. *Id.* at 1094-95.

The second reason used by the courts to turn down sellers who raise the defense of failure of supplies is the availability of other supplies and suppliers when the parties fail to relate the contract to a specific and exclusive source of supply. For example, in *Luria Brothers v. Piolet Brothers Scrap Iron & Metal, Inc.*,¹⁷⁰ Piolet defaulted on a written contract to sell 35,000 tons of scrap steel to Luria. The contract was silent as to the intended source of the steel. At the trial, Piolet offered testimony that the parties had agreed orally that the source of supply was a particular "fly by night" supplier who had later flown away. This testimony was excluded under section 2-202, the Code's parol evidence rule, and the court then ruled against Piolet because it had failed to show that the contract was confined to a specific source or that "substitute scrap was not available" on the open market.¹⁷¹

A similar case is *Frank B. Bozzo, Inc. v. Electric Weld Division*.¹⁷² Electric contracted to supply steel mesh to Bozzo as needed in the performance of a highway construction contract between Bozzo and the Commonwealth of Pennsylvania. Electric was obtaining the steel mesh from U.S. Steel, but the contract did not so specify, nor was there evidence of any understanding to make that source exclusive. U.S. Steel was unable to furnish the steel as Bozzo needed it, so Electric was in default. The court denied the section 2-615 defense.¹⁷³

Lurking in the background of the supply cases is the exercise or absence of diligence on the part of the seller. Comment 5 to section 2-615 observes even though the agreement makes a particular source of supply exclusive, the seller must employ "all due measures to assure himself that his source will not fail."¹⁷⁴ In *Bozzo*,

170. 600 F.2d 103 (7th Cir. 1979).

171. *Id.* at 112.

172. 423 A.2d 702 (Pa. Super. Ct. 1980).

173. *Id.* at 707; *accord*, *Huntington Beach Union High School Dist. v. Continental Information Systems Corp.*, 621 F.2d 353, 356-57 (9th Cir. 1980) (where contract to supply computers did not specify source and seller's proposed source failed, seller remained obligated to obtain computers elsewhere and supply same even though such would result in a loss on the contract); *Center Garment Co. v. United Refrigerator Co.*, 341 N.E.2d 669, 672-73 (Mass. 1975) (franchisor unequivocally bound under contract with franchise holder to provide supplies necessary to implement franchise, despite failure of franchisor's source and franchisor's subsequent unsuccessful good faith attempt to secure comparably priced supplies elsewhere).

174. U.C.C. § 2-615, Comment 5.

the court found relevant the fact that earlier in the year sufficient steel had been available from U.S. Steel, but that Electric, even though it knew Bozzo would eventually need the steel, did not reserve it at the time.¹⁷⁵ In *Center Garment Co. v. United Refrigerator Co.*,¹⁷⁶ the court chastised the seller for failing to arrange for a "backup supplier."¹⁷⁷ In *Heat Exchangers*, the evidence highlighted by the court indicated Heat Exchangers had not made prompt and timely orders for the necessary supplies,¹⁷⁸ and in *Barbarossa* the court noted that "Iten made no special effort to avoid the cancellation of this particular order" by General Motors.¹⁷⁹ On the other hand, in *Olson v. Spitzer*,¹⁸⁰ a case in which the seller successfully raised a section 2-615 defense based on failure of supplies, the trial court had found that the seller "made due and diligent effort to attempt to locate the additional accessories and equipment required of the contract."¹⁸¹

The best, if not only, way for a seller to insure that the failure of supplies will constitute an excuse of performance is to insist that the contract contain either an escape clause or a clause designating a particular source of supply as exclusive. Illustrative is *Robberson Steel, Inc. v. J. D. Abrams, Inc.*,¹⁸² a case very similar to *Bozzo*.¹⁸³ Robberson agreed to furnish structural steel to Abrams as needed in the construction of four bridges under a contract with the Texas Highway Department. Robberson was unable to obtain steel from steel mills in the area, defaulted on the contract, and pled excuse under section 2-615. Robberson's standard form contract contained a clause stating "[d]elivery is subject to our ability to procure steel from our steel mill suppliers."¹⁸⁴ Tragically for it, Robberson

175. See *Frank B. Bozzo, Inc. v. Electric Weld Div.*, 423 A.2d 702, 706 (Pa. Super. Ct. 1980).

176. 341 N.E.2d 669 (Mass. 1975).

177. *Id.* at 672.

178. See *Heat Exchangers, Inc. v. Map Constr. Corp.*, 368 A.2d 1088, 1091 (Md. Ct. Spec. App. 1977).

179. *Barbarossa & Sons v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 658 (Minn. 1978).

180. 257 N.W.2d 459 (S.D. 1977).

181. *Id.* at 461.

182. 582 S.W.2d 558 (Tex. Civ. App.—El Paso 1979, no writ).

183. *Cf. Frank B. Bozzo, Inc. v. Electric Weld Div.*, 423 A.2d 702, 707 (Pa. Super. Ct. 1980) (supplier of steel mesh under public paving contract liable for breach where its steel source failed and contract did not specify source).

184. *Robberson Steel, Inc. v. J. D. Abrams, Inc.*, 582 S.W.2d 558, 562 (Tex. Civ. App.—El Paso, 1979, no writ).

checked its supply sources before accepting Abrams' contract and, being assured of a steady supply, deleted the escape clause from the form returned to Abrams. With the clause, Robberson probably would have won; without it, Robberson lost as a matter of law.

The decision in *Spitzer* can be distinguished from the other cases noted only by the existence of an escape clause in the contract between the parties. Spitzer, an implement dealer, agreed to sell the Olsons a new John Deere 6600 gas combine containing, among other attachments, a "four-row cornhead."¹⁸⁵ The contract specified that "[t]his order is subject to your ability to obtain such Equipment from the manufacturer" ¹⁸⁶ Spitzer had great difficulty obtaining the four-row cornhead, although he made direct contact with the manufacturer, the manufacturer's area representative, and several area dealers. Eventually the Olsons "covered" and sued for the difference. Spitzer pled excuse under section 2-615, and the defense was successful. Surprisingly, the court did not stress the above escape clause, mentioning it merely as supporting the application of section 2-615 to excuse the seller's performance.¹⁸⁷ Without the clause, the case would be an aberration when compared to other cases with similar fact situations. In *Spitzer*, the Olsons had covered through the John Deere dealer in Aberdeen. The court, apparently without evidence, speculated that it would have been futile for Spitzer to have attempted to obtain the cornhead from that dealer. The court then indulged in the unusual, if not amazing, observation that Spitzer was not obligated by the contract to purchase a cornhead at retail price.¹⁸⁸ This observation is in contrast to the attitude of the court in *Barbarossa*, wherein the court required Iten to expend special effort to attempt to fulfill the buyer's order.¹⁸⁹ This latter attitude is typical, and indicates the *Spitzer* decision probably turned on the presence of the escape clause in the contract.

Absent a contract provision, the only argument available to a seller is to relate the supply failure to some other recognized cause, as in *McDonnell Douglas* where McDonnell Douglas related its

185. *Olson v. Spitzer*, 257 N.W.2d 459, 461 (S.D. 1977).

186. *Id.* at 461.

187. *Id.* at 463.

188. *Id.* at 462.

189. *See Barbarossa & Sons v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 658 (Minn. 1978).

supplier's failure to government "jawboning."¹⁹⁰ This argument will succeed only if the entire market is affected, and, therefore, it is doubtful the excuse would have succeeded in any of the cases discussed above.

E. *Strikes and Labor Disputes*

Impracticability of performance due to intervening strikes or other manifestations of labor disputes is raised as a section 2-615 excuse with some frequency. Although such events differ from those previously discussed, in that they are not related to the energy crisis, they certainly form a part of our modern commercial world. The pervading judicial message to litigants whose contracts have been thwarted by labor disputes is simply that the application of section 2-615 to provide an excuse is normally a question of fact.

The most comprehensive case involving the issue is *Mishara Construction Co. v. Transit-Mixed Concrete Corp.*¹⁹¹ Mishara, a general contractor constructing a housing project, sued Transit for cover damages caused by Transit's failure to deliver ready-mix concrete to the job site as required by the contract. The defense, "a labor dispute disrupted work on the job site,"¹⁹² was accepted by the jury, and judgment was rendered for the seller. The appellate issue was whether "as matter of law and without reference to individual facts and circumstances . . . 'picket lines, strikes or labor difficulties' provide no excuse for nonperformance by way of impossibility."¹⁹³ The court agreed with the buyer that "certainly, in general, labor disputes cannot be considered extraordinary in the course of modern commerce,"¹⁹⁴ and recognized that, in some cases, such as when a picket line is shown to be a mere inconvenience or where there is a long record of labor difficulties in the industry, the issue could be decided as a matter of law.¹⁹⁵ The court, however, affirmed the lower court's judgment for the seller on the theory that, in most cases, when the parties have not con-

190. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 980 (5th Cir. 1976).

191. 310 N.E.2d 363 (Mass. 1974).

192. *Id.* at 364.

193. *Id.* at 366.

194. *Id.* at 368.

195. *Id.* at 367.

tractually allocated responsibility for delays caused by labor disputes, "justice is better served by appraising all of the circumstances, the part the various parties played, and thereon determining liability." ¹⁹⁶

No contrary cases, wherein labor disputes are held as a matter of law either to constitute or not to constitute an excuse under section 2-615, have been found. In *Glassner v. Northwest Lustre Craft & Co.*,¹⁹⁷ a buyer of china dishes and glassware sought to rescind the contract when notified by the seller that a strike would delay completion of delivery of the goods. The lower court, relying upon pre-Code cases, granted a summary judgment for the buyer. This was reversed on appeal, however, as the appellate court felt the UCC defense raised issues of material fact.¹⁹⁸

Heat Exchangers came close to ruling out strikes as a section 2-615 excuse as a matter of law.¹⁹⁹ In that case, however the seller's own witness testified that "the strikes caused a very small portion of the problems that we encountered at that time,"²⁰⁰ thus admitting away the defense.

F. Crop Failure

The most frequently advanced excuse for failure to perform a contract is the failure to provide farm products due to crop failures caused by weather conditions — the classic "act of God" defense. This excuse is not related to the energy crisis, nor is it necessarily

196. *Id.* at 368.

197. 591 P.2d 419 (Or. Ct. App. 1979). To the same effect is *Lippsett Indus. Corp. v. Barth Smelting & Ref. Corp.*, 17 U.C.C. REP. SERV. 406 (N.Y. App. Div. 1975). These two cases ignore, and may be construed as abrogating, the buyer's absolute right under section 2-616 to terminate the contract when notified that seller will be delayed by any section 2-615 reason. This ruling may be explained in *Glassner*, however, by the fact that the buyer sought not simply to terminate but to fully rescind the contract by returning the dishes already delivered and receiving a refund of payments already made. See *Glassner v. Northwest Lustre Craft Co.*, 591 P.2d 419, 419 (Or. Ct. App. 1979). In both cases the courts raised the issue of whether time was of the essence under the contracts and, finding it not to be, assigned as fact issues the materiality of the delay. See *id.* at 420; *Lippsett Indus. Corp. v. Barth Smelting & Ref. Corp.*, 17 U.C.C. REP. SERV. 406, 407 (N.Y. App. Div. 1975). This may have been intended as an application of the section 2-616 requirement that there be a "material delay." See U.C.C. § 2-616(1).

198. See *Glassner v. Northwest Lustre Craft*, 591 P.2d 419, 421 (Or. Ct. App. 1979).

199. See *Heat Exchangers, Inc. v. Map Constr. Corp.*, 368 A.2d 1088 (Md. Ct. Spec. App. 1977).

200. *Id.* at 1091-92.

an innovation of modern existence (unless one accepts the theory that devastating weather conditions are caused by industrial and automotive smog, by fluorocarbons being vented into the ozone, and the like), but the sheer volume of cases justifies its mention here.

Although the number of cases is large, the problems involved are few. There appears to be only one rule governing all of these cases: if the contract can be construed as particularizing a specific crop, which fails, then the excuse will succeed;²⁰¹ if the contract does not particularize the crop and other contract goods are available to the seller, the excuse will fail.²⁰² This rule is analytically sound under either section 2-615, in that if crops are not particularized and are available elsewhere performance is not impracticable, or under section 2-613, in that when the goods are unspecified the contract does not "require for its performance goods identified when the contract is made."²⁰³

The only issue which perplexes the courts in these cases is the frequent necessity of determining whether the contract does or does not particularize a specific crop — an issue which often involves the application of the parol evidence rule embodied in section 2-202.²⁰⁴ The courts are not always consistent in applying the parol evidence rule in crop failure cases. For instance, the Supreme

201. See, e.g., *Michigan Bean Co. v. Senn*, 287 N.W.2d 257 (Mich. Ct. App. 1979); *Dunavant Enterprises, Inc. v. Ford*, 294 So. 2d 788 (Miss. 1974); *Campbell v. Hostetter Farms, Inc.*, 380 A.2d 463 (Pa. Super. Ct. 1977).

202. See, e.g., *Bunge Corp. v. Recker*, 519 F.2d 449 (8th Cir. 1975); *Ralston Purina Co. v. McNabb*, 381 F.Supp. 181 (W.D. Tenn. 1974); *Renner Elevator Co. v. Schuer*, 267 N.W.2d 204 (S.D. 1978). One case even extends the area of availability of alternate sources to the boundaries of the United States. See *Bunge Corp. v. Recker*, 519 F.2d 449, 451 (8th Cir. 1975).

203. See U.C.C. § 2-613; *id.* § 2-615, Comment 9.

204. See U.C.C. § 2-202. The parol evidence rule embodied in the Code provides:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Id.

Court of South Dakota excluded evidence that the crop was particularized, even though the contract contained a provision wherein the seller affirmed "that he is the lawful owner of said commodities . . . and that he has good right to sell the same" ²⁰⁵ Alternatively, a Pennsylvania court allowed similar parol evidence, even though in the written contract "[n]othing was said about the source of commodities being the farms of appellee." ²⁰⁶

As previously mentioned, Mississippi has a separate *force majeure* provision in its version of Article 2. ²⁰⁷ This provision has been cited in several crop failure cases, but it does not appear to have changed the basic rule. The provision has been held inapplicable if a crop is not particularized, ²⁰⁸ applicable if the crop is particularized, ²⁰⁹ and is sometimes ignored in favor of section 2-615. ²¹⁰

G. *Miscellaneous Excuses*

A considerable number of other events have been alleged as excuses for nonperformance of contracts. The most serious of these is war, which obviously will affect commercial transactions in at least the belligerent nations, but which surprisingly has been the subject of little litigation.

The Vietnam War was the basic excuse relied upon by McDonnell Douglas in evading its contract with Eastern Air Lines, ²¹¹ and the war, with the resulting government jawboning of McDonnell

205. *Renner Elevator Co. v. Schuer*, 267 N.W.2d 204, 207 (S.D. 1978).

206. *Campbell v. Hostetter Farms, Inc.*, 380 A.2d 463, 465 (Pa. Super. Ct. 1977).

207. MISS. CODE ANN. § 75-2-617 (1972). Mississippi's provision provides as follows:

Force Majeure. Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent. If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller may allocate its available supply among itself and all of its customers, including those not under contract, in an equitable manner. Such deliveries so suspended shall be cancelled without liability, but the contract shall otherwise remain unaffected.

Id.

208. *See Ralston Purina Co. v. Rooker*, 346 So. 2d 901, 903 (Miss. 1977).

209. *See Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652, 658 (Miss. 1975).

210. *See Dunavant Enterprises, Inc. v. Ford*, 294 So. 2d 788, 792 (Miss. 1974).

211. *See Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 980 (5th Cir. 1976).

Douglas and its suppliers, was accepted by the court as rendering McDonnell Douglas's performance of its contract with Eastern commercially impracticable. This was true even though the Eastern Air Lines-McDonnell Douglas contract had been signed in February 1965.²¹² The court summarized the history of American involvement in Vietnam,²¹³ and found that "[i]t was not until 1966 that the war first began to have a substantial impact on the American economy."²¹⁴ This may be correct, but one might argue that the economic impact of the war on the American economy was not the point in issue in the case. The point was that in February 1965, when the contract was signed, the parties knew that the United States was deeply involved in Vietnam.²¹⁵ Thus, an aircraft manufacturer such as McDonnell Douglas could be expected to reasonably foresee and anticipate emergency orders and priority demands from the Defense Department which could affect performance of its contract with a private airline. This argument was simply not addressed by the court.

The modern case most frequently cited concerning war and its effects on contracts is *Transatlantic Financing Corp. v. United States*,²¹⁶ a non-Code case relevant here because the court cited and discussed section 2-615 and commercial impracticability.²¹⁷ *Transatlantic* was a suit for extra costs initiated by a seller who was transporting goods from Galveston, Texas to Bandar Shapur, Iran. The seller's planned route through the Suez Canal was diverted around the Cape of Good Hope when Egypt closed the Suez Canal in November of 1956 as a result of hostilities with England, France, and Israel. The court agreed with seller that the closing of the Suez Canal was an unforeseen and unplanned contingency, but disagreed that adding 3,000 miles to a 10,000 mile voyage, without harm to the goods, rendered performance impracticable.²¹⁸ It should be noted this case does not rule out war as a valid section 2-

212. *Id.* at 962.

213. *Id.* at 980.

214. *Id.* at 981.

215. *Id.* at 980. The court observed that the Gulf of Tonkin resolution was passed on August 2, 1964 and that massive American buildup began in earnest in January of 1965. See *id.* at 980.

216. 363 F.2d 312 (D.C. Cir. 1966).

217. See *id.* at 315-20.

218. *Id.* at 316, 319-20.

615 excuse in a proper fact situation.

Unavailability of transportation has also been raised as an excuse, and when it is, section 2-614(1) becomes relevant.²¹⁹ In *Nora Springs Cooperative Co. v. Brandau*,²²⁰ the buyer refused to take delivery of the amount of corn specified by the contract, alleging that "a shortage of railroad cars during the period in question made it temporarily impossible to accept delivery."²²¹ The court rejected the defense because the buyer failed to show the unavailability of alternative modes of transportation, a decision consistent with both section 2-614 and section 2-615.²²²

Destruction of the seller's plant by fire has been accepted as a valid section 2-615 excuse,²²³ as has unexpected severe weather conditions in July forcing the seller's trucks off the highway.²²⁴

In *Heat Exchangers*, one of the excuses claimed by the seller was a third party's threat of a patent infringement suit.²²⁵ This was not rejected by the court as a matter of law, but, since no patent suit developed and the buyer had agreed to accept the goods without the offending features, the court rejected the defense as a matter of fact.²²⁶

Devaluation of the dollar was urged as an excuse in a recent Tenth Circuit case wherein an importer of Swiss sewing machines was sued by the distributor to whom the machines were sold.²²⁷ The importer claimed the 200% reduction of the value of the dollar in relation to Swiss francs, between the time of contracting and

219. Section 2-614(1) deals with substitute performance providing: "(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted." U.C.C. § 2-614.

220. 247 N.W.2d 744 (Iowa 1976).

221. *Id.* at 747.

222. *Id.* at 748; accord *Fratelli Gardino, S.p.A. v. Caribbean Lumber Co.*, 587 F.2d 204, 206 (5th Cir. 1979).

223. See *Goddard v. Ishikawajima-Harima Heavy Indus. Co.*, 287 N.Y.S.2d 901, 902 (App. Div. 1968); cf. *Commonwealth v. Diamond Shamrock Chem. Co.*, 391 A.2d 1333, 1339 (Pa. Commw. Ct. 1978) (whether closure of seller's plant due to fire constituted excuse presented fact question).

224. *Process Supply Co. v. Sunstar Foods, Inc.*, 27 U.C.C. REP. SERV. 122, 126 (U.S.D.A. 1979).

225. See *Heat Exchangers, Inc. v. Map Constr. Corp.*, 368 A.2d 1088, 1092 (Md. Ct. Spec. App. 1977).

226. See *id.* at 1092.

227. *Bernina Distrib., Inc. v. Bernina Sewing Mach. Co.*, 646 F.2d 434 (10th Cir. 1981).

the time for performance, reduced the importer's profit margin to such an extent that the contract had become commercially impracticable under section 2-615. The court rejected the claim on the dual grounds that fluctuations in the exchange rate were foreseeable²²⁸ and that increased cost of performance did not rise to the level of commercial impracticability.²²⁹ The court noted the doctrine of impracticability was unavailable to one seeking relief under section 2-615 unless he "could show he could perform only at a loss, and that the loss would be especially severe and unreasonable."²³⁰

Finally, although human pestilence has yet to be litigated under section 2-615, epidemics of cholera and avian influenza in turkeys were assigned by a seller to excuse his failure to perform a contract to supply turkeys to the United States Department of Agriculture in *Jennie-O Foods, Inc. v. United States*.²³¹ The court adopted an attitude which should surprise no one who has read this far. It stated that it had never applied "the commercial impracticality standard . . . with frequency or enthusiasm."²³² While recognizing performance of the contract could cause economic hardship to the seller because of the epidemic, in the absence of satisfactory evidence of a reasonable effort to obtain healthy turkeys elsewhere, the court rejected the defense.²³³

VII. CONCLUSION

Probably the best summary of the present status in court of section 2-615 and related provisions is expressed by the above quoted language from *Jennie-O Foods*.²³⁴ The courts have applied the commercial impracticability standard infrequently and without enthusiasm. There are exceptions to this, notably *Eastern Air Lines*,

228. *See id.* at 439. The importer had written the distributor three weeks prior to the execution of the contract concerning a recent seven percent devaluation of the dollar in relation to the franc, thus evidencing "clear foreknowledge of the possibility of currency fluctuations." *Id.* at 439.

229. *See id.* at 440.

230. *Id.* at 440.

231. 580 F.2d 400 (Ct. Cl. 1978).

232. *Id.* at 409.

233. *Id.* at 412.

234. *Id.* at 409.

Inc. v. McDonnell Douglas Corp.,²³⁵ but the trend is with *Jennie-O*. Moreover, with respect to two principal problems of the current world, energy uncertainties and runaway inflation, the passage of time will undoubtedly decrease the frequency of successfully urging commercial impracticability. A seller who entered into a long-term contract in 1969 might have convinced a court that he was surprised by double-digit inflation occurring in the 1970's, but such a claim would not be heard in 1981. The energy shortages that were forecast only by insiders in the 1960's now represent the norm. Even the "new spirit of commercial law," voiced in *Aluminum Co. of America*,²³⁶ was applied to cost increases of over 500% and to multi-million dollar losses. It is doubtful that this new spirit would sympathize with a contemporary seller who claimed not to have anticipated 12% to 20% inflation per year.

The authorities provide a clear message — do not rely solely upon section 2-615 and its claim of commercial impracticability. Draft contracts with escape clauses for both parties, with *force majeure* clauses, and cost escalation clauses. The cases do not directly instruct on how to draft such clauses, but they do present guidelines and illustrate pitfalls. In drafting escalation clauses it is important to select an index that will accurately reflect increases in the cost of the contract goods, to avoid the plight of the sellers in *Aluminum Co. of America*²³⁷ and *Peabody Coal*.²³⁸ Further, a clause should be included providing in effect that if actual costs exceed the contract index by a specified percentage, the contract will either be renegotiated or some other equitable adjustment will be triggered.

In drafting escape clauses and *force majeure* clauses as many contingencies as can be foreseen should be mentioned, but care should be taken to include general language to provide for the unforeseen. It is imperative to make clear that the general contingency language of section 2-615 is not superseded. Further, unless forced to do so by the bargain, sellers should not assume a greater

235. 532 F.2d 957 (5th Cir. 1976).

236. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 89-93 (W.D. Pa. 1980).

237. *Id.* at 89.

238. *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 722-23 (Mo. Ct. App. 1979).

burden than is imposed by either section 2-615 or section 2-616.²³⁹

It is doubtful that the general Code provisions, ineffective as they have turned out to be, could be improved upon meaningfully. The task is for the parties and their attorneys, in each transaction, to attempt to foresee all contingencies, to bargain concerning their risks, and to clearly express their bargain in the contract.

239. See U.C.C. § 2-615; *id.* § 2-616; *Gold Kist, Inc. v. Stokes*, 226 S.E.2d 268, 270 (Ga. Ct. App. 1976) (section 2-615 will not apply where seller "assumes a greater obligation" by making an affirmative commitment to pay stipulated damages should performance be rendered impossible); *Swift Textiles, Inc. v. Lawson*, 219 S.E.2d 167, 172 (Ga. Ct. App. 1975) (seller denied relief under § 2-615 when found to have "assumed a greater obligation" by contracting to allow buyer to cover at defaulting seller's expense).