

# Frustration as an Agricultural Buyer's Excuse Under U.C.C. Section 2-615

*On its face, Uniform Commercial Code section 2-615 applies to sellers only. This article argues that courts should allow agricultural buyers to seek excuse because of frustration under section 2-615. The article demonstrates that the section does not exclude buyers and was not intended to exclude them. It analyzes the policy underlying the doctrine of frustration and shows how this policy can apply to an agricultural buyer. The article concludes that section 2-615 may have particular significance for agricultural buyers.*

Joshua James had owned a few hundred acres of arid land in California's Central Valley for several years. In 1974, the construction of a new irrigation canal and the formation of a new water district had made his land suitable for farming for the first time. He contracted to purchase an irrigation system in the summer of 1975 to help establish his farm. The contract called for a system designed to meet the specific needs of his farm. It also called for delivery in 1977.

In November, 1975, California entered the worst drought in its history.<sup>1</sup> As a result, the water district was unable to supply Joshua with the water necessary to operate his farm. Joshua's only option was to minimize his losses by allowing the ground to lie fallow until the drought's end. He sold some of his farm equipment but he was unable to find anyone willing to assume his contract for the irrigation system. No one wanted to buy a system designed for someone else's land. When Joshua notified the manufacturer that he could not accept delivery, the company brought an action against him for breach of contract.

The drought had also forced Joshua to cancel a contract to sell his produce to a nearby cannery. His inability to grow the crops as he had promised, however, was not a breach of contract because it fell within the provisions of section 2-615 of the Uniform Commercial Code (U.C.C.),<sup>2</sup> which excuses failure to perform when an unexpected change

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1. Interview with Bill Clark, Spokesperson, Drought Information Center, California Department of Water Resources, in Sacramento, California (April 3, 1978).

2. U.C.C. § 2-615 (1962) reads in part:

in circumstances renders performance impracticable.<sup>3</sup> Unfortunately for Joshua, the section does not appear to affect his sprinkler contract. Its text refers only to the rights and duties of sellers, not to those of buyers.<sup>4</sup>

The text of section 2-615 incorporates one of two common law doctrines that can excuse a contract because of unexpected change: the doctrine of impossibility.<sup>5</sup> That doctrine excuses a promisor when an unanticipated change in circumstances renders his or her performance impossible.<sup>6</sup> The parallel doctrine of frustration excuses a promisee when an unanticipated change in circumstances totally destroys the value of the promisor's performance.<sup>7</sup> Because a buyer is a promisee, section 2-615 does not, on its face, incorporate the doctrine of frustration.

This article suggests that, despite its apparent limitation to sellers, section 2-615 can excuse an agricultural buyer's failure to take delivery of goods because of changed circumstances. It shows first that a court can interpret section 2-615 to incorporate the doctrine of frustration, and that such interpretation is consistent with the U.C.C.'s drafters' intent. It explains the policy underlying the doctrine of frustration and examines the reasons why courts have not applied it to buyers of goods. It shows that drought may be the failure of a presupposed condition within the meaning of section 2-615. It then concludes that section 2-615 may have particular significance for agricultural buyers.

## I. SECTION 2-615 DOES NOT EXCLUDE BUYERS

Because section 2-615 already incorporates the doctrine of impossibility,<sup>8</sup> courts can easily extend its scope to include buyers. The doctrines

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"EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS. Except so far as a seller may have assumed a greater obligation . . .

(a) Delay in delivery or non-delivery . . . by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . . ."

California adopted § 2-615 without amendment. CAL. COM. CODE § 2615 (West 1964).

3. U.C.C. § 2-615, Comment 4 (1962) states that "local crop failure . . . is within the contemplation of this section." See *Id.*, Comment 9; Comment, *Crop Failures and Section 2-615 of the Uniform Commercial Code*, 22 S.D. L. REV. 529 (1977).

4. See note 2 *supra*.

5. U.C.C. § 2-615, Comments 1 & 3 (1962).

6. See, e.g., *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991-92 (5th Cir. 1976); RESTATEMENT OF CONTRACTS § 457 (1932).

7. See, e.g., *Pacific Trading Co., Inc. v. Mouton Rice Milling Co.*, 184 F.2d 141, 148 (8th Cir. 1950); *Lloyd v. Murphy*, 25 Cal. 2d 48, 53, 153 P.2d 47, 50 (1944); RESTATEMENT (SECOND) OF CONTRACTS § 285 (Tent. Draft No. 9, 1974). Because the two doctrines raise some identical issues, this article occasionally cites some impossibility cases in its discussion of frustration.

8. See text accompanying note 5 *supra*.

of impossibility and frustration are very similar in that both apply to contracts made in reliance on an assumption that a certain contingency will not occur. They are different in that impossibility focuses on the promisor's inability to perform whereas frustration is concerned with the benefit the promisor's performance confers on the promisee.<sup>9</sup> Section 2-615 requires that an unanticipated change render performance "impracticable."<sup>10</sup> A court can interpret this term to include both situations.<sup>11</sup> Thus it would not do violence to the section to read the doctrine of frustration into its text. In fact, dicta in two recent cases do just that.<sup>12</sup>

An interpretation of section 2-615 that incorporates the doctrine of frustration is also consistent with the U.C.C.'s drafters' intent. When the American Law Institute and the National Conference of Commissioners on Uniform State Laws initially considered section 2-615 in 1949, an accompanying official comment stated that the section "obviously does apply" to buyers.<sup>13</sup> Legal scholars criticized this comment, not for attempting to include buyers, but for appearing to contradict textual language which only mentioned sellers.<sup>14</sup> Shortly thereafter, the drafters amended the comment to state that in some situations, the section "may well apply" to buyers.<sup>15</sup> The amendment may have been an equivocation, but it was not a repudiation of the drafters' previous opinion. If the drafters had decided that the section should not apply to buyers, they could have said so explicitly.

The drafters may have omitted buyers from the language of section 2-615 because virtually every court to hear a buyer's claim of frustration had rejected it.<sup>16</sup> Because the courts had not yet determined when ex-

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9. See text accompanying notes 6 and 7 *supra*.

10. See note 2 *supra*.

11. U.C.C. § 2-615, Comment 3 (1962) states that the section uses the test of "impracticability . . . to call attention to the commercial character of the criterion chosen by this Article." (See RESTATEMENT (SECOND) OF CONTRACTS § 281, Comment d (Tent. Draft No. 9, 1974) for a more complete discussion of impracticability.) In so doing, the drafters contrast "impracticability" with both "impossibility" and "frustration." The implication is that the drafters would consider performance of a frustrated contract to be impracticable.

12. *Terry v. Atlantic Richfield Co.*, 72 Cal. App. 3d 962, 964-65, 140 Cal. Rptr. 510, 511 (3d Dist. 1977); *Nora Springs Co-op Co. v. Brandau*, 247 N.W.2d 744, 747-48 (Iowa 1976).

13. U.C.C. § 2-615, Comment 9 (1949).

14. Certain Members of Faculty of Harvard Law School, *Report on Article 2—Sales*, 6 THE BUSINESS LAWYER 151, 160-61 (1951).

15. U.C.C. § 2-615, Comment 9 (1952).

16. *Kahle v. Amtorg Trading Corp.*, 93 F. Supp. 405 (D.N.J. 1950) (buyer's purpose not a condition of contract); *Rock v. Deason & Keith*, 146 Ark. 124, 225 S.W. 317 (1920) (government regulation preventing resale at profit no excuse); *Sistrom v. Anderson*, 51 Cal. App. 2d 213, 124 P.2d 372 (2d Dist. 1942) (buyer assumed risk of subsequent deterioration of turkeys); *Baetjer v. New England Alcohol Co.*, 319 Mass. 592, 66 N.E.2d 798 (1946) (buyer assumed risk of wartime disruption); *Popper v. Centre Brass Works, Inc.*, 180 Misc. 1028, 43 N.Y.S.2d 107 (City Ct. N.Y. 1943); *Neuberg v. Avery F. Payne Co.*, 37

cuse would be appropriate, the drafters feared that inclusion of buyers in the broad language of section 2-615 might cause some courts to excuse buyers in inappropriate circumstances.<sup>17</sup> The drafters apparently believed, however, that there were some situations in which a court should consider excusing a buyer because of frustration.<sup>18</sup> Therefore they used language which left open the possibility of excusing buyers without saying when or how a court should grant such excuse.<sup>19</sup>

## II. THE POLICY UNDERLYING THE DOCTRINE OF FRUSTRATION

Some courts and commentators have characterized frustration as a doctrine that excuses a promisee when there is a "practical" failure of consideration.<sup>20</sup> Simply stated, the doctrine of failure of consideration excuses a promisee's duty of counterperformance when the promisor does not perform.<sup>21</sup> It embodies a basic principle of contract law, that if

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N.Y.S.2d 366 (Sup. Ct. 1942), *rev'd on other grounds*, 265 App. Div. 1052, 41 N.Y.S.2d 195 (1943) (contract not rendered worthless); *Nora Springs Co-op Co. v. Brandau*, 247 N.W.2d 744 (Iowa 1976) (buyer assumed risk of boxcar shortage). One case, *Johnson v. Atkins*, 53 Cal. App. 2d 430, 127 P.2d 1027 (1st Dist. 1942), did excuse a buyer of goods, but the drafters may not have wished to rely on it. It is not strong authority. In that case, the court excused a copra buyer when Columbian officials refused to permit the copra to enter the country. When the buyer refused to accept part of the purchase, the parties submitted the dispute to arbitrators in accordance with the contract. The arbitrators held the buyer liable for the entire purchase price. They did not require the seller to mitigate damages. The court was obviously loathe to enforce an award which ignored a principle as basic as mitigation of damages. It therefore held that the Columbian officials' action frustrated the contract, thereby voiding the arbitration clause. The court's reliance on the doctrine of frustration is questionable, however, because the facts of the case indicate that the buyer assumed the risk of failure to secure the necessary permit. *Id.* at 435, 127 P.2d at 1030. *See* text accompanying notes 43-50 *infra*.

17. The Permanent Editorial Board for the U.C.C. gave this reason for refusing to amend § 2-615 to include buyers. PERMANENT EDITORIAL BOARD FOR THE U.C.C., REPORT NO. 3, at 49 (1967).

18. U.C.C. § 2-615, Comment 9 (1962) makes a veiled reference to *Ingram-Day Lumber Co. v. McLouth*, 275 U.S. 471 (1928) when it suggests that "the reason of the section" may apply to "a war procurement subcontract known to be based on a prime contract which is subject to cancellation." The defendant in that case had made a contract to purchase lumber for the purpose of building tugboats pursuant to a contract with a quasi-governmental agency. When the agency cancelled the tugboat contract, he cancelled his lumber contract. The Supreme Court rendered judgment for the plaintiff. Apparently, the defendant did not even raise the defense of frustration. Even if he had, excuse would have been inappropriate because the lumber company did not rely on the defendant's purpose in making the contract. *See* text accompanying notes 24-27 & 41 *infra*. The drafters apparently felt, however, that excuse of a buyer might be appropriate in situations similar to that which *Ingram-Day* presented.

19. *See* 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 41.7, at 1105 (1965). Professor Gilmore was one of the principle drafters of the U.C.C.

20. *E.g.*, *Pacific Trading Co., Inc. v. Mouton Rice Milling Co.*, 184 F.2d 141, 148 (8th Cir. 1950); *Autry v. Republic Prod., Inc.*, 30 Cal. 2d 144, 148, 180 P.2d 888, 891 (1947); *Lloyd v. Murphy*, 25 Cal. 2d 48, 53, 153 P.2d 47, 50 (1944); 6 CORBIN, CONTRACTS § 1361, at 496 (1962); 6 WILLISTON, CONTRACTS § 1935, at 5419 (rev. ed. 1938).

21. For a discussion of failure of consideration *see, e.g.*, *Taliaferro v. Davis*, 216 Cal. App. 2d 398, 410-11, 31 Cal. Rptr. 164, 172 (1st Dist. 1963); *Holm v. Woodworth*, 271 So.

one party does not perform, the other one should not have to perform either.

Frustration is not actually a failure of consideration, however. A promisor's act can constitute valuable consideration even if it does not confer a benefit on the promisee. Generally, the performance of any act which, but for the contract, the promisor was not obligated to perform constitutes valuable consideration.<sup>22</sup> When the contracting parties understand that the promisor's performance might not confer a benefit on the promisee, there is no reason to excuse the promisee simply because that possibility is realized.

The situation is different when the parties contract in reliance on an assumption that the promisor's performance will confer a particular benefit. The leading case of *Krell v. Henry*<sup>23</sup> illustrates how an unexpected change in circumstances can work a practical failure of consideration on a promisee. In 1902, Albert Edward was to be crowned King of England. A two-day coronation procession was to proceed along the Pall Mall, past a suite of rooms that Mr. Krell owned. Krell advertised that his rooms were available on the days of the procession. Mr. Henry agreed to pay 75 £ for the daytime use of the rooms. The two exchanged letters which memorialized the contract but contained no reference to the procession. Unfortunately, the king became ill two days before the coronation, causing the procession to be cancelled. When Henry refused to pay for the rooms, Krell sued him. The court held that Henry did not have to pay.

The *Krell* court initially determined that the parties had tacitly assumed that the coronation procession would occur.<sup>24</sup> It then determined that their assumption had formed the "foundation" of their contract.<sup>25</sup> Upon examining all the evidence, the court found that their agreement was not a demise or an agreement to let rooms but "a licence [sic] to use

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2d 167, 169 (Fla. App. 1972); *Lawrence v. Lawrence*, 217 N.W.2d 792, 796 (N.D. 1974); *Poppenga v. Cramer*, — S.D. —, 250 N.W.2d 278, 279 (1977); CAL. CIV. CODE § 1689(b)(4) (West 1973); 6 CORBIN, *supra* note 20, § 1255; RESTATEMENT OF CONTRACTS § 274 (1932).

22. For example, a promise not to drink, use tobacco, swear or play cards or billiards constitutes valuable consideration. *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891). *See also* *Mustang Equip., Inc. v. Welch*, 115 Ariz. 206, 564 P.2d 895, 898 (1977) (plaintiff's promise not to execute prospective judgment constituted consideration); *Mutz v. Wallace*, 214 Cal. App. 2d 100, 111, 29 Cal. Rptr. 170, 177 (1st Dist. 1963) (requirement of notice for exercise of arbitrary power of termination sufficient legal detriment to constitute consideration); *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 31 N.C. App. 490, 229 S.E.2d 697, 700 (1976) (forbearance of right to cancel insurance constituted consideration).

23. [1903] 2 K.B. 740.

24. *Id.* at 750.

25. *Id.*

the rooms for a particular purpose and no other."<sup>26</sup> That purpose, of course, was to view the coronation procession.

The "foundation" of a contract can be viewed as that thing or set of things which gives a promisor's performance value. If a promisor's performance occurs in a vacuum, it has no value to anyone. Only interaction with other factors can make it valuable. In the absence of such other factors, a promisor cannot sell his or her performance because no one will have an incentive to buy it. For example, interaction with the coronation procession made Krell's view worth 75 £. Without the procession, the view was worthless and no one would have paid 75 £ to obtain it. Thus the procession was the "foundation" of the contract, for without it the contract would not have existed.

The *Krell* court also determined that neither party had anticipated the possibility that the coronation procession would not occur.<sup>27</sup> In so doing, the court implicitly recognized that every contract involves an allocation of risks.<sup>28</sup> When negotiating a contract, a prudent businessperson recognizes that certain events may occur which will reduce the value of the promisor's performance. Each party has the option of assuming a given risk, *i.e.*, agreeing to absorb the loss resulting from a change in circumstances, or paying the other party to assume it. The party who has assumed the risk of a given event which later occurs is not deprived of the contract's benefit. On the contrary, he or she receives the precise benefit the parties intended the contract to confer under the circumstances. Therefore, if one party assumes the risk of a given event, the law will respect that allocation.<sup>29</sup>

Since the parties in *Krell* had never made a formal contract, the court had to infer the contract from the exchange of letters and other extrinsic evidence. If the parties had entered into a formal contract which did not mention the procession, the court might have found that Henry had assumed the risk of its non-occurrence.<sup>30</sup> In view of the informality of their contract, however, the court found that neither party had contemplated the procession's cancellation.<sup>31</sup> Therefore Henry had not assumed that particular risk.

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26. *Id.*

27. *Id.*

28. See *Lloyd v. Murphy*, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1944); 6 CORBIN, *supra* note 20, at § 1354.

29. *E.g.*, *Megan v. Updike Grain Corp.*, 94 F.2d 551, 555 (8th Cir. 1938), *cert. dismissed*, 305 U.S. 663 (1939) (no excuse where defendant assumed risk of unfavorable change in freight rates); *Glenn R. Sewell Sheet Metal, Inc. v. Loverde*, 70 Cal. 2d 666, 676, 451 P.2d 721, 727, 75 Cal. Rptr. 889, 895 (1969) (defendant assumed risk of burdensome repairs); *A-Leet Leasing Corp. v. Kingshead Corp.*, 150 N.J. Super. 384, 375 A.2d 1208 (1977) (defendant assumed risk of burdensome repairs).

30. See text accompanying notes 49 & 50 *infra*.

31. *Krell v. Henry*, [1903] 2 K.B. 740, 750.

The court concluded that the frustrating event prevented the contract from conferring the benefit that both parties had intended it to confer.<sup>32</sup> Thus the procession's cancellation constituted a practical, if not literal, failure of consideration. The parties in *Krell* had not bargained for Krell's performance, they had bargained for the benefit of that performance. The benefit of Krell's performance was the only thing Henry wanted, and was the only reason Krell could demand compensation of 75 £. Therefore the court excused Henry's duty to pay even though Krell could have performed the act he promised to perform. The procession's occurrence was the foundation of the contract. Neither party had assumed the risk of the procession's cancellation. And the procession's cancellation prevented the contract from conferring its intended benefit. If the court had not excused Henry's duty to pay, a fortuitous change of circumstances would have allowed Krell to enjoy a benefit at Henry's expense.

### III. LIMITATIONS OF THE DOCTRINE OF FRUSTRATION

In the 75 years since the *Krell* case, virtually no American court has used the doctrine of frustration to excuse a buyer of goods.<sup>33</sup> None of these courts have suggested, however, that frustration is inapplicable to buyers *per se*. In each case, the court denied excuse because the facts did not warrant it. The structure of most purchase transactions prevents buyers from satisfying all the elements of frustration.

First, the requirement that the parties have relied on an assumption that a frustrating event would not occur disqualifies anyone who buys a good which has several uses. Every one of a good's uses gives it value. No one use can form the foundation of a contract to sell such a good because the seller's ability to make the contract does not depend on that particular use. For example, when a manufacturer who had contracted to purchase glass coal to produce fireplace accessories was forced out of business by subsequent governmental regulation of brass and other metals, the court held that the government regulation did not frustrate the contract.<sup>34</sup> Because glass coal can be used to manufacture many different things, the buyer's particular purpose was not essential to the contract; it did not form the contract's foundation. The court implied that it would have reached a different result if the regulation had prevented the defendant from making any use of the coal whatsoever.<sup>35</sup>

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32. *Id.* at 751-52.

33. *See* note 16 *supra*.

34. *Popper v. Centre Brass Works, Inc.*, 180 Misc. 1028, 43 N.Y.S.2d 107 (City Ct. N.Y. 1943).

35. *Id.*, 43 N.Y.S.2d at 108. The court's opinion illustrates the difficulty some courts have experienced in applying the doctrine of frustration. The opinion suggests that the contract was not frustrated because it did not indicate that the government regulation

Second, the requirement that the frustrating event be one the parties did not anticipate disqualifies anyone who buys goods with an intent to resell. The buyer's sole reason for making the contract in that case is to resell the goods at a profit. A substantial drop in the market value of those goods may prevent a buyer from achieving that purpose. Although the parties may not have actually anticipated such a drop, courts may find an allocation of risk arising out of trade custom as well as the contract terms.<sup>36</sup> Trade custom allocates the risk of a drop in resale value to the buyer.<sup>37</sup> Thus frustration will not excuse a contract to purchase goods for distribution.

Third, an unexpected change in circumstances is not likely to render a contract to purchase goods worthless. Although *Krell* only required that an unexpected change prevent a contract from conferring its intended benefit, later courts have refused to excuse a promisee if the promisor's performance conferred any significant benefit.<sup>38</sup> The situation in that case is not analogous to a failure of consideration because the promisee receives something of value for his or her promise of counterperformance. Therefore, since most goods have more than one purpose, a change in circumstances which frustrates a buyer's particular purpose does not render the contract valueless.

Finally, since frustration excuses only executory contracts, changed circumstances affect purchase contracts less than other types of contracts. Historically, frustration cases have usually involved leases<sup>39</sup> be-

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would excuse the buyer. *Id.* Of course, if it had so indicated, there would have been a clear allocation of risk which would have obviated the need to invoke frustration. See text accompanying note 29 *supra*. The court's judgment, however, accords with the analysis presented herein.

36. *E.g.*, *Commercial Contractors, Inc. v. United States Fidelity & Guaranty Co.*, 524 F.2d 944, 955 (5th Cir. 1975) (trade custom allocated risk of labor shortage); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 316-17 (D.C. Cir. 1966) (trade custom and surrounding circumstances allocated risk of unavailability of Suez canal); U.C.C. § 2-615, Comment 8 (1962).

37. *E.g.*, *Pacific Trading Co. v. Mouton Rice Milling Co.*, 184 F.2d 141, 149 (8th Cir. 1950); *In Re Briner*, 155 Misc. 722, 282 N.Y.S. 257, 262 (Sup. Ct. 1935); 6 CORBIN, *supra* note 20, at § 1360, at 485.

38. *Plaza Amusement Co. v. Rothenberg*, 65 F.2d 254 (5th Cir. 1933), *cert. dismissed*, 290 U.S. 707 (1933); *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P.2d 47 (1944) (lessee's use of premises unrestricted); *Grace v. Croninger*, 12 Cal. App. 2d 603, 55 P.2d 940 (1st Dist. 1936) (Prohibition did not frustrate lease of premises used as saloon, cigarstore and boot-black); *General Talking Pictures Corp. v. Rinas*, 248 App. Div. 164, 288 N.Y.S. 266 (1936) (theater's destruction did not frustrate lease of moving picture equipment because contract allowed its use elsewhere).

39. *E.g.*, *Garner v. Ellingson*, 18 Ariz. App. 181, 501 P.2d 22 (1972); *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P.2d 47 (1944) (discussion of California lease cases, *id.* at 53, 153 P.2d at 50); *Hess v. Domouchel Paper Co.*, 154 Conn. 343, 225 A.2d 797 (1966); *Perry v. Champlain Oil Co.*, 101 N.H. 97, 134 A.2d 65 (1957); *A-Leet Leasing Corp. v. Kingshead Corp.*, 150 N.J. Super. 384, 375 A.2d 1208 (1977); *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883 (1944) (discussion of English lease cases, 146 P.2d at 886-87); *Hinchman v. City Water Co.*, 179 Tenn. 545, 167 S.W.2d 986 (1943); 6 CORBIN, *supra* note 20, at § 1356.



cause leases remain executory for a long period of time and are more susceptible to frustration by unallocated risks than are other contracts. Buyers' contracts, on the other hand, do not remain executory very long. Since title to goods normally passes shortly after the parties make a contract of sale, changed circumstances have little opportunity to affect the contract. Once a buyer takes possession of goods, he or she assumes all the risks of ownership.<sup>40</sup>

#### IV. DROUGHT AS THE FAILURE OF A PRESUPPOSED CONDITION

Although the doctrine of frustration will not apply to most purchase contracts, it may apply in some situations. The hypothetical example of Joshua James, set forth at the beginning of this article, presents a situation where a court should use the doctrine of frustration, as incorporated into section 2-615, to excuse a buyer of goods. Moreover, it illustrates how an agricultural purchase contract can differ from other contracts in a way that may make application of section 2-615 to it particularly appropriate.

If Joshua is successfully to claim excuse, he must first show that his contract was based on an assumption that drought would not occur.<sup>41</sup> It is important that Joshua's contract called for a custom-made irrigation system. If it had not, the promisor's performance would simply have been the manufacture and delivery of equipment usable on any farm. The extrinsic circumstance making the contract valuable would have been the expectation of an adequate water supply throughout the region. In that case, the drought would not have rendered the contract worthless, for it did not affect the rest of the state as severely as it did Joshua's area. Thus, even if both parties had assumed the existence of an adequate water supply on Joshua's farm, that assumption would not have formed the foundation of the contract. The seller would have been able to sell the equipment even in the absence of that particular assumption.

The promisor's performance in this case, however, was to be the manufacture and delivery of a system specifically designed to meet the requirements of Joshua's farm. The extrinsic circumstance that would have made this performance valuable was the existence of an adequate water supply for Joshua's farm. The assumption that such a water supply would exist formed the foundation of Joshua's contract. If both parties had not expected Joshua to be able to use the equipment on his farm, then this particular contract could not exist.

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40. See U.C.C. § 2-509 (1962).

41. "[P]erformance 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* . . ." U.C.C. § 2-615 (1962) (emphasis added).

Joshua must also prove that he did not assume the risk of the frustrating event, in this case drought.<sup>42</sup> A court may find an allocation of risk in the contract's terms, trade custom or the circumstances surrounding the contract's formation.<sup>43</sup> In this case, Joshua's contract made no reference to the need for water.<sup>44</sup> Nor is a court likely to find that trade custom allocated the risk of drought. The phenomenon of drought is obviously not common, since California has not had a severe drought in several decades.<sup>45</sup> It would be difficult to show that a commonly understood trade custom has developed with respect to an event which is not within the experience of those in the trade.<sup>46</sup>

Furthermore, farmers generally do not assume the risk of climatic change. The law is settled that if abnormal weather conditions cause a crop failure, a court will excuse the failure to deliver those crops.<sup>47</sup> The parties to a contract to deliver specific crops assume that the crops will exist at the time of delivery.<sup>48</sup> The possibility of adverse climatic change is the same whether the farmer acts as a seller or buyer. There is no reason why a farmer should assume the risk in one context and not in another. A farmer should not be expected to rely on a different set of tacit assumptions just because he or she sits on one side of the bargaining table rather than the other.

Despite the general rule, a court may find that Joshua assumed the risk of drought if he knew, or should have known, that drought was imminent.<sup>49</sup> If the drought was sufficiently foreseeable, a court may in-

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42. "[P]erformance 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 . . . ." U.C.C. § 2-615 (1962) (emphasis added).

43. *E.g.*, *West Los Angeles Inst. for Cancer Res. v. Mayer*, 366 F.2d 220, 225 (9th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967) (no allocation of risk of change in tax law); *Lloyd v. Murphy*, 25 Cal. 2d 48, 55-56, 153 P.2d 47, 50 (1944) (surrounding circumstances allocated risk of war). *See* note 36 *supra*.

44. If Joshua's contract had expressly or implicitly allocated the risk of drought, Joshua clearly could not claim excuse. U.C.C. § 2-615, Comment 8 (1962).

45. The last severe drought was in 1929. Interview with Bill Clark, Spokesperson, Drought Information Center, California Department of Water Resources, in Sacramento, California (April 3, 1978).

46. *See, e.g.*, *Lipschutz v. Gordon Jewellery Corp.*, 373 F. Supp. 375, 387 (D.C. Tex. 1974); 3 CORBIN, *supra* note 20, at §§ 556, 557 (1962).

47. *Mitchell Canneries, Inc. v. United States*, 77 F. Supp. 498 (Ct. Cl. 1948) (seller excused when region's entire blackberry crop failed); *Pearson v. McKinney*, 160 Cal. 649, 117 P. 919 (1911) (contract to deliver specific trees excused). *See* U.C.C. § 2-615, Comments 4 & 9 (1962). *Cf.* *Bunge Corp. v. Recker*, 519 F.2d 449 (8th Cir. 1975); *Ralston Purina Co. v. McNabb*, 381 F. Supp. 181 (W.D. Tenn. 1974); *Eskew v. California Fruit Exchange*, 203 Cal. 257, 263 P. 804 (1927). In the latter cases, the court did not excuse a seller because the contract was not for a specific crop.

48. *See* *Pearson v. McKinney*, 160 Cal. 649, 117 P. 919 (1911) (contract to deliver specific trees excused).

49. *See* *United States v. Buffalo Coal Mining Co.*, 345 F.2d 517 (9th Cir. 1965) (defendant should have foreseen difficulty of working mine and therefore assumed risk of same); *Lloyd v. Murphy*, 25 Cal. 2d 48, 54-56, 153 P.2d 47, 50-51 (1944) (defendant

fer that the parties actually foresaw it. If Joshua realized the possibility of drought and yet did not protect himself against it in his contract, a court may infer that he elected to assume the risk rather than pay the manufacturer to assume it.<sup>50</sup> In this case, Joshua made his contract months before the drought began. At that time there was nothing that would have put a reasonable businessperson on notice that drought was approaching. Although the issue of assumption of risk is ultimately a question of fact, it appears that in Joshua's case neither the contract, trade custom nor the surrounding circumstances allocated the risk of drought to him.

Finally, Joshua must demonstrate that the drought rendered the promisor's performance "impracticable."<sup>51</sup> To do so, Joshua must first show that the drought prevented the contract from conferring its intended benefit.<sup>52</sup> In this case, the drought did not absolutely prevent Joshua from watering crops. He still had some water available. The cost of making use of it, however, would have far exceeded the value of any crops grown. Thus it was not commercially practicable for Joshua to use the equipment. As a practical matter, the drought deprived Joshua of the contract's intended benefit.

But Joshua must also show that the promisor's performance would

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should have foreseen possibility of wartime regulation); *Straus v. Kazemkas*, 100 Conn. 581, 124 A. 234, 239 (1924) (defendant should have foreseen possibility of embargo). *But see* *West Los Angeles Inst. for Cancer Res. v. Mayer*, 366 F.2d 220, 225 (9th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 318 (D.C. Cir. 1966). The latter opinions stated that the issue of foreseeability was not determinative.

50. *E.g.*, *United States v. General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974) (risk of foreclosure by superior lienor within reasonable contemplation of parties); *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991-92 (5th Cir. 1976) (disapproving trial court's jury instruction on foreseeability); *Lloyd v. Murphy*, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1944) (risk of war reasonably foreseeable); U.C.C. § 2-615, Comment 8 (1962).

51. "[P]erformance 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 . . ." U.C.C. § 2-615 (1962) (emphasis added). *See* text accompanying note 11 *supra*.

52. *Eastern Airlines, Inc., v. McDonnell Douglas Corp.*, 532 F.2d 957, 991 (5th Cir. 1976) (discussing rationale of § 2-615); *United States v. General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974) (discussing rationale of doctrine of frustration); *West Los Angeles Inst. for Cancer Res. v. Mayer*, 366 F.2d 220, 224 (9th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967) (unexpected tax law change deprived plaintiff of intended benefit); *Perry v. Champlain Oil Co.*, 101 N.H. 97, 134 A.2d 65, 67 (1957) (failure to distribute particular brand did not alter intended benefit); *119 Fifth Avenue, Inc. v. Taiyo Trading Co., Inc.*, 190 Misc. 123, 73 N.Y.S.2d 774, 776-77 (Sup. Ct. 1947), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1949) (question of fact whether government seizure altered intended benefit). *See also* *Guthrie v. Times-Mirror Co.*, 51 Cal. App. 3d 879, 888 n.7, 124 Cal Rptr. 577, 583 n.7 (4th Dist. 1975); *Hess v. Domouchel Paper Co.*, 154 Conn. 343, 225 A.2d 797, 801 (1966).

have conferred no unintended benefits.<sup>53</sup> If, despite a frustrating event, a promisee receives something of value in exchange for a promise of counterperformance, then there is no "practical" failure of consideration. If, for example, Joshua had been able to sell the equipment to another farmer, the contract would have conferred a collateral benefit, even though the parties did not intend that particular benefit.<sup>54</sup> If a contract can confer a substantial benefit, it does not matter whether the promisee realizes a profit or not. Courts have repeatedly emphasized that they will not excuse a contract simply because it is more difficult or expensive than anticipated.<sup>55</sup>

If a court determines that Joshua's contract would have conferred a collateral benefit, it must then determine whether that benefit would have been substantial. This determination is not easy. The distinction between a difficult contract and an impracticable contract is one of degree rather than kind.<sup>56</sup> Generally, courts have drawn the line at "hardship."<sup>57</sup> When they have felt that the promisee could have counterperformed, they have been reluctant to grant excuse.<sup>58</sup> They have generally realized the seriousness of excusing an otherwise valid contract, and have generally refrained from doing so where the equities

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53. See note 38 *supra*.

54. See *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P.2d 47 (1944) where the court held that even though wartime regulations "frustrated" the lessee's plans, they did not render the leasehold worthless because he could sublet them at a reasonable rate.

55. *E.g.*, *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966) (14% increase in cost, *inter alia*, no excuse); *Megan v. Updike Grain Corp.*, 94 F.2d 551, 554 (8th Cir. 1938), *cert. dismissed*, 305 U.S. 663 (1939) (freight rate changes rendering counterperformance more difficult, *inter alia*, did not warrant excuse); *Lloyd v. Murphy*, 25 Cal. 2d 48, 54, 153 P.2d 47, 51 (1944) (wartime restriction only made business less profitable); RESTATEMENT (SECOND) OF CONTRACTS § 281, Comment d (Tent. Draft No. 9, 1974).

56. See *Gulf Oil Corp. v. Federal Power Comm.*, 563 F.2d 588, 599-600 (3d Cir. 1977); *Natus Corp. v. United States*, 371 F.2d 450, 456 (Ct. Cl. 1967); *Kennedy v. Reece*, 225 Cal. App. 2d 717, 725, 37 Cal. Rptr. 708, 712 (5th Dist. 1964).

57. The question of hardship is only important when the frustrating event does not totally destroy the contract's value, forcing the court to determine whether the remaining value is substantial. See *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916). Many courts have given as a reason for not granting excuse the failure of a "frustrating" event to work hardship on the promisee. *Lloyd v. Murphy*, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1944); *Guthrie v. Times-Mirror Co.*, 51 Cal. App. 3d 879, 888 n.7, 124 Cal. Rptr. 577, 583 n.7 (4th Dist. 1975); *Perry v. Champlain Oil Co.*, 101 N.H. 97, 134 A.2d 65, 66 (1957); *Maryland Trust Co. v. Tulip Realty Co. of Md.*, 220 Md. 399, 153 A.2d 275, 285-86 (1959). A court may grant excuse where there is no showing of hardship, *20th Century Lites, Inc. v. Goodman*, 64 Cal. App. 2d Supp. 938, 149 P.2d 88 (Los Angeles 1944) (wartime blackouts frustrated lease of neon sign), or it may refuse to grant excuse even though there is extreme hardship. *Brown v. Oshiro*, 68 Cal. App. 2d 393, 156 P.2d 976 (2d Dist. 1945) (Japanese hotel lessee and 75% of his clientele "evacuated" from Los Angeles).

58. *E.g.*, in *Lloyd v. Murphy*, 25 Cal. 2d 48, 57, 153 P.2d 47, 52 (1944) the court emphasized that the plaintiff lessors "offered to lower the rent if defendant should be unable to operate profitably, and their conduct was at all times fair and co-operative."

have not demanded it.<sup>59</sup>

A court will also consider the fact that the drought ended in January, 1978.<sup>60</sup> A frustrating event of temporary duration, such as drought, may not render a contract completely worthless if the promisor's performance will regain its value when things return to normal. In return for a promise of counterperformance, the promisee receives something which may be valuable in the future. Although this argument has some merit, courts have been unwilling to find that an expectation is sufficient to preclude excuse. They will grant total excuse only if counterperformance is materially more burdensome after the frustration ceases than it would have been if the frustrating event had not occurred.<sup>61</sup>

Thus it appears that under section 2-615, Joshua's refusal to take delivery of the irrigation system at the time called for in the contract was not a breach. He would not have been able to use the system to water his crops, and the contract would not have conferred any other benefit. The occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made therefore rendered the promisor's performance "impracticable." Nothing in the facts, however, suggests that it would have been materially more burdensome for Joshua to accept delivery when the drought ended than it would have been if the drought had not occurred. Therefore, although a court should allow Joshua to claim the protection of section 2-615, it should only excuse a delay in counterperformance.<sup>62</sup> It should not excuse a total failure to counterperform.

As the example of Joshua James illustrates, an agricultural purchase contract may differ from other types of purchase contracts in ways that make it more susceptible to frustration. Many agricultural machines, for example, are specialized. They have only one purpose or a few closely

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59. "The question in cases involving frustration is whether the equities of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case . . ." *Lloyd v. Murphy*, 25 Cal. 2d 48, 53-54, 153 P.2d 47, 50 (1944) (citations omitted); *Perry v. Champlain Oil Co.*, 101 N.H. 97, 134 A.2d 65, 66 (1957).

60. Interview with Bill Clark, Spokesperson, Drought Information Center, California Department of Water Resources, in Sacramento, California (April 3, 1978).

61. *Pacific Trading Co. v. Mouton Rice Milling Co.*, 184 F.2d 141, 148 (8th Cir. 1950) (no evidence that delivery of rice subsequent to time called for in contract burdened seller); *Autry v. Republic Prod., Inc.*, 30 Cal. 2d 144, 148-49, 180 P.2d 888, 891 (1947) (acting contract not more burdensome after war than before); *Village of Minnesota v. Fairbanks, Morse & Co.*, 226 Minn. 1, 31 N.W.2d 920, 926 (1948) (performance excused where cost increases during five year delay would have made performance substantially different from that contemplated); 6 WILLISTON, *supra* note 20, at § 1957; RESTATEMENT (SECOND) OF CONTRACTS § 289 (Tent. Draft No. 9, 1974).

62. U.C.C. § 2-615 (1962) excuses "[d]elay in delivery or non-delivery . . . ."

related purposes. The expectation that the machine will confer a particular benefit is what makes the machine valuable. If no one wanted to obtain that particular benefit, then the seller could not sell the machine. Thus an unexpected occurrence which prevents a particular buyer from obtaining the particular benefit that he or she desires also destroys the foundation of the contract, whereas it would not in other circumstances.

Whether an agricultural buyer assumes the risk of a frustrating event is a question of fact depending primarily on the nature of the event.<sup>63</sup> It is difficult to speculate about what kinds of events may frustrate contracts. These events are unanticipated by definition. One type of event which can frustrate an agricultural contract, however, is an unexpected climatic change. As this article demonstrates, farmers do not normally assume the risk of such change.<sup>64</sup> Thus an agricultural buyer may be less likely to assume the risk of a frustrating event than a buyer in other circumstances.

Whether a frustrating event renders a contract impracticable is also a question of fact.<sup>65</sup> The answer depends on the circumstances surrounding a given situation. It seems likely, however, that if an agricultural machine cannot confer its intended benefit, it will not confer any collateral benefits either. A machine designed to perform one specific, perhaps complex task is probably not adaptable to other functions. In this respect, agricultural machinery differs from goods which have many varied uses.

### CONCLUSION

This article has attempted to define the circumstances in which a court should allow an agricultural buyer to claim the protection of section 2-615 of the Uniform Commercial Code. It has examined the legislative history of the U.C.C. and shown that its drafters did not intend to exclude buyers from the section's scope. It has shown that a court could easily read section 2-615 to incorporate a buyer's excuse because of frustration. It has examined the policy behind the doctrine of frustration and has found that, although courts have not excused buyers in the past, there is no reason that they should never excuse buyers. It has demonstrated that excuse is appropriate when a change in circumstances, the risk of which the buyer did not assume, renders a contract impracticable by depriving the promisor's performance of all significant value. Finally, it has indicated the factors that make an agricultural buyer a better candidate for excuse under section 2-615 than other buyers.

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63. See text accompanying notes 43-50 *supra*.

64. See text accompanying note 47 *supra*.

65. See text accompanying notes 51-59 *supra*.

Section 2-615 injects an element of equity into the commercial world. It recognizes that there are occasions when circumstances change so drastically that the performance called for in a contract does not effectuate the parties' intent. If a contract's foundation has crumbled, enforcement of the contract may allow one party to benefit entirely at the expense of the other. Section 2-615 allows a court to do justice in this situation when strict enforcement of contract law would not. Courts should be willing to extend the section's scope to buyers when justice so demands.

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