Labor Strife and U.C.C. § 2-615: One Strike and You're Out?

This comment examines the application of the contractual excuse doctrines of impossibility and impracticability to cases in which a labor strike has impaired a business' ability to perform its contractual obligations. The comment demonstrates the inequities which result from the courts' present method of applying Uniform Commercial Code Article II, section 615 to labor strike situations. It then proposes a new system of analysis to be used in the application of section 2-615 to such cases.

INTRODUCTION

The related contractual excuse doctrines of impossibility[1] and impracticability[2] have arisen in varied factual settings. One such

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[1] Under the common law doctrine of impossibility, a court may free a promisor from his contractual obligations if an after-arising event renders performance of that obligation objectively impossible. *See* note 5 and accompanying text *infra.*

[2] Impracticability is more a refinement of the doctrine of impossibility than a separate doctrine. A comparatively modern development, it liberalizes the requirements of impossibility, requiring that performance be rendered impracticable instead of objectively impossible. *See* Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916), *discussed in* note 8 *infra;* RESTATEMENT (SECOND) OF CONTRACTS § 281 (Tent. Draft No. 9, 1974). The U.C.C. adopts the impracticability doctrine in art. II, § 615 (§ 2-615):

> Excuse by Failure of Presupposed Conditions
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> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
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> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
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> (b) Where the causes mentioned in paragraph (a) affect only

setting may occur when a labor strike interferes with a business-promisor's ability to perform its contractual obligations.

The willingness of the courts to recognize that a labor strike may give rise to an excuse may have an important effect on the bargaining strength of the parties to a labor dispute. If a court grants the promisor an impossibility excuse in a strike situation, the promisor may be better able to endure protracted negotiations without fearing the cost of a damage award. Conversely, a court's denial of excuse may strengthen the striking workers' negotiating position. The promisor in such a case may face the alternatives of quickly settling the strike in order to perform the contract, or of suffering a damage award for non-performance.[3]

This comment focuses on the application of the doctrines of impossibility and impracticability in cases where a labor strike has disabled a promisor's ability to perform its contractual obligations. After examining the common law approach to such cases and the current application of U.C.C. section 2-615,[4] this comment demonstrates why these approaches are unsatisfactory in labor strike cases. It then proposes a new strategy, the "commercial foresight" test, to be used in applying U.C.C. section 2-615 to strike cases. Finally, a hypothetical case illustrates the advantages of this new strategy.

I. Impossibility and Impracticability at Common Law and under the Uniform Commercial Code

A. Excuse at Common Law

Under the common law doctrine of impossibility, courts would excuse a promisor's performance only if an event which was ob-

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> 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.

[3] *See* Delaware, L. & W. R.R. v. Bowns, 58 N.Y. 573, 582, 28 N.Y.S. 554, 556 (1874) (where employee strike delayed plaintiff railroad's performance, the court noted the dilemma of the plaintiff: pay higher wages or lose income).

[4] *See* note 2 *supra*.

jectively unforeseeable at the time of contracting rendered performance of the contractual obligation objectively impossible.[5] The courts also required that the after-arising event have occurred without the fault of the promisor.[6] Because these requirements rarely coalesced in strike cases, the courts seldom granted an impossibility excuse in such situations.[7]

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[5] *See* 18 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1932 (3d ed. 1978), in which objective and subjective impossibility are distinguished:

> Impossibility may be due to the nature of the thing to be done, or merely to the incapacity of the particular person who has undertaken to do it. It is the difference between "the thing cannot be done" and "I cannot do it." The first is called objective; the second subjective.

The RESTATEMENT (SECOND) OF CONTRACTS § 281, Comment e (Tent. Draft No. 9, 1974), and 6 A. CORBIN, CONTRACTS §§ 1325, 1332 (1962), make similar distinctions. For a more detailed history of common law impossibility, see *id.* §§ 1320-1372; R. GOTTSCHALK, IMPOSSIBILITY OF PERFORMANCE IN CONTRACT (1938); R. MCELROY, IMPOSSIBILITY OF PERFORMANCE (1941); 18 S. WILLISTON, *supra* this note, §§ 1931-1979; Page, *The Development of the Doctrine of Impossibility of Performance,* 18 MICH. L. REV. 589 (1920).

[6] *E.g.,* McGovern v. City of New York, 234 N.Y. 377, 388, 138 N.E. 26, 31 (1923).

[7] Many courts have concluded that strikes render performance only subjectively impossible. *E.g.,* Pratt v. Schreiber, 214 Mo. App. 268, 269, 249 S.W. 449, 451 (1923); *see* Fritz-Rumer-Cooke Co. v. United States, 279 F.2d 200, 201 (6th Cir. 1960); Frawley v. Atchison T. & S.F. R.R., 220 Mo. App. 1189, 1194, 299 S.W. 93, 98 (1927). Or, since the promisor could settle the strike by yielding to the strikers' demands, some courts have concluded that the strike's continuance could be considered the promisor's fault. *E.g.,* McGovern v. City of New York, 234 N.Y. 377, 388, 138 N.E. 26, 31 (1923). Common law courts were more receptive to an impossibility plea in cases involving violent strikes than in those involving peaceful strikes. *E.g.,* Haas v. Kansas City, Ft. S. & G. R.R., 81 Ga. 792, 7 S.E. 629 (1888); Southern Cotton Oil Co. v. Louisville & N. R.R., 15 Ga. App. 751, 84 S.E. 198 (1915). Some courts stated that the violence prevented the use of non-union employees. *E.g.,* Empire Transp. Co. v. Philadelphia & Reading Coal & Iron Co., 77 F. 919, 927-28 (8th Cir. 1896). Others stated that violent strikers were no longer employees, but rather common lawbreakers. *E.g.,* Geismer v. Lake Shore & Mich. S. Ry., 102 N.Y. 563, 571, 7 N.E. 828, 831 (1886). However, a strike's peaceful nature did not always foreclose a grant of excuse. *E.g.,* Richland S.S. Co. v. Buffalo Dry Dock Co., 254 F. 668, 672 (2d Cir. 1918) (The Richland Queen) (dry dock company not liable for damages resulting from delay caused by dockworkers' strike); Badhwar v. Colorado Fuel & Iron Corp., 138 F. Supp. 595, 607-08 (S.D.N.Y. 1955) (seller of soda not responsible for damages caused by delay in shipment to buyer when peaceful shipping strike caused the delay), *aff'd,* 245 F.2d 903 (2d Cir. 1957). Many such cases involved common carriers who extended shipment times because of a strike's occurrence. Courts held that in the absence of a specific

Some more modern common law courts liberalized the requirements of the impossibility doctrine. These courts allowed excuse in situations falling short of strict objective impossibility, if performance had become "impracticable."[8]

B. Excuse under U.C.C. § 2-615

The Uniform Commercial Code's analogue to the common law excuse doctrines of impossibility and impracticability appears in section 2-615.[9] A general review of two leading section 2-615 cases is necessary before that section's application to strike cases may profitably be explored. One such case is *Transatlantic Financing Corp. v. United States.*[10] The 1956 closure of the Suez

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delivery date, calculation of a reasonable time for delivery should include consideration of the strike. *E.g.*, Ritchie v. Oregon Short Line R.R., 42 Idaho 193, 244 P. 580 (1926); Warren v. Portland Terminal Co., 121 Me. 157, 116 A. 411 (1922). For a definition of "reasonable time," see 6 A. CORBIN, *supra* note 5, § 1340, at 406.

[8] The seminal case was Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916). Defendant had contracted to obtain all gravel necessary for a construction project from plaintiff's land, but failed to do so because much of the gravel was below the water table and could not be removed by ordinary means. The court ruled that the excess cost of removing the gravel was so great that performance had been rendered impracticable. *Id.* at 293, 156 P. at 460. For a case rejecting a supplier's strike as grounds for excuse "under the liberal view tending to recognize great hardship as the equivalent of legal impossibility," see Oliver-Elec. Mfg. Co. v. I.O. Teigen Constr. Co., 177 F. Supp. 572, 576 (D. Minn. 1959).

[9] *See* note 2 *supra.*

[10] 363 F.2d 312 (D.C. Cir. 1966). Because *Transatlantic* involved a contract for services rather than for the sale of goods, *see* U.C.C. § 2-102, the case did not fall under the provisions of Article II of the U.C.C. Nevertheless, the court used U.C.C. § 2-615 by analogy. *Id.* at 315, 318, 319. Several commentators have recognized the case as a leading U.C.C. § 2-615 authority. 3A SALES AND BULK TRANSFERS UNDER THE U.C.C. (Matthew Bender) § 14.13[3], at 14-86 to 14-87 (1976); Duesenberg, *Contract Impracticability: Courts Begin to Shape § 2-615*, 32 BUS. LAW. 1089, 1095-96 (1977); Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks under UCC § 2-615*, 54 N.C.L. REV. 545, 563 n.88 (1976); Schmitt & Wollschlager, *Section 2-615 "Commercial Impracticability:" Making the Impracticable Practicable*, 81 COM. L.J. 9, 11 (1976); 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, 214 (1979); Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 NW. U.L. REV. 1032, 1042 (1978).

Canal[11] forced Transatlantic's ship, on charter to the United States, to sail a longer route to its destination in Iran. After the United States rejected a request for extra compensation, Transatlantic sued to recover the increased costs incurred because of the delay.[12] The district court dismissed the suit.[13]

The appellate court applied a three part test to assess Transatlantic's claim of impracticability.[14] First, a contingency must have occurred.[15] Second, the risk of that occurrence must not have been allocated to one of the parties by agreement or custom.[16] Third, the occurrence of the contingency must have rendered the contractual obligation commercially impracticable.[17]

Willing to assume that the parties intended the Suez route, the court held that the Canal's closure satisfied the first part of the test.[18] Addressing the second part of the test, the court first stated that foreseeability of a contingency was merely probative of the assumption of its risk.[19] Nonetheless, the court found that Transatlantic did or should have foreseen the possibility of the closure. The court, therefore, in apparent infidelity to its own standard, deemed the risk of the Canal's closure to have been

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[11] Other contract "frustration" cases arising from the same event include Glidden Co. v. Hellenic Lines Ltd., 275 F.2d 253 (2d Cir. 1960); Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia), [1964] 2 Q.B. 226 (C.A. 1963); Société Franco Tunisienne D'Armement v. Sidermar S.p.a., [1961] 2 Q.B. 278 (1960); Tsakiroglou & Co. v. Noblee Thorl G.m.b.H, [1960] 2 Q.B. 348 (C.A.).

[12] Transatlantic alleged that the closure of the Suez Canal rendered performance of the charter impracticable, and that it should have been excused from its obligation to perform. Since it had performed, Transatlantic asserted a right to payment in *quantum meruit* for the longer voyage. Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966).

[13] *Id.* at 312.

[14] *Id.* at 315.

[15] The court defined a contingency as "something unexpected." *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 316.

[19] The court stated:

> Foreseeability or even recognition of a risk does not necessarily prove its allocation . . . . Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy. Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs.

Id. at 318.

allocated to Transatlantic.[20]

The court declined, however, to rest its decision on the conclusion that Transatlantic had assumed the risk of the closure.[21] Rather, the court adopted an objective standard to determine the impracticability of performance.[22] It then held that under the third part of its test the increase in cost was not sufficient to justify an impracticability excuse.[23]

Excuse was also denied in *Eastern Air Lines, Inc. v. Gulf Oil Corp.*[24] Defendant Gulf had contracted to supply jet fuel to Eastern.[25] In October 1973, the Organization of Petroleum Exporting Countries (OPEC) embargoed shipments of crude oil to the United States. Subsequently, OPEC instituted a four hundred percent increase in the price of crude oil.[26] Asserting that the price escalator clause in the contract failed to reflect changes in the market, Gulf threatened to cut off the fuel supply if Eastern failed to meet its demand for a price increase. In response, Eastern sued for injunctive relief.[27]

The district court developed a four part test to evaluate Gulf's assertion that performance had been rendered impracticable under section 2-615. First, the court said, a presupposed condition must fail.[28] Second, the existence of the condition must

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[20] *Id.* Although the court stated that foreseeability of the risk is only probative of its assumption, it went on to assert that "circumstances" indicated that Transatlantic had assumed the risk of the Canal's closure. *Id.* at 318-19. However, the foreseeability of the Canal's closure was the only circumstance concerning risk assumption which the court discussed. Thus, although foreseeability is assertedly only probative of risk assumption, it appears to have been dispositive here.

[21] *Id.* Nevertheless, the court stated that since the contingency was foreseeable, it would judge the impracticability of performance on stricter terms than it would otherwise have done. *Id.* at 319. For a criticism of this approach, see Comment, *Contractual Excuse Based on a Failure of Presupposed Conditions,* 14 DUQ. L. REV. 235, 250-51 (1976).

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

[23] Transatlantic had incurred an increased cost of $43,972.00 over the contract price of $305,842.92. *Id.* at 319.

[24] 415 F. Supp. 429 (S.D. Fla. 1975).

[25] Because jet fuel is considered "goods" under U.C.C. § 2-105(1), Article II of the U.C.C. directly applied to this case.

[26] Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 434 (S.D. Fla. 1975).

[27] *Id.* at 431-32.

[28] *Id.* at 438.

have been an underlying assumption of the contract.[29] Third, the failure of the presupposed condition must have been unforeseeable.[30] Fourth, the parties must not have specifically allocated the risk of the condition's failure to the party seeking excuse.[31]

Addressing the first two parts of its test, the court ruled that no presupposed condition underlying the contract had failed.[32] In applying the third part of its test, the court held that the parties could reasonably have foreseen the events connected with the energy crises. Reasonable foreseeability, therefore, removed the case from the scope of U.C.C. section 2-615.[33] In addition, the court found that Gulf's increased cost of performance was insufficient to render the contractual obligation impracticable.[34]

Neither the *Transatlantic* nor the *Gulf Oil* test appreciably differs from the common law requirements for the impossibility excuse. Both the *Gulf Oil* and the *Transatlantic* courts have revived the common law requirement of objective unforeseeabil-

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 439-41. The court applied the first two parts of the test together.

[33] *Id.* at 441-42. The court did not address the express allocation of the risk, the fourth part of the test.

[34] *Id.* at 440-41. A comparison of the seemingly different *Transatlantic* and *Gulf Oil* tests proves fruitful. Both tests utilize an objective foreseeability standard. Although the *Gulf Oil* court makes unforeseeability an express part of its test, *id.* at 438, the *Transatlantic* court includes this requirement in the risk-allocation portion of its test. Transatlantic Financing Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966). Moreover, while *Transatlantic* deemed a contingency's foreseeability to be only probative of assumption of the risk, *id.*, *but see* note 20 *supra*, *Gulf Oil* considers a contingency's foreseeability to be fatal to a claim of impracticability. Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 434 (S.D. Fla. 1975). However, this apparent difference in the two tests fades upon examination of the *Transatlantic* court's application of its own standard. *See* note 20 *supra*. Further, recent cases, while citing *Transatlantic* for its general reading of § 2-615, tend to consider a contingency's foreseeability to be fatal to an impracticability excuse. *E.g.*, Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 134-35 (N.D. Iowa 1978) (foreseeable increase in cost of uranium production), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979); Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721, 726 (Mo. App.) (foreseeable increase in cost of coal production), *cert. denied*, 444 U.S. 865 (1979). *See* note 20 *supra* and text accompanying note 78 *infra*.

ity.[35] Moreover, the *Transatlantic* court continued to use an objective standard to judge the impracticability of performance.[36] Given the U.C.C.'s stated goal of liberalizing commercial law,[37] as well as the assertions of various commentators that excuse was to become more readily available under U.C.C. section 2-615,[38] both tests are unacceptable.

C. The Application of U.C.C. § 2-615 to Strike Cases

The leading case involving a strike as a possible excuse for nonperformance of contractual duties under U.C.C. section 2-615 is *Mishara Construction Co. v. Transit-Mixed Concrete Corp.*[39] Defendant Transit-Mixed entered into a requirements contract for concrete with plaintiff Mishara.[40] Later, Mishara's employees struck and established picket lines which remained throughout the contract term.[41] Transit-Mixed's employees re-

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[35] The court in *Gulf Oil* revealed a strict common law attitude toward foreseeability, *see* note 5 *supra*, when it held that it would not excuse non-performance because the oil embargo, price increases and price controls were reasonably foreseeable. Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp 429, 441-42 (S.D. Fla. 1975); *see* note 58 *infra*. Similarly, the *Transatlantic* court seems to have concluded that foreseeability of a contingency should foreclose a plea of impracticability. *See* note 20 *supra*.

[36] "The issue of impracticability should no doubt be 'an objective determination of whether the promise can reasonably be performed rather than a subjective inquiry into the promisor's capability of performing as agreed.' " Transatlantic Financing Corp. v. United States, 363 F.2d 312, 319 n.13 (D.C. Cir. 1966).

[37] U.C.C. § 1-102(2)(a) states: "Underlying purposes and policies of this Act are to simplify, clarify and modernize the law governing commercial transactions." *See* note 61 *infra*.

[38] Duesenberg, *supra* note 10, at 1100; Duesenberg, *Exiting from Bad Bargains via U.C.C. Section 2-615: An Impractical Dream*, 13 UNIFORM COM. CODE L.J. 32, 35, 38 (1980); Hurst, *supra* note 10, at 555; Schmitt & Wollschlager, *supra* note 10, at 11; Wallach, *supra* note 10, at 203, 211.

[39] 365 Mass. 122, 310 N.E.2d 363 (1974). The remaining two strike cases referring to U.C.C. § 2-615 are not useful to this discussion. Lipsett Indus. Corp. v. Barth Smelting & Ref. Corp., 17 U.C.C. Rep. 406 (N.Y. Sup. Ct. 1975), relies principally on U.C.C. § 2-616. The court refers to § 2-615 only in passing. *Id.* at 407. Glassner v. Northwest Lustre Craft Co., 39 Or. App. 175, 591 P.2d 419 (1979), an appeal from a grant of summary judgment, holds that impracticability under § 2-615 is a question of fact. Therefore, the court held, it was error to grant summary judgment. *Id.* at 180, 591 P.2d at 421.

[40] Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 123, 310 N.E.2d 363, 364 (1974).

[41] *Id.* at 124, 310 N.E.2d at 364.

fused to cross the picket lines and the deliveries of concrete ceased.[42] Mishara covered and sued for cover costs.[43] Transit-Mixed sought excuse under section 2-615.[44] The trial court denied Mishara's request for a jury instruction which stated that, as a matter of law, a strike could never give rise to an impracticability excuse.[45] The jury found for Transit-Mixed.[46]

In broad dictum the Supreme Judicial Court of Massachusetts formulated a two-part test for evaluating the proposed section 2-615 excuse. First, performance of the contract must have become impracticable. Second, the contingency rendering performance impracticable must have been "one which the parties assumed would not occur."[47] Noting that the law no longer required strict impossibility,[48] the court nevertheless indicated that the party seeking excuse must show circumstances of a sort which drastically increase the difficulty or expense of performance.[49]

The second part of the court's test, as articulated, seems to call for a subjective foreseeability standard.[50] However, a close reading of the case reveals that the test is actually an objective one.[51] The court indicated that its test should be strictly applied in a strike situation, since in modern times labor strife must be considered an ordinary risk of commerce.[52] The court nonetheless conceded that it might allow excuse under section 2-615 if

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[42] *Id.*

[43] *Id.* For the meaning of and the parties' obligations concerning "cover," see U.C.C. §§ 2-711 to 2-713.

[44] Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 127, 310 N.E.2d 363, 366 (1974).

[45] *Id.* at 126-27, 310 N.E.2d at 366.

[46] *Id.* at 123, 310 N.E.2d at 364.

[47] *Id.* at 127-28, 310 N.E.2d at 367.

[48] *Id.* at 127-28, 310 N.E.2d at 366.

[49] *Id.* at 128, 310 N.E.2d at 366-67. Note, however, that the court never really applied the test to the facts of the case. Since the court considered impracticability a question of fact, and since Mishara's requested jury instruction would have foreclosed excuse as a matter of law, the verdict for Transit-Mixed was affirmed. *Id.* at 130, 310 N.E.2d at 368.

[50] The contingency must be "one which the parties *assumed* would not occur." *Id.* at 128, 310 N.E.2d at 367 (emphasis added).

[51] *Id.* at 129, 310 N.E.2d at 366-67. The court examined whether "the contingency which developed [was] one which the parties could *reasonably* be thought to have *foreseen* as a real possibility which could affect performance." *Id.* at 129, 310 N.E.2d at 367 (emphasis added). This is the language of an objective test.

[52] *Id.* at 130, 310 N.E.2d at 368.

the "probability of a labor dispute appears to be *practically nil,* and . . . the occurrence of such dispute provides *unusual difficulty.*"[53]

As the leading case applying section 2-615 in a strike situation, *Mishara* proposes standards only slightly less strict than those of common law impossibility.[54] Such standards are far too strict to be acceptable under the goals and purposes of the Uniform Commercial Code.[55]

II. Criticism of the Present Construction of U.C.C. § 2-615

The present approach of courts in reviewing excuses claimed under U.C.C. section 2-615 is susceptible to two major criticisms. The first involves the use of the common law strict objective foreseeability standard.[56] The second concerns the courts' inconsistent and shortsighted application of the impracticability standard.

A. Objective Foreseeability and Assumption of Risk

Numerous commentators have criticized the tendency of courts construing U.C.C. section 2-615 to adhere to the standards of common law impossibility.[57] The courts' proclivity to equate a contingency's foreseeability with the promisor's assumption of its risk exemplifies their refusal to abandon the

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[53] *Id.* (emphasis added). Since Transit-Mixed evidently delivered concrete on occasion after picket lines went up, *id.* at 124, 310 N.E.2d at 364, and Mishara was able to obtain cover, the inability to perform in this case appeared to be merely subjective. It seems inconsistent that the court, upon adopting a very strict standard for impracticability, would allow the verdict of excuse to stand in the face of such a subjective inability to perform. However, this apparent inconsistency is resolved upon recalling that Mishara sought approval of a jury instruction which stated that a strike as a matter of law could never render a contractual obligation commercially impracticable. *See* note 45 and accompanying text *supra.*

[54] *See* notes 5 & 6 and accompanying text *supra.*

[55] *See* notes 37 & 38 and accompanying text *supra,* and text accompanying notes 61 & 62 *infra.*

[56] For a specific criticism of this standard, see Note, *The Doctrine of Impossibility of Performance and the Foreseeability Test,* 6 Loy. Chi. L.J. 575 (1975).

[57] Hurst, *supra* note 10, at 574; Schmitt & Wollschlager, *supra* note 10, at 11, 13; 72 Nw. U.L. Rev., *supra* note 10, at 1033, 1042-43.

common law impossibility standards.[58] Since foreseeability of a contingency has been the most common reason for denying a section 2-615 excuse,[59] this tendency has a severe impact on that section's application.

Although at common law courts equated foreseeability of a contingency with the assumption of the risk of its occurrence,[60] the drafters of the Uniform Commercial Code intended to break with the common law of impossibility.[61] Indeed, the language of section 2-615 conflicts with the common law foreseeability test. The word "foreseeable" appears nowhere in section 2-615. In addition, Comment 1 to section 2-615 states that excuse will arise when an *"unforeseen"* contingency "not within the *contemplation of the parties* at the time of contracting" renders performance impracticable.[62] Thus, the Code itself suggests that a subjective standard be used to adjudge foreseeability under section 2-615.[63]

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[58] Language in Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975), typifies the courts' attitude toward foreseeability: "If a contingency is foreseeable, it and its consequences are taken outside the scope of U.C.C. § 2-615 . . . ." *Id.* at 441. *Contra,* Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 76 (W.D. Pa. 1980), *vacated upon stipulation,* No. 80-1604 (3d Cir. Feb. 5, 1981), *discussed in* note 63 *infra.*

[59] Henszey, *UCC Section 2-615 — Does "Impracticable" Mean Impossible?,* 10 UNIFORM COM. CODE L.J. 107 (1977); *see, e.g.,* Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976); Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975); Publicker Ind., Inc. v. Union Carbide Corp., 17 U.C.C. Rep. 989 (E.D. Pa. 1975); Maple Farms v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (1974).

[60] *See, e.g.,* Oliver-Elec. Mfg. Co. v. I.O. Teigen Constr. Co., 177 F. Supp. 572, 576 (D. Minn. 1959) ("The impossibility must arise from facts which the promisor had no reason to anticipate.").

[61] Section 1-102(2)(a) of the U.C.C. states that one of the Code's purposes is to "modernize the law governing commercial transactions." Comment 3 to U.C.C. § 2-615 specifically states that the framers of the Code intended an impracticability standard, "as contrasted with 'impossibility.'" Taken together, these provisions indicate an intention to break with the common law.

[62] U.C.C. § 2-615, Comment 1 (emphasis added). "[U]nforeseen," read in conjunction with "contemplation of the parties," indicates an intention to adopt a more subjective standard.

[63] The proposed RESTATEMENT (SECOND) OF CONTRACTS professes to adopt the standards of U.C.C. § 2-615. RESTATEMENT (SECOND) OF CONTRACTS, Intro. Note to Chap. 11, at 42. (Tent. Draft No. 9, 1974). According to the Restatement's drafters, "the fact that the event was foreseeable or even foreseen does not necessarily compel a conclusion that its nonoccurrence was not a basic as-

Besides being repugnant to the apparent intent of the framers of the Code, the common law objective foreseeability standard is inappropriate when applied to the circumstances surrounding modern commercial transactions. The common law standard is based upon the fiction that if a reviewing court finds the occurrence of the disabling event foreseeable, then the parties themselves foresaw the event's occurrence and its consequences[64] and

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sumption." *Id.* at 43. Both 14 DUQ. L. REV., *supra* note 21, at 249, and 72 NW. U.L. REV., *supra* note 10, at 1039, endorse the use of a subjective standard. A recent case specifically rejected the objective unforeseeability requirement. In Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980), *vacated upon stipulation,* No. 80-1604 (3d Cir. Feb. 5, 1981), Essex contracted to supply aluminum for smelting to Alcoa, which was to redeliver the metal to Essex. Alcoa brought suit seeking equitable reformation of the contract price on the theory that the increased cost of performance rendered the obligation impracticable. Since the contract in this case was not for the sale of goods, it did not fall under the provisions of U.C.C. Article II. *See* note 10 *supra.* Nevertheless, the court applied § 2-615 by analogy. Citing Judge Wright's rejection in *Transatlantic* of the requirement that the disabling contingency be objectively unforeseeable, *see* note 19 *supra,* the court said:

> The court believes that Indiana courts would find Judge Wright's approach is more in keeping with the spirit and purpose of the Uniform Commercial Code than the strict approach of Judge King in *Eastern Air Lines.* [*See* note 59 *supra.*] The Code . . . seeks to accommodate the law to sound commercial sense and practice. Courts must decide the point at which the community's interest in predictable contract enforcement shall yield to the fact that enforcement of a particular contract would be commercially senseless and unjust. The spirit of the Code is that such decisions cannot justly derive from legal abstractions. They must derive from courts sensitive to the mores, practices and habits of thought in the respectable commercial world.
>
> If it were important to the decision of this case, the court would hold that the foreseeability of a variation between the WPI-IC [Wholesale Price Index] and Alcoa's costs would not preclude relief under the doctrine of impracticability.

499 F. Supp. at 76.

[64] [J]udges expect the parties to a contract to be seers. And to the extent the contingency, whether it be inflation, oil embargos, shortages or whatever, appears foreseeable, it is difficult to avoid the conclusion that if the contingency "was foreseeable there should have been provision for it in the contract, and the absence of such provision gives rise to the inference that the risk was assumed."

Wallach, *supra* note 10, at 215 (citing Lloyd v. Murphy, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1974)). *See also* Duesenberg, *supra* note 10, at 1097.

intended the promisor to bear the risk of that occurrence.[65] The fallacy of this fiction is that while a court might deem an event foreseeable after the fact, this does not establish that the parties foresaw it or intended tacitly to assign its risk.[66]

Even where the parties have foreseen that a contingency might occur, it does not necessarily follow that the parties foresaw the occurrence's ultimate effects on their contractual obligations.[67] Modern businessmen do not always have the time to consider the full range of possible occurrences and effects. Even when traders foresee an occurrence, they often cannot agree upon, or do not care to negotiate about, who will bear its risk.[68]

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[65] Although excuse clauses can be used to protect parties from the occurrence of a strike, this comment recognizes that under modern business practices parties do not always include such clauses in contracts. Businessmen often form contracts at arms' length, without detailed negotiations, and often on preprinted order-acceptance forms. *See* note 19 *supra*. Further, businessmen who do attempt to insert such clauses may run afoul of U.C.C. § 2-207, Additional Terms in Acceptance or Confirmation, under which differing material terms do not necessarily become part of the bargain. *See* Marlene Indus. Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 380 N.E.2d 239, 408 N.Y.S.2d 410 (1978). Moreover, courts may give such a clause a strained and artificial construction. *See* Butler v. Nepple, 54 Cal. 2d 589, 599, 354 P.2d 239, 245, 6 Cal. Rptr. 767, 773 (1960). Finally, Professor Karl Llewellyn, who prepared § 87 of the Revised Sales Act, the precursor of § 2-615, believed that excuse should be available without resort to such a clause. Unpublished notes of Karl Llewellyn, in Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75, 77 (1974).

[66] For a criticism of the imputation of intent tacitly to assign risk upon deeming a contingency reasonably foreseeable, see 6 LOY. CHI. L.J., *supra* note 56, at 578-79; Comment, *Restitution of Money Paid or Benefits Conferred Where Further Performance Has Been Excused*, 46 MICH. L. REV. 401, 405 (1948).

[67] Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860 (1968); Hurst, *supra* note 10, at 567-68; 6 LOY. CHI. L.J., *supra* note 56, at 578-79 (also asserting that under certain conditions relief should be available even where the parties subjectively foresaw the disabling contingency, *id.* at 584); 72 NW. U.L. REV., *supra* note 10, at 1040-41.

[68] If the law refused an appropriate remedy when a prudently drafted long term contract goes badly awry, the risks attending such contracts would increase. Prudent business people would avoid using this sensible business tool. Or they would needlessly suffer the delay and expense of ever more detailed and sophisticated drafting in an attempt to approximate by agreement what the law could readily furnish by general rule.

Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 89 (W.D. Pa. 1980), *vacated upon stipulation*, No. 80-1604 (3d Cir. Feb. 5, 1981). *See* Trans-

The common law objective foreseeability standard poses special problems in strike cases. A court which remained loyal to this standard would likely conclude, as did the *Mishara* court, that the occurrence of a strike would rarely be unforeseeable to a businessman.[69] Therefore, most labor strikes would not serve as a basis for a section 2-615 excuse no matter how impracticable performance had become. Such a conclusion overlooks the possibilities inherent in many labor strike situations. Based upon past labor-management relations, a businessman might not expect his employees to strike despite the fact that they had voiced grievances or that a collective bargaining agreement was expiring. Even where an employer foresaw a strike, it might last longer or produce more serious consequences than expected. Non-striking employees might unexpectedly refuse to cross picket lines, as might employees of vital suppliers.[70] Unexpected sympathy strikes might occur. In any of these situations, the common law objective foreseeability standard would preclude excuse despite the fact that the parties did not foresee the impracticability of performance at the time of contracting.

B. Narrow Reading of Commercial Impracticability

The second major criticism of the present approach to section 2-615 is the courts' inconsistent and shortsighted reading of commercial impracticability. Courts have stated that for performance of a contract to be legally impracticable, the extent of the additional cost must change the very nature of performance.[71] In concluding that the additional expense has not

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atlantic Financing Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966); Farnsworth, *supra* note 67, at 869-70; Hurst, *supra* note 10, at 549; 72 Nw. U.L. Rev., *supra* note 10, at 1040. One commentator states: "Such factors as the parties' business relationship, their bargaining position, and a party's ability to draft an all-inclusive excuse clause may result in the absence of a contract provision." 6 Loy. Chi. L.J., *supra* note 56, at 580. Further, it is asserted that each of these factors may be just as probative of non-assumption of risk, as of assumption of risk. *Id.* Finally, the commentator maintains that a court should not decide that the risk has been assumed "until a full inquiry into the facts surrounding the making of the contract has been made." *Id.* at 587-89.

[69] Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 310 N.E.2d 363 (1974).

[70] *See, e.g., id., discussed in* text accompanying notes 39-53 *supra.*

[71] Transatlantic Financing Corp. v. United States, 363 F.2d 312, 319 (D.C. Cir. 1966); Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass.

reached such proportions, the courts have often engaged in wide inquiries into economic factors external to the contract.[72] But the courts have failed to explore the possibility that such factors may contribute to a finding that performance has been rendered impracticable.[73]

In three leading cases courts have considered outside economic factors in denying an impracticability claim.[74] In *Eastern Air Lines, Inc. v. Gulf Oil Corp.*,[75] the court rejected Gulf's impracticability claim. In so doing, the court relied partly on evidence that all of Gulf's commercial activities produced record profits in the year in question.[76]

The court in *Missouri Public Service Co. v. Peabody Coal Co.*[77] used similar reasoning. The defendant Peabody contracted to supply coal for the plaintiff's power plant, but failed to deliver under the contract. When the plaintiff sued, Peabody asserted that increases in the cost of performance rendered performance impracticable under section 2-615. In denying the excuse the trial court considered Peabody's general financial condition, resources, experience in coal production, and the availability of coal reserves. The appellate court affirmed, holding that the trial court properly considered such factors.[78]

Finally, consideration of projected external factors precluded an impracticability excuse in *United States v. Wegematic Corp.*[79] The defendant Wegematic had contracted to sell the United States a computer requiring technology yet to be developed. The government sued when Wegematic could not deliver the computer. The court recognized that development of the computer system would require huge sums of money, thereby

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122, 128, 310 N.E.2d 363, 366-67 (1974); *see* note 23 and accompanying text *supra*.

[72] *See* Duesenberg, *supra* note 38, at 38-40.

[73] The *Transatlantic* court specifically rejected such a subjective examination of the promisor's ability to perform. Transatlantic Financing Corp. v. United States, 363 F.2d 312, 319 n.13 (D.C. Cir. 1966); *see* note 36 *supra*.

[74] United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975); Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. App.), *cert. denied*, 444 U.S. 865 (1979).

[75] 415 F. Supp. 429 (S.D. Fla. 1975).

[76] *Id.* at 441.

[77] 583 S.W.2d 721 (Mo. App.), *cert. denied*, 444 U.S. 865 (1979).

[78] *Id.* at 726.

[79] 360 F.2d 674 (2d Cir. 1966).

producing substantial losses on the contract in question. Nevertheless the court held that the profits which Wegematic would realize from future sales defeated the claim of commercial impracticability.[80]

While the courts have considered external economic factors in denying a claim of impracticability, no cases have been found in which such factors were considered in granting an excuse under U.C.C. section 2-615.[81] Courts should address such factors in considering an excuse claim, because if external economic factors can render an apparently burdensome obligation less so, they can also render an apparently innocuous contractual obligation more onerous.[82]

III. Proposal

A. The Commercial Foresight Test

This comment proposes that courts apply the following test when a party seeks excuse for non-performance because of a labor strike's occurrence.[83] This test will remedy many of the shortcomings and inequities which result from the courts' present application of U.C.C. section 2-615. The test, labeled the commercial foresight test, would be applied in two parts:

> 1. Should the promisor have foreseen the strike and its broader effects, in light of all the commercial circumstances of the transaction?

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[80] *Id.* at 677.

[81] *See* note 73 *supra*. *See also* Pauley Petroleum, Inc. v. United States, 591 F.2d 1308, 1319 (Ct. Cl.), *cert. denied,* 444 U.S. 898 (1979), a non-U.C.C. "commercial frustration" case, in which the court refused to grant excuse based upon burdensome external economic factors.

[82] *See* Duesenberg, *supra* note 10, at 1094: "What is impracticable for one seller might not be for another. The difference could be attributed to size, profitability, management capabilities, competence of engineers, scientists, and almost any other of the many qualities which distinguish individual from individual and organization from organization." Similarly, the court in Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721, (Mo. App.), *cert. denied,* 444 U.S. 865 (1979), stated: "[T]he application of the doctrine [§ 2-615 commercial impracticability] and the equitable principles inherent therein might call for relief in one instance and not another based upon these factors, and others, *outside the strict confines of the contract itself.*" 583 S.W.2d at 726 (emphasis added).

[83] This test assumes that the parties have not expressly assigned the risk of the strike's occurrence. Were such a risk expressly assigned, no § 2-615 excuse would be available. *See* U.C.C. § 2-615, Comment 8.

2. Did the strike's occurrence render the obligation impracticable, in light of both the individual contract and the broader commercial circumstances of the transaction?[84]

The proposed test is a modified objective test, allowing courts to consider some subjective factors. The first part of the test will therefore avoid the simplistic approach of the common law[85] and of modern courts in their refusal to abandon a strict objective standard despite the intent of the U.C.C.'s framers.[86] This part of the test urges courts to examine the circumstances of the transaction in order to determine what a businessman might have foreseen beyond the occurrence of the strike. Courts using the commercial foresight test would examine the foreseeability of the strike's effects that ultimately determine the impracticability of performance. Using the commercial foresight test, courts would also consider the good faith exercised by the party seeking excuse.[87]

Part two of the commercial foresight test urges courts to look beyond the economics of the individual contract. The courts should consider the commercial setting in which the strike occurs to determine whether extreme or unreasonable difficulty, expense, injury, or loss[88] has rendered performance commercially impracticable.[89] This is especially important in strike cases, where the settlement of the dispute may have a long term effect not only upon the individual contract but also upon all of the

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[84] For excuse to be granted the circumstances of a case must satisfy both parts of the commercial foresight test.

[85] *See* note 60 and accompanying text *supra*.

[86] *See* notes 61-63 and accompanying text *supra*.

[87] *See* U.C.C. §§ 1-203 & 2-103(1)(b).

[88] 18 S. WILLISTON, *supra* note 5, § 1931. *See* RESTATEMENT (SECOND) OF CONTRACTS § 281, Comment d (Tent. Draft No. 9, 1974).

[89] *See* notes 75-82 and accompanying text *supra*. The party seeking excuse would bear the burden of pleading and proving the additional factors which courts should consider under this proposed system of analysis. Thus, the pleadings and the evidence introduced at trial would present these additional factors to the court. The resulting increase in complexity of the issues should not unduly burden the court. For examples of the courts' handling of extremely complex factual issues, see Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975); *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 405 F. Supp. 316 (J.P.M.L. 1975), *discussed in* Comment, *The International Uranium Cartel: Litigation and Legal Implications*, 14 TEX. INT'L L.J. 59 (1979). Gulf Oil and Westinghouse recently settled their suit out of court, Wall St. J., Jan. 30, 1981, at 2, col. 2.

promisor's commercial activities.[90]

B. Application of the Commercial Foresight Test

The following hypothetical case illustrates a typical strike occurring in a commercial setting. This hypothetical contrasts the approaches of the common law, present U.C.C. authority, and the proposed commercial foresight test in assessing a claim of excusable non-performance.

A seller contracts to sell goods to a buyer. Thereafter a strike by the seller's employees prevents performance. The buyer obtains a cover contract and sues the seller for the cover costs incurred. The seller claims excuse.

The seller's claim of impossibility would fail at common law. First, courts would almost certainly deem the strike's occurrence foreseeable.[91] Second, another seller's ability to perform would indicate that performance was only subjectively impossible.[92] If these two factors did not doom the impossibility plea, courts might also hold that the seller had the power to settle the strike and perform. Continuation of the strike would therefore be considered the seller's fault.[93] Finally, courts might consider the strike's violent or peaceful nature in determining the impossibility of performance.[94]

A court following the current application of U.C.C. section 2-615 would likely consider the strike objectively foreseeable and thus hold that the seller assumed the risk of its occurrence.[95] Even if the court considered the strike unforeseeable, the seller would have the difficult task of showing the impracticability of performance. This would require proof that economic losses on this contract, standing alone, were so substantial as to warrant

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[90] An employer settling with the striking workers may take the added labor costs into account in future prices. But such adjustment is not possible in contracts existing at the time of the settlement. Thus, if a contractor would suffer comparatively small losses on all existing contracts as a result of a strike settlement, courts should consider the total of these losses in deciding whether or not to grant an excuse. It may be inappropriate to state that losses may be made up in the future, because in a volatile economy future price increases to make up for past losses may price a businessman out of the market.

[91] *See* note 5 and accompanying text *supra*.

[92] *Id.*

[93] *See* note 6 and accompanying text *supra*.

[94] *See* note 7 *supra*.

[95] *See* note 52 and accompanying text *supra*.

an impracticability excuse.[96]

A court using the commercial foresight test would consider additional factors in assessing the excuse claim. In proving that it did not assume the risk of the strike's occurrence, the seller might show that although the strike was foreseeable, its effects were not. For example, unforeseen violence might prevent use of substitute labor. Employees of necessary suppliers might unexpectedly refuse to cross the seller's employees' picket lines.[97]

If the court concluded that the strike was commercially unforeseeable and thus that the seller had not assumed the risk of its occurrence, it would then assess the claim of commercial impracticability. A commercial foresight analysis would allow the seller to show the strike's impact on the individual contract within its broader commercial setting. Thus, the seller might acknowledge that relatively small losses on this individual contract would result from settling with the workers and performing. However, the seller might then show that the resulting higher labor costs would aggregate to create ruinous losses when it performed all other existing commercial obligations.[98] Further, even small losses on the individual contract might prove disastrous to an infant concern.

A court using the commercial foresight test would also consider non-economic factors in determining commercial impracticability. For example, the seller's use of non-union labor might endanger future contracts with unionized businesses,[99] or irreparably harm future relations with the seller's own employees.[100]

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[96] *See* notes 23 & 34 and accompanying text *supra*.

[97] Many other factors would also merit consideration in support of an excuse claim. For example, the seller might show that, although the parties could have reasonably foreseen the labor dispute, previous similar disputes had not resulted in strikes. This might have been a wildcat strike. The strike might have lasted longer than was expected. Unexpected sympathy strikes by other vital employees might have precluded performance. Courts should consider all relevant circumstances in determining whether a strike was commercially foreseeable, whether it rendered performance commercially impracticable, *see* notes 98-100 and accompanying text *infra*, and ultimately whether to allow excuse.

[98] *See* note 90 *supra*.

[99] *See* Ziger v. Shiffer & Hillman Co., [1933] 2 D.L.R. 691 (Can.).

[100] This hypothetical involves the likely situation where a contracting party's own employees strike, affecting its ability to perform. There are two other potentially common situations. In the first of these, a strike by employees of a major supplier of a seller of goods prevents or hinders the seller's performance of a contract with a buyer. As in the hypothetical in the text, a court applying

CONCLUSION

This comment demonstrates that courts ignore or only pay lip service to the U.C.C. framers' objective of modernizing the law of excuse in commercial sales situations. Failure to adhere to this goal may result in the wrongful denial of excuse in situations where a labor strike has rendered performance commercially impracticable. Since U.C.C. section 2-615 was intended to liberalize the law of excuse, the courts must more fully consider all commercial factors in a strike situation when deciding whether or not to grant an excuse.

To aid the courts in the evaluation of a claim of U.C.C. section 2-615 commercial impracticability, this comment has proposed the two part commercial foresight test. First, the courts must consider whether the promisor should have commercially foreseen that the strike would hinder its performance. Second, the courts must consider whether the strike rendered performance impracticable within the commercial setting of the contract. A

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the commercial foresight test should weigh a variety of factors in determining both the strike's commercial foreseeability and whether or not it rendered performance of the contract commercially impracticable. For example, in determining commercial foreseeability, the court might find that, although the strike was foreseeable, the seller investigated and concluded in good faith that the strike would not affect its supply. Such a good faith conclusion might indicate that the interruption of supply was commercially unforeseeable. *See* U.C.C. § 2-615, Comment 5; Wallach, *supra* note 10, at 211; *Symposium, The Uniform Commercial Code and Contract Law: Some Selected Problems,* 105 U. PA. L. REV. 836, 895 (1957). Factors a court might consider in determining commercial impracticability include availability of an alternative supply, its cost if available, and the effect of possible increased cost on all of the seller's existing commercial obligations.

The second common situation occurs when a buyer's employees strike and the seller's employees refuse to cross picket lines to deliver goods for which the buyer has contracted. *See* Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 310 N.E.2d 363 (1974), *discussed in* notes 39-53 and accompanying text *supra.* A court applying the commercial foresight test might consider factors indicating the commercial foreseeability not only of the strike but also of the institution of the picket line and the refusal of the seller's employees to cross it. To determine the commercial impracticability of the performance, a court here might weigh largely non-economic factors. For instance, the court might consider the ramifications upon both the seller's labor relations and its commercial activities of pressuring its employees to cross the picket line, or of hiring non-union labor. A court might also weigh the seller's good faith attempts to arrange an alternative delivery site which the buyer rebuffed or which proved unworkable.

hypothetical case both demonstrated the advantages of this proposed test and illustrated the expanded catalogue of factors which a court should consider. By helping to meet the U.C.C.'s goal of modernizing commercial law and liberalizing the law of excuse in commercial situations, the commercial foresight test will better serve the realities of the modern marketplace.

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