

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

2018

Mutual Mistake or Excuse: Which Approach to Pursue When Seeking Judicial Relief From Contractual Obligations on the Basis of Supervening Knowledge?

Gregory S. Crespi
Southern Methodist University, Dedman School of Law

Recommended Citation

Gregory S. Crespi, Mutual Mistake or Excuse: Which Approach to Pursue When Seeking Judicial Relief From Contractual Obligations on the Basis of Supervening Knowledge? (2018)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

MUTUAL MISTAKE OR EXCUSE:
WHICH APPROACH TO PURSUE WHEN SEEKING JUDICIAL
RELIEF FROM CONTRACTUAL OBLIGATIONS ON THE
BASIS OF SUPERVENING KNOWLEDGE?

by

Gregory Crespi¹

Preliminary draft

June 12, 2018

1. Homer R. Mitchell Endowed Professor in Commercial and Insurance Law, Dedman School of Law, Southern Methodist University. J.D., Yale Law School, Ph.D., University of Iowa.

ABSTRACT

When a person seeks to be relieved from their contractual obligations on the basis of supervening knowledge of a fact existing at the time of contracting that has rendered their performance impracticable or even impossible, and/or has frustrated their purpose in entering into the contract, they would appear to have choice between asserting a mutual mistake enforceability defense or instead asserting one or more of the impossibility, impracticability, or frustration of purpose excuse defenses. Do they in fact have this choice, or does each of these approaches for obtaining judicial relief have its own distinct scope of application, with little if any overlap? If there are circumstances where a person does have this choice, which approach is likely to be more promising as the primary means of seeking relief?

There is unfortunately a relative absence of clarifying case law on this question, and this brief article considers the guidance provided by Sections 152 and 266 of the Restatement (Second) of Contracts and the associated Official Comments. The article concludes that where there is a choice available between the two approaches the question as to which one to most aggressively pursue, rather than only plead secondarily in the alternative, turns upon the definition of “materiality” that will be applied by the court with regard to the mutual mistake defense. The mutual mistake defense approach is likely to be the more promising tact in all instances, although perhaps only marginally so if the court applies the most stringent materiality criterion somewhat ambivalently suggested by the Official Comment to Restatement (Second) Section 152.

INTRODUCTION

Assume that two persons have entered into a contract with one another. Assume also that at the time of contracting they each reasonably believed that a certain possible event had not occurred. That event had already taken place, however, and the contracting parties then later learned of this, a situation commonly referred to as their obtaining “supervening knowledge” of a fact existing at the time of contracting. Assume now that one party to the contract then seeks judicial relief from their contractual obligations because their performance has been made significantly more burdensome by the event – perhaps enough more so to be made impracticable or even impossible – or because their principal purpose in entering into the contract has been substantially frustrated by the event, or both.²

Given supervening knowledge of an existing fact that has these adverse consequences for a person’s performance obligations and/or for the ability of the contract to satisfy their purposes there appear to be two plausible arguments that this person could offer in an attempt to obtain judicial relief from their obligations.

2. That person could be a defendant in a breach of contract action, or the plaintiff in an action seeking either rescission or reformation of the contract. I will hereafter refer to the person asserting a mutual mistake defense or an excuse defense in an attempt to reduce or eliminate their contractual obligations as the “party seeking relief.”

One argument would be that the circumstances meet the criteria for judicial relief on the basis of a mutual mistake as to a fact existing at the time of contracting.³

The other argument would be that the circumstances meet the criteria for relief from contractual obligations because a fact that was unknown to both of the parties at the time of contracting gives rise to either an impracticability or impossibility or frustration of purpose excuse defense.⁴

Both the mutual mistake and excuse defense theories appear on their face to fit this simple hypothetical situation equally well; they clearly have at least a “substantial area of overlap.”⁵ Where both approaches appear to be potentially viable one would think that the mutual mistake theory would in general be the better approach to pursue, given that it would appear to be much easier to

3. “Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of mistake under the rule stated in Section 154.” Restatement (Second) of Contracts, Section 152(1).

4. “Where, at the time a contract is made, a party’s performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary...Where, at the time a contract is made, a party’s principle purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render that performance arises, unless the language or circumstances indicate the contrary.” Restatement (Second) of Contracts, Section 266(1), (2).

5 “In broad outline the doctrines of impracticability and frustration of purpose resemble the doctrine of mistake...there is a substantial area of overlap between the three doctrines. Alumimum Co. of American v. Essex Group, Inc., 499 F.Supp. 53, 70-72 (1980) (hereinafter “ALCOA”).

demonstrate the “materiality” of the mistake, as that defense requires, than it would be to meet the very demanding eligibility criteria for any of the several excuse defenses that I will later discuss.⁶ But is it really that simple? Do the two approaches overlap whenever supervening knowledge of an existing fact has the significant consequences noted above, thus always favoring assertion of the mutual mistake defense? Or do these approaches instead each have largely separate and distinct areas of application, with only limited overlap, with the appropriate tact to take in seeking relief depending on the presence or absence of certain other factors? And in those instances where there is overlap, at least in the limited sense that the several common threshold requirements of each of the two approaches are met, what other factors might suggest that a particular approach would be the most promising?

I have been teaching introductory contract law at the Dedman School of Law at Southern Methodist University for almost 30 years. Over that time I have always called to my students’ attention the fact that under the circumstances of

⁶ “A second distinction between the [mutual mistake and impracticability] doctrines, however, makes mistake appear the more attractive argument. A party who claims relief for mistake must show that the mistake had a material effect on his performance...To obtain relief for impracticability, on the other hand, the party must show that the event had made performance impossible or nearly so...Thus a party arguing mutual mistake has the advantage in that he need not show that performance has become impracticable, but need only show that the balance of the exchange was materially affected.” E Allan Farnsworth, Julia L. Brickell & Stephen P., Chawaga, “Relief for Mutual Mistake and Impracticability,” 1 J. L. & Comm. 1, 27 (1981).

supervening knowledge of an existing fact that has the impact described above we have the unusual situation of two different mitigating doctrines, based on different underlying rationales, that each appear to apply as a basis for the party prejudiced by the fact obtaining relief. This point unfortunately comes up towards the end of the spring semester when I am scrambling to try to complete the two-semester contracts course sequence coverage, and my time is unusually tight. As a result I have always rather superficially and cavalierly told my students that if they need to later address this question on behalf of their clients they should “check the probably rather sparse collection of mutual mistake and excuse defense precedents that exist in the relevant jurisdiction” to see which theory would appear to be more promising as a means of obtaining relief, given the specific facts of their case, and that in most instances the mutual mistake approach is likely to be the more promising tact because of its less demanding requirements, and I leave it at that. I have now decided that it is time for me to give this question a little more thought so that I can provide students with a more complete and accurate discussion of the choices that lawyers will face under these circumstances the next time that I cover this material in class.

In this brief essay I will first consider whether there is any basis in the law for guiding a person’s choice between assertion of the mutual mistake defense or

assertion of the relevant excuse defense, under those supervening knowledge circumstances that potentially satisfy the elements of either defense, in an attempt to obtain judicial relief from their contractual obligations.⁷ I will then consider whether those legal principles that now guide this choice are justified.

MUTUAL MISTAKE V. THE EXCUSE DEFENSES

The ideal source of authority for choosing between the mutual mistake and the excuse defense approaches as a means for obtaining relief under supervening knowledge circumstances would be the judicial opinions handed down in those cases where a person has asserted both a mutual mistake defense and an excuse defense as alternative bases for relief under those circumstances, and where both approaches satisfy the several threshold criteria they share that I will later discuss, and where the court has then granted relief under one theory but denied it under the other theory. Unfortunately, I have not been able to locate any such cases. There is one relatively well-known 1980 case that I will refer to extensively in this article in which a federal district court discussed at length the mutual mistake approach

⁷ There is, of course, no reason why a person seeking relief could not plead both of these theories as alternative bases for relief, and this is often done. As a matter of argumentative strategy, however, it is usually more effective to first argue the more plausible theory that advances one's case before turning to less persuasive alternative theories, if those other theories are convincing enough to even merit being argued at all, and to do this one must first assess which approach is more likely to prove successful.

and both the impracticability and frustration of purpose excuse defense approaches, and then granted relief under each of these several theories,⁸ and there are likely to exist at least a few other such cases as well.⁹ In addition, there are many opinions in which courts have denied both mutual mistake and excuse defense arguments for relief. But I have not located any cases which allow relief under one approach but reject the other approach when they have both been advanced as alternative theories, and that would thus suggest fact-specific grounds for choosing between the two approaches. The paucity if not complete absence of such cases suggests that any meaningful distinctions that can be drawn between these two approaches as to their relative merits and proper scope of application will be rather subtle. In the absence of clear case law let me now turn to the guidance provided by the Restatement (Second) of Contracts.

8. *ALCOA*, *supra* n. 5. In that case the federal district court extensively discussed the mutual mistake argument, as well as the impracticability and frustration of purpose arguments, that ALCOA had made seeking equitable modification of the terms of its contract with Essex Group, Inc., *id.* at 53-78. The court there ruled that under Indiana law, *id.* at 59, each of these three theories provided a sufficient independent basis for granting ALCOA the relief sought, *id.* at 70-72. The opinion provides a comprehensive and useful discussion of the several elements of each of these theories, *id.* at 60-78, but since the court upheld all three of these theories (apparently in anticipation of being subjected to close appellate review, *id.* at 70) the case unfortunately does not shed much light on the appropriate contours of the various approaches, on when one approach is likely to prove more promising than the others. As I will later discuss, however, the ALCOA opinion does discuss the “material effect” criterion of the mutual mistake defense, *id.* at 64-65, a topic that has some relevance for choosing between the two approaches.

9 *See*, e.g., *Murray v. Willistown Twp.*, 169 A.3d 84, 92 (Pa. Super. Ct. 2017) (upholding a mutual mistake claim on appeal while noting that “the issue here more closely resembles one of impracticability of performance.”)

A. The Restatement (Second) of Contracts Framework

If one compares the Restatement (Second) of Contracts treatment of the mutual mistake defense with its treatment of the several excuse defenses under supervening knowledge circumstances one can see that the drafters of that document had in mind that these two approaches should have somewhat different primary areas of application, but with some overlap as well. The position taken appears to be that under most (but not all) circumstances either one or the other of these two approaches would be better suited to the addressing the equities of the situation than would be the other approach. These distinctions, however, are somewhat buried in ambiguous discussions contained in the Official Comments rather than featured more visibly and clearly in the text of the relevant Sections, and consequently they have received less scholarly and judicial attention than they perhaps merit.

Let me start by setting out for comparison the text of Restatement (Second) Section 152(1) that articulates the common law mutual mistake defense with the text of Section 266(1) and (2) that sets forth the scope of the common law impracticability defense (and implicitly also the impossibility defense) and the frustration of purpose defense under supervening knowledge circumstances:

B. Analysis of the Text of Sections 152(1) and 266(1) and (2)

“Section 152. When Mistake of Both Parties Makes a Contract

Voidable

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of mistake under the rule stated in Section 154.”¹⁰

“Section 266. Existing Impracticability or Frustration

(1) Where, at the time a contract is made, a party’s performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.

(2) Where, at the time a contract is made, a party’s principle purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract

10. Restatement (Second) of Contracts, Section 152(1).

is made, no duty of that party to render that performance arises, unless the language or circumstances indicate the contrary.”¹¹

Both the mutual mistake and the excuse defense approach require the person seeking relief under supervening knowledge circumstances to satisfy the same three threshold elements. First of all, they each require that the non-existence of the relevant facts at the time of contracting was a basic assumption shared by both parties to the contract. Second, they each require that the party seeking relief is not at fault for not knowing that the relevant facts already existed at the time of contracting. Third, they each require that neither the contract language nor the surrounding circumstances indicate that the party seeking relief has assumed the risk of the relevant facts being in existence at the time of contracting.¹² Failure to meet all three of these threshold requirements will bar a person from obtaining relief under either approach. So, assuming that all of three of these threshold elements are met under supervening knowledge circumstances, based on the text of

11. Restatement (Second) of Contracts, Section 266(1), (2).

12 Allan Farnsworth in his prominent contract law treatise takes the position that with regard to these two approaches “[I]t is more likely that a party will be regarded as having borne the risk of mistake rather than the risk of supervening frustration.” E. Allan Farnsworth, Contracts (4th ed. 2004), at 607. *See also* Farnsworth et al, *supra* n. 6, at 27 “[C]ourts are more likely to find that a party bore the risk of the disadvantage caused by a mutual mistake than that a party assumed the risk that performance would become impracticable.”)

these two Restatement (Second) Sections which of these two approaches is more likely to succeed as a basis for obtaining relief?

The key concept for sorting this out is the principle of materiality. Once the threshold criteria noted above have been met the remaining criterion for the mutual mistake defense under Section 152(1) is that the mistake have a “material effect on the agreed exchange.”¹³ Each of the several excuse defenses also has its own required hardship criterion, in lieu of a materiality criterion, in addition to those three threshold criteria set forth above. Under Section 266(1) the remaining criterion is that the party’s performance be rendered “impracticable,”¹⁴ and under Section 266(2) the remaining criterion is that the party’s “principle purpose is substantially frustrated.”¹⁵ There is an extensive body of case law regarding what must be demonstrated to satisfy each of these various criteria for being excused that I will not address in this brief essay, other than to here note that the several excuse defenses all have very demanding requirements.¹⁶ The question I will focus

13 Restatement (Second) of Contracts, Section 152(1).

14 While Section 266 does not have a provision relating to supervening impossibility, presumably that situation is covered under Section 266(1) as an extreme form of impracticability where the increase in cost resulting from the relevant events is essentially infinite.

15 Restatement (Second) of Contracts, Section 266(2).

16 For discussion of the various criteria of the excuse defenses *see, e.g.*, ALCOA, *supra* n. 5, at 70-78. *See also* UCC S. 2-615 and the Official Comment to that section; Nicholas R. Weiskopf, “Frustration of Contractual Purpose – Doctrine or Myth?,” 70 St. Johns L. Rev. 239 (2012); Melvin A. Eisenberg, “Impossibility, Impracticability, and Frustration,” 1 J. Leg. Anal.

upon here is this: under these supervening knowledge circumstances when one or more of these excuse defenses is potentially available as an avenue for relief, is the mutual mistake approach also available as an alternative approach and, if so, under what circumstances would the mutual mistake approach be the more promising approach to pursue?

“Materiality” is a rather protean legal concept one that takes different shapes in different contractual contexts. The usual understanding of the phrase “material change” under general commercial law¹⁷ or under securities law¹⁸ is that it refers to any change that is more than *de minimus* in impact, a very low threshold. On the other hand, the assessment as to whether a person’s failure to fully perform a contractual obligation rises to the level of a “material breach” for the purpose of determining whether there has been non-fulfillment of an implied-in-law condition of the other party’s performance obligations involves a complex, multi-factor analysis where in some instances even a significantly deficient performance may

207 (2009); Farnsworth et al (1981), *supra* n. 6.

17. Consider, for example, UCC Section 2-207, the “battle of the forms” provision. Under Section 2-207(2)(b) an additional term in an expression of acceptance will not become part of the contract if it “materially” alters the contract, and Official Comments 4. and 5. to that Section make clear that the drafters here intended to impose a very low *de minimus* materiality threshold.

18. *See, e.g., TSC Industries v. Northway*, 426 US 438, 444-449 (1976) (defining a “material” fact as one for which there need be only a substantial likelihood that it would have assumed actual significance in the deliberations of a reasonable shareholder).

be regarded as a “non-material breach.”¹⁹ The impracticability excuse defense, in contrast, usually requires far more than simply “material” increases in the cost of performance, as well as requiring also a significant change in the nature of the required performance.²⁰ The impossibility excuse defense is of course even more demanding as to the necessary impact of the relevant events upon performance. And the benefits that a party expects to obtain from a contract have to be not just “materially” reduced but instead drastically impaired if not eliminated altogether by an event for its impact to be regarded as sufficient to “substantially frustrate” a person’s “principle purpose.”²¹

The conclusion therefore suggested by comparing the texts of Sections 152(1) and 266(1) and (2) is that the mutual mistake approach should probably be the preferred approach for seeking relief, even if an excuse defense may also be potentially available, because due to the less stringent “materiality” requirement the mutual mistake approach will dominate each of the excuse defenses with their more restrictive criteria under all circumstances in which both approaches meet the

19. See Restatement (Second) of Contracts Section 241, which assesses whether a party’s failure to fully perform a contract obligation is “material” by a complex multi-factor analysis where the extent to which the deficient performance impairs the benefits obtained by the other party is only one factor to be considered.

20 See, e.g., Transatlantic Financing Corporation v., United States, 363 F.2d 312, ___ (D.C. Cir. 1966); see also UCC S. 2-615, Comment 4; Eisenberg, *supra* n. 16.

21. See generally Nicholas R. Weiskopf, “Frustration of Contractual Purpose – Doctrine or Myth?,” 70 St. Johns L. Rev. 239 (1996).

other threshold criteria.²² In other words, the mutual mistake approach will allow for a party to obtain relief in all supervening knowledge situations where relief could also be obtained on the basis of impracticability (or impossibility) under Section 266(1), or where relief would be available for frustration of purpose under Section 266(2), as well as providing relief under some circumstances where none of those excuse defenses would succeed.

C. The Official Comments to Sections 152 and 266

This conclusion that is based solely upon a textual comparison of the two relevant Restatement (Second) Sections is undercut to some extent, however, by the Official Comments to these Sections, for a couple of reasons. First of all, Comment c. to Section 152 takes the position that for there to be a “material effect upon the exchange” for mutual mistake purposes that (except for “exceptional cases”²³) the mistake must have an impact on both of the parties to the contract, not

²² “[M]utual mistake...does not require the same level of loss [as does the impracticability excuse] to permit avoidance of the contract, i.e., mutual mistake only requires a material effect upon performance.” John Edward Murry, Jr., Murray on Contracts (5th ed. 2011) at 719 n. 74.

²³ “In such [ordinary] cases the materiality of the effect on the agreed exchange will be determined by the overall impact on both parties. *In exceptional cases* the adversely affected party may be able to show that the effect on the agreed exchange has been material simply on the ground that the exchange has become less desirable for him, even though there has been no effect on the other party. Cases of hardship that result in no advantage to the other party, are, however,

merely an impact only upon the person seeking relief as to the cost or nature or possibility of their performance even if that impact is very substantial, or as to the ability of the contract to meet that person's primary purposes, again without regard to the significance of this impact.²⁴

The drafters of Section 152(1) apparently envisioned as the paradigm cases for defining the scope of the mutual mistake defense the two classic 19th century Sherwood v. Walker²⁵ and Wood v. Boynton²⁶ mutual mistake cases, where one of these cases allowed the defense²⁷ and the other did not.²⁸ In each of those cases the mutual mistake made as to the value of the goods at issue in setting the contract price impacted both the buyers and sellers of the goods, benefitting the buyers but injuring the sellers by an equal amount. But the mistakes made in these cases did not give rise to excuse defenses by the adversely impacted sellers because their performances of delivering the goods at issue were not rendered impossible nor

ordinarily appropriately left to the rules on impracticability and frustration. See Illustration 9 and Section 266.” Restatement (Second) of Contracts, Section 152, Comment c (italics added for emphasis). The Comment unfortunately does not clarify what would constitute an “exceptional” case where the mutual mistake defense could be asserted even where only one party has been impacted by the mistake.

24. *Id.*

25. Sherwood v. Walker, 33 N.W. 919 (Mich. 1887) (granting the seller relief on a mutual mistake defense theory).

26. Wood v. Boynton, 25 N.W. 42 (Wisc. 1885) (denying the seller relief sought on a mutual mistake defense theory).

27. Sherwood, supra n. 25.

28. Wood, supra n. 26.

impracticable, nor were their primary purposes substantially frustrated.²⁹

Comment c. specifically states that events that result in hardship to the party seeking relief but that do not confer an advantage upon the other party are “ordinarily appropriately left to the rules on impracticability and frustration.”³⁰

The Comment then presents an Illustration that conveys the principle that that if supervening knowledge of a fact substantially frustrates the purpose of one party, but does not impact the other party, then “the effect on the agreed exchange of performances is not material” and the adversely impacted party should instead seek relief under the Section 266(2) supervening frustration provision.³¹

This position presented in Comment c. and elaborated upon by this Illustration is an interesting idea as to the proper relationship of the mutual mistake and excuse defense approaches, giving each approach a distinct and well-defined scope of application, with there being relatively little overlap.³² The

²⁹ *But see* ALCOA, *supra* n. 5, holding that an event that will turn an expected profit into a substantial loss may justify a frustration of purpose defense.

³⁰ Restatement (Second) of Contracts, Section 152, Comment c. The Comment unfortunately fails to elaborate as to what exceptional circumstances might justify departing from this “ordinarily appropriate” principle.

³¹ *Id.* at Illustration 9. In my opinion the point made by this Illustration would be more clear if Comment had taken the position that a mutual mistake that significantly impacts only one party to a contract does not qualify as a “material effect on the agreed exchange,” despite perhaps having a “material” impact, because a mistake with an effect on only one party even if “material” should not be regarded as having an impact “on the exchange.” But the comment instead limits “materiality” itself only to those events having a significant impact upon both parties.

³² *But see* ALCOA, *supra* n. 5, where the court held that the mutual mistake defense and

persuasiveness of this Illustration as a positive statement of the law, however, is undercut by the fact that the Reporter’s Note to Section 152 states that this particular Illustration was “suggested by Anderson Bros. v. O’Meara.”³³ The Reporter appears, however, to have unfortunately misread the holding of this case, which denied relief for mutual mistake on the basis that the mistake was unilateral rather than mutual, if there had been a mistake made at all,³⁴ and not because the impact of a mutual mistake was only upon the party seeking relief. The Anderson Bros. case does not hold or even “suggest” that to be regarded as a mutual mistake justifying relief the revelation of the unknown facts must impact both parties to the contract, and it is somewhat concerning that the Reporter’s Note does not refer to any more on-point case precedents that would support this proposition.³⁵

The extent to which courts embrace this restrictive definition of materiality in the mutual mistake context that is suggested by Comment c. is uncertain. The

the impracticability excuse defense and the frustration of purpose excuse defense all applied under those circumstances, *id.* at 70.

33. Restatement (Second) of Contracts, Section 152, Reporter’s Note to Comment c. *See Anderson Bros. v. O’Meara*, 306 F.2d 672 (5th Cir. 1962).

34 Anderson Bros., *id.*, at ____.

35 The 8th Circuit Court of Appeals has specifically rejected this interpretation of Comment c. as requiring for a mutual mistake defense a showing that both parties to the contract are impacted by the mistake:

“Rather, comment (c) [to Section 152] prescribes a totality-of-the-circumstances approach, in which either or both parties may be adversely affected by a mutual mistake.” Roers v. Countrywide Home Loans, Inc., 728 F.3d 832, 837 (8th Cir. 2013).

noted contract law scholar Allan Farnsworth was ambivalent on this point in his well-known single-volume contract law treatise. He first stated broadly that a party seeking to assert a mutual mistake defense has a “better chance” of establishing materiality if “the mistake also has an impact on the other party.”³⁶ However, the only case that Farnsworth cited in support of this claim expresses agreement only in dicta in a ruling that denied the mutual mistake defense on assumption of risk grounds.³⁷ Farnsworth also in his discussion cited a contrasting case that in his opinion “supports the [opposing] view that hardship for one party is a sufficient basis for avoidance for mistake,”³⁸ and called attention to the position taken in

36 “The party adversely affected [by a mutual mistake] has a better chance of showing that the effect on the agreed exchange is material if...the mistake also has an impact on the other party. Courts have been reluctant to allow avoidance if the mistake merely makes the exchange less desirable for one party...cases of [unilateral] hardship are ordinarily left to be dealt with under the rules of impracticability and frustration” E. Allan Farnsworth, Contracts, at 607-608 (4th ed. 2004). *See also* John Edward Murray, Jr., Murray on Contracts (5th ed. 2011) at 494 (“If the discovered mistake reveals an exchange that is not only substantially less desirable for one party, but substantially more desirable for the other, a court will be more amenable to granting relief than if there is merely a loss to one party without a corresponding gain to the other.”)

37 “A related distinction [to the mutual mistake versus assumption of risk grounds on which the case before the court was decided] is the manner in which the mistake...affects the contemplated performance or the equivalence of value. To the extent that Alcoa [in the ALCOA case, supra n. 5] was disadvantaged by the mistake, Essex [the other party to the contract] was enriched. Here, by contrast, while the unavailability of reprocessing has the effect of making performance by Westinghouse more expensive, it in no way enriches Florida [the other party to the contract], or gives Florida any benefit it did not bargain for.” In re Westinghouse Elec. Corp., 517 F.Supp. 440, 458 (E.D. Va. 1981) (cited by Farnsworth, *id.*, at 608).

38 Farnsworth, *supra* n. 34, at 607 (“Case law supports this view that hardship for one party is a sufficient basis for avoidance for mistake.”) (citing in support Dover Pool & Racquet Club v. Brooking, 322 NE 2d 168, 171 (Mass. 1975) (“[A]s a result of the mistake enforcement of the contract would be materially more onerous to the purchaser than it would have been had

Comment c. that even where a mutual mistake has had no impact on the other party to the contract a person may be able to obtain mutual mistake relief under “exceptional circumstances,”³⁹ which are left undefined. He also noted more generally that the mutual mistake cases “are not marked by their consistency in either reasoning or result.”⁴⁰

Even under this narrow interpretation of the “material effect on the agreed exchange” phrasing of Section 152(1) as requiring that a mutual mistake must have an impact upon both parties to provide a basis for relief there will still be some overlap between these two approaches. There are instances for which the events at issue, when they come to light, will not only have a material impact upon both parties but will also potentially meet the requirements of one or more excuse defenses,⁴¹ presenting the party seeking relief with a choice of approaches to pursue. As discussed above, a comparison of the texts of Section 152(1) and 266(1) and (2) would appear to favor assertion of the mutual mistake defense as easier to establish in all circumstances where both that defense and an excuse

the facts been as the parties believed them to be. The contract was therefore voidable by the purchaser...”)

39 *Id.* at 607 (Citing Restatement (Second) of Contracts Section 152, Comment c.).

40 *Id.* at 605.

41 “In many of the cases that come under this Section [266], relief under the rules relating to mistake...will also be appropriate...In that event the party entitled to relief may, of course, choose the ground on which he will rely.” Restatement (Second) of Contracts, Section 266, Comment a. *See also, e.g.,* ALCOA, *supra* n. 5, at 70-72.

defense are potentially available.

However, Comment c. to Section 152 not only suggests that an event must impact both parties to the contract to be material but also suggests that even where both parties are impacted the materiality threshold for the mutual mistake defense should be set at a very high level. To the extent that the courts take this suggestion it will be relevant for the choice of approaches because it will adversely impact the prospects for success with the mutual mistake approach. Specifically, Comment c. states that for a person seeking relief to show this material effect:

“It is not enough for him to prove that he would not have made the contract had it not been for the mistake. He must show that the resulting imbalance in the exchange is so severe that he can not be fairly required to carry it out.”⁴²

This quote from the Comment equates “material effect” with a “severe imbalance” sufficient to make the exchange unfair, an extremely high materiality threshold when contrasted with the commonly applied and much less demanding standards of materiality in other contexts that I have noted above. If this stringent “severe imbalance” materiality standard were to be widely embraced by the courts for resolving mutual mistake claims this would greatly reduce or perhaps even

42. Restatement (Second) of Contracts, Section 152, Comment c.

eliminate altogether the gap between the “material effect” showing required for the mutual mistake defense and the very substantial impacts that are required for the impracticability, impossibility or frustration of purpose excuse defenses. However, other portions of Comment c. undercut this call for consistent application of such a stringent materiality standard rather than applying the much less demanding materiality standards generally applied in commercial law or in securities law, or the broader but still less restrictive multi-factor standard for determining materiality in the implied-in-law contractual conditions context that is set forth in Section 241.⁴³

Despite the ambivalent position taken by Comment c. on the appropriate materiality threshold a substantial number of courts have cited approvingly this “severe imbalance” language in ruling upon mutual mistake defense claims,⁴⁴ as

43. That Comment later significantly undercuts its recommendation for use of this stringent standard by broadly stating that “The standard of materiality here, as elsewhere in the Restatement (e.g. Section 237) is a flexible one to be applied in light of all the circumstances.” *Id.* Comment a. to Section 237 then refers the reader back to the broad, multi-factor determination of materiality set forth in Section 241. Restatement (Second) of Contracts, Section 237, Comment a.

44 *See., e.g.*, United States v. Thompson, 2017 U.S. Dist. LEXIS 32820, at 15 (W.D. Pa. 2017); Schildkamp v. Feed Commodities International, LLC, 2016 Vt. Unpub. LEXIS 238 at 11 (Vt. 2016); Stegen v. Hanson, 2013 Iowa App. LEXIS 776 at 8-9 (Iowa App. 2013); Breeze v. United States, 2013 U.S. Dist. LEXIS 9598 at 16 (E.D. Tenn. 2013); Roers v. Countrywide Home Loans, Inc., 728 F.3d 832, 837 (8th Cir. 2013); Roers v. Bank of America, 2012 U.S. Dist. LEXIS 116725 at 39 (D. C. Minn. 2012); Eteson v. Eteson, 2011 NJ Super Unpub. LEXIS 2547 at 13-14 ((NJ App. 2011); Miami Valley Paper v. Lebbing Eng’g & Consulting GBMH, 2010 U.S. Dist. LEXIS 150333 at 4 (S.D. Ohio 2010); United States v. Frownfelter, 626 F.3d

have some commentators,⁴⁵ with some of these courts finding the claims before them to have met this stringent materiality standard,⁴⁶ while a somewhat larger number of other courts have applied this standard but found it to not have been met,⁴⁷ and still other courts have embraced this standard in dicta but have then resolved the mutual mistake claim presented to them on other grounds.⁴⁸

D. Discussion of Comment c. to Section 152.

The portion of Comment c. to Section 152 that suggests that the scope of the mutual mistake defense should be restricted to circumstances where the events at issue have affected the benefits and burdens of the contract to both parties, and to

549, 556 (10th Cir. 2010); City of Cape May v. Dash, 2008 N.J. Super. Unpub. LEXIS 1624 at 35 (NJ Super. 2008); Land Grantors v. United States, 81 Fed. Cl. 580, 605 (Ct. Cl. 2008); McKeever v. Warden, SCI-Grateford, 486 F.3d 81, 86 (3rd Cir. 2007); Leading Edge Development Servs. v. EnXco Inc., 2006 U.S. Dist. LEXIS 92654 at 31 (Ct. Cl. 2005); Land Grantors v. United States, 71 Fed. Cl. 614, 627 ((Ct. Cl. 2006); Land Grantors in Henderson, Union v. United States, 64 Fed. Cl. 661, 706 (Ct. Cl. 2005); Wrisley v. Eleanor A. Krock & Kathleen S. Keller, 2000 Pa. Dist. & Cnty. Dec. LEXIS 438 at 9 (Pa. Comm. Pleas 2000); Hillside Ass'n of Hollis v. Maine Bonding & Casualty Co., 135 N.H. 325, 332-333 (N.H. 1992); Pawtucket Lodge No. 4 v. City of Pawtucket, 1985 R.I. Super. LEXIS 160 at 7-8 (R.I. 1985); ALCOA, *supra* n. 5, at 64.

45 *See, e.g.*, Farnsworth, *supra* n. 36, at 606 (citing approvingly the Comment c. “severe imbalance” materiality criterion suggestion); Murray, *supra* n. 36, at 494 (citing a case that quoted the “severe imbalance” language of Comment c.)

46 *See, e.g.*, Land Grantors v. United States (2008), *supra* n. 44, Land Grantors in Henderson, *supra* n. 44, Hillside Ass'n, id., Pawtucket Lodge, *supra* n. 44, ALCOA, *supra* n. 5.

47 *See, e.g.*, United States v. Thompson, *supra* n. 44, Schildkamp, *supra* n.44, Stegen, *supra* n. 44, Roers v. Bank of America, *supra* n. 44, Eteson, *supra* n. 44, United States v. Frownfelter, *supra* n. 44, City of Cape May, *supra* n. 44, McKeever, *supra* n. 44.

48 *See, e.g.*, Roers v. Contrywide, *supra* n. 44, Breeze, *supra* n. 44, Land Grantors v. United States (2006), *supra* n. 44, Wrisley, *supra* n. 44.

thereby relegate to the excuse defenses any claims for relief based upon supervening knowledge under circumstances where only one party's performance, or ability to have the contract meet their purposes, has been significantly impacted by those events, makes some sense as a categorization framework. This framework would clarify the scope of each approach, and would greatly limit their areas of overlap. But it would also raise some new concerns that are not addressed in the Comment.

Under that suggested framework most (but not all⁴⁹) attempts to obtain judicial relief based upon supervening knowledge of existing events would fit only one approach or the other, depending on the circumstances, but not both. This would have the advantage of often sparing the person seeking relief from the burden of having to argue and prove each of two alternative theories, and would consequently also reduce the burden on the courts. On the other hand, judicial acceptance of this framework would very sharply curtail the availability of the mutual mistake defense. The courts would then in most instances deny mutual mistake relief to those persons who can establish that an event unknown at the time of contracting has materially and adversely impacted them, but cannot demonstrate that it has also adversely impacted the other party. Unless those persons can also

⁴⁹ See, e.g., ALCOA, *supra* n. 5.

show that the event has had sufficient impact upon them to render their performance impossible or impracticable, or to partially frustrate their primary purpose, very demanding requirements indeed, they will be denied relief altogether.⁵⁰

Comment c. to Restatement (Second) Section 152 also raises the question of how significant the impact of a mutual mistake must be on a person before that person can obtain relief from their contractual obligations on that basis. However, even if the Section 152(1) requirement for the mutual mistake defense that the mistake have a “material effect on the exchange” is interpreted (as the Comment somewhat ambivalently recommends) as imposing a “severe imbalance” standard, rather than either the much less stringent materiality criteria usually applied under commercial law or securities law, or the also less stringent Section 241 multi-factor criteria for finding materiality in the implied-in-law conditions context, that harsher materiality standard still appears to be less demanding than the onerous eligibility criteria that must be met to successfully invoke either the impossibility,

⁵⁰ Whether the scope of mutual mistake relief should be so limited is a larger question that is not addressed by Comment c., and that I will also not address in this brief essay. I am here focusing solely on the scope of application and relative attractiveness of the mutual mistake and excuse defense approaches for seeking relief under supervening knowledge circumstances, given the eligibility contours that courts are in fact likely to apply for each of these approaches, and not on the more theoretical and more difficult question of the proper eligibility criteria that should be applied for each approach.

impracticability or frustration of purpose excuse defenses. Imposition of a “severe imbalance” materiality criterion would therefore appear to still leave the mutual mistake approach at least modestly more attractive than the excuse defense approach under those circumstances in which a person might arguably qualify for relief under either approach.

CONCLUSION

When a person seeks judicial relief from their contractual obligations on the basis that the parties to the contract were not aware of facts existing at the time of contracting, through no fault of their own, and those facts when later revealed have made that person’s performance arguably either impracticable or impossible, or have arguably partially frustrated their primary purpose in entering into the contract, the text of Restatement (Second) Sections 152(1) and 266(1) and (2) viewed in isolation suggests that both the mutual mistake defense and one or another of the excuse defenses will each be available as plausible argumentative approaches, and that the mutual mistake defense will generally be easier to establish because the materiality of the mistake will usually be less difficult to establish than would be the more demanding criteria of each of the excuse defenses.

Comment c. to Section 152, however, goes well beyond the Section's text in suggesting two limitations on the scope of the mutual mistake defense that would make the choice of approach to pursue for relief more complicated. That Comment first suggests that the mutual mistake defense should be limited in its application to only those circumstances where the facts that later come to light impact the benefits and burdens of the contract to both parties, and in general should not be allowed under those circumstances where the facts when revealed have a material impact on one party possibly substantial enough to render that party's performance impossible or impracticable, or partially frustrate that party's primary purpose in entering into the contract, but that do not affect the value of the contract to the other party. That Comment essentially calls for a requirement that a mutual mistake have a material effect on both parties, i.e. a material effect "on the exchange," rather than simply a material impact on the person seeking relief.

If this limit on the scope of the mutual mistake defense was judicially embraced it would clarify in most instances which of these two approaches were a more suitable basis for relief, given the circumstances, although in some instances both approaches for seeking relief would still be available.⁵¹ But adoption of this limiting principle would do more than simply provide clarification as to which

⁵¹ See., e.g., ALCOA, *supra* n. 5.

approach was more appropriate. It would also severely restrict the availability of the mutual mistake defense under circumstances where the facts when revealed materially impact only one party to the contract, and where the impact is not sufficient for that person to be able to meet the stringent excuse defense criteria. Absent a judicial consensus that the scope of the mutual mistake defense should be so sharply curtailed it would probably be preferable to develop some other criterion for determining when a contracting party who seeks relief based on supervening knowledge of existing facts should pursue a mutual mistake approach, and when they should instead seek to invoke an excuse defense.

Whether or not the mutual mistake defense is interpreted to require that both parties be impacted by the mistake, in those supervening knowledge instances where either the mutual mistake or the excuse defense approach arguably meets the requisite criteria then the question remains as to which approach would be more promising to the party seeking relief. The text of the relevant Restatement (Second) Sections 152(1) and 266(1) and (2) as discussed above suggest that the mutual mistake approach will dominate the excuse defense approach under all circumstances of supervening knowledge.⁵² However, one portion of Comment c. to Section 152 somewhat ambivalently suggests a second limitation on the mutual

⁵² See Farnsworth et al (1981), *supra* n. 6.

mistake defense, a limitation that the “material effect” criterion should require a showing of a “severe imbalance” of a magnitude sufficient to make it unfair to hold the adversely impacted person to their contractual obligation. This strict criterion, which as I have noted has been embraced by a significant number of courts,⁵³ would sharply limit the advantage of pressing the mutual mistake approach for relief over attempting to satisfy any of the excuse defenses with their strict requirements. But it would not entirely eliminate that advantage given how difficult those excuse defense criteria are to meet.

In overall conclusion, the mutual mistake defense should probably be advanced at least as an alternative ground for relief in any instance where one is seeking to be excused from one’s contractual obligations on the basis of impossibility, impracticability or frustration of purpose as a result of supervening knowledge. There does not appear to be any significant downside risk of doing so.⁵⁴ The mutual mistake approach certainly will have a substantial advantage over the excuse defense approach if the reviewing court does not require a showing of impact upon both parties to the contract to meet the “material effect on the

⁵³ See *supra* n. 44.

⁵⁴ As a matter of argumentative strategy, however, pleading a very weak argument, even only as an alternative ground for recovery, may possibly distract a court from focusing on and recognizing the merits of the stronger arguments that one is presenting. A decision should be made as to whether such secondary arguments that can be pleaded in the alternative are plausible enough to avoid tainting by association the primary theories being advanced.

exchange” requirement of this approach. And even if a restrictive “severe imbalance” materiality requirement is imposed by the court, as will often be the case,⁵⁵ this will still probably be an easier showing to make than satisfying the very demanding requirements of either the impossibility, impracticability, or frustration of purposes defenses.⁵⁶

⁵⁵ *See supra* n. 46.

⁵⁶ *See supra* n. 20.