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COMMENTS

ALLOCATING RISK IN TAKE-OR-PAY CONTRACTS: ARE FORCE MAJEURE AND COMMERCIAL IMPRACTICABILITY THE SAME DEFENSE?

by *Harold Alexander Lewis*

JUSTICE Oliver Wendell Holmes once said that parties entering into a contract primarily focus on performing the contract rather than on breaching it, and that contractual provisions therefore generally concern the results of performance rather than the results of a breach.¹ Justice Holmes's statement, however, does not accurately depict the provisions of natural gas take-or-pay contracts,² which often include detailed and complex language designed to allocate the risks of certain occurrences between the parties. This Comment explores the courts' role in giving effect to the risk allocation language of take-or-pay contracts. More specifically, this Comment focuses on the application of the doctrine of commercial impracticability, as defined in Uniform Commercial Code (UCC) section 2-615,³ to the construction of force majeure clauses⁴ in take-or-pay contracts.

1. O. HOLMES, *THE COMMON LAW* 302 (1946).

2. A typical take-or-pay provision provides: "Buyer agrees to purchase and receive from Seller or to pay for if available but not taken, a quantity of gas equal to . . . [a specified percent] . . . of the Delivery Capacity of each well . . ." Medina, McKenzie & Daniel, *Take or Litigate: Enforcing the Plain Meaning of the Take-or-Pay Clause in Natural Gas Contracts*, 40 ARK. L. REV. 185, 187 (1986). A take-or-pay provision allows a producer to maintain its cash flow during the life of the well and offers a secure and dedicated reserve of gas to the pipeline. *Id.* at 187-90.

3. U.C.C. § 2-615 (1987) provides in part:

Except so far as a seller may have assumed a greater obligation . . . :

(a) Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any . . . governmental regulation or order . . .

Courts and commentators have noted that § 2-615 embodies the doctrine of commercial impracticability. See *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974); *Louisiana Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1323 (E.D. La. 1981); Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 16; Walter, *Commercial Impracticability in Contracts*, 61 ST. JOHN'S L. REV. 225, 227 (1987).

4. A typical force majeure clause in a take-or-pay contract provides, in pertinent part:

The primary issue is whether under a force majeure clause a court may excuse a party's performance because the occurrence of a force majeure event has rendered the party's performance commercially impracticable. Several courts have recently addressed this issue.⁵ The decisions evidence confusion about the interaction between section 2-615 and a force majeure clause and reveal a fundamental misunderstanding of the difference between the commercial impracticability excuse and the force majeure excuse. A force majeure clause allocates to one party the risks arising from the occurrence of a specifically contemplated event.⁶ Section 2-615, on the other hand, allocates the risks arising from events that the parties neither contemplated nor allocated.⁷ More importantly, the party seeking an excuse under a force majeure clause must show that a force majeure event actually prevents its performance.⁸ The party seeking a section 2-615 excuse, conversely, must show not that the event has prevented its performance, but that it merely has rendered its performance commercially impracticable.⁹ If an event within the force majeure clause occurs, a court must determine the appropriateness of granting an excuse under the force majeure clause by referring to the rules of construction applicable to force majeure clauses.¹⁰ If an event not within the force majeure clause occurs, however, the court must find guidance outside of the contract under the rules set forth in section 2-615. Because of this fundamental distinction, a court should not refer to section 2-615 to determine the appropriateness of granting an excuse under a

If either party is rendered unable by force majeure, or any other cause of any kind not reasonably within its control, wholly or in part, to perform or comply with any obligation or condition of this Agreement, upon such party's giving timely notice and reasonably full particulars to the other party such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period; . . . The term "force majeure" shall include, without limitation by the following enumeration, acts of God, and the public enemy, the elements, fire, accidents, breakdowns, strikes, differences with workmen, and any other industrial, civil or public disturbance, or any act or omission beyond the control of the party having the difficulty, and any restrictions or restraints imposed by laws, orders, rules, regulations or acts of any government or governmental body or authority . . .

Langham-Hill Petroleum Inc. v. Southern Fuels Co., 813 F.2d 1327, 1329 n.1 (4th Cir. 1987); see also Medina, McKenzie & Daniel, *supra* note 2, at 222 n.117 (1986) (another example of a typical force majeure clause). The notion of force majeure arose originally to address those occurrences, such as acts of God, that humans had no power to control. See Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1540 (5th Cir. 1984); Squillante & Congalton, *Force Majeure*, 80 COM. L.J. 4, 5 (1979).

5. See Hamilton Bros. Oil Co. v. ANR Pipeline Co., No. CIV-88-132-A (W.D. Okla. Feb. 21, 1989); ANR Pipeline Co. v. Devon Energy Corp., No. G86-1123 CA (W.D. Mich. Feb. 1, 1989); Dyco Petroleum Corp. v. ANR Pipeline Co., No. 86-C-1097-C (N.D. Okla. Sept. 1, 1988); Burkhart Petroleum Corp. v. ANR Pipeline Co., No. 87-C-257-C (N.D. Okla. June 30, 1988); Atlantic Richfield Co. v. ANR Pipeline Co., 768 S.W.2d 777 (Tex. App.—Houston [14th Dist.] 1989, no writ).

6. See *infra* note 99.

7. See *infra* text accompanying notes 48-50.

8. See *infra* note 114.

9. See *infra* note 47.

10. See *infra* notes 100-07.

force majeure clause. The recent decisions noted above¹¹ have overlooked this fundamental distinction.

This Comment focuses on gas sales contracts between producers and pipelines for two reasons. First, recent judicial action concerning both the application of UCC section 2-615¹² and the construction of force majeure provisions¹³ has occurred in take-or-pay litigation. Second, several courts addressing take-or-pay claims have implicitly answered the issue presented above without specifically addressing the implications of such judicial risk allocation.¹⁴ These decisions may have a dramatic effect on the outcome of pending take-or-pay litigation, because they take an authoritative step in the opposite direction from prior take-or-pay litigation.¹⁵

This Comment consists of three parts. The first part sets forth the economic and regulatory background of the natural gas industry. The second part discusses the legal setting of the take-or-pay controversy. It focuses on the development of the common law excuse of commercial impracticability, on the treatment of that excuse in UCC section 2-615, and on the scope of the law surrounding the force majeure excuse. Part three analyzes the recent decisions that have incorrectly combined the two excuses.

I. BACKGROUND: THE NATURAL GAS INDUSTRY

To understand best how the issue addressed in this Comment arose, one must grasp the economic and regulatory underpinnings of the natural gas industry.¹⁶ Prior to 1930, producers realized little value from natural gas they owned: They could not store the gas once it was extracted, and they could not transport it beyond a very limited distance because modern pipeline technology had yet to become available. For those interested in the more lucrative oil that often lay underneath, the gas was a bothersome by-product of which the operator had to dispose before producing oil.¹⁷ By the

11. See cases cited *supra* note 5.

12. See *Reading & Bates Petroleum Co. v. Transok, Inc.*, No. CJ-85-1992 (Tulsa County Dist. Ct., Okla. Jan. 27, 1987); *Challenger Minerals, Inc. v. Southern Natural Gas Co.*, No. 84-C-357-E (N.D. Okla. Sept. 9, 1986), *withdrawn as settled* (Nov. 26, 1986); *Thomas N. Berry & Co. v. Northern Natural Gas Co.*, No. CIV-85-1430-R (W.D. Okla. May 15, 1986); *Lively Exploration Co. v. Valero Transmission Co.*, No. 2930 (Sutton County Dist. Ct., 112th Jud. Dist. of Texas, Sept. 16, 1985).

13. See *Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98 (W.D. La. 1985); *Golsen v. ONG W., Inc.*, 756 P.2d 1209 (Okla. 1988); *Valero Transmission Co. v. Mitchell Energy Corp.*, 743 S.W.2d 658 (Tex. App.—Houston [1st Dist.] 1987, no writ).

14. See *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986); *Dyco Petroleum Corp. v. ANR Pipeline Co.*, No. 86-C-1097-C (N.D. Okla. Sept. 1, 1988); *Burkhart Petroleum Corp. v. ANR Pipeline Co.*, No. 87-C-257-C (N.D. Okla. June 30, 1988).

15. See *infra* notes 124-48 and accompanying text for the complete analysis of the cases' application of the force majeure and § 2-615 excuses.

16. This discussion draws primarily from *Moody, The Natural Gas Industry After Partial Deregulation*, 36 INST. OF OIL & GAS L. & TAX'N § 6 (1985); E. SANDERS, *THE REGULATION OF NATURAL GAS: POLICY AND POLITICS, 1938-1978* (1981); S. WILLIAMS, *THE NATURAL GAS REVOLUTION OF 1985* (1985).

17. E. SANDERS, *supra* note 16, at 24-25; *Tannenbaum, Commercial Impracticability Under the Uniform Commercial Code: Natural Gas Distributors' Vehicle for Excusing Long-Term Requirements Contracts?*, 20 HOUS. L. REV. 771, 771 (1983).

early 1930s, however, technology had advanced sufficiently to allow companies to construct lengthy interstate pipelines.¹⁸ These new pipelines created an interstate market for the gas and increased its value to producers.¹⁹ Despite the emergence of a national pipeline system, the natural gas industry lacked the ability to service the nation consistently.²⁰ As a response to the problematical structure of the industry, Congress enacted the Natural Gas Act of 1938 (NGA).²¹

In enacting the NGA, Congress set in place a regulatory scheme that still affects producers and pipelines today.²² Commentators have described the environment in which producers and pipelines have operated since passage of the NGA as "a roller coaster ride"²³ through "inconsistent and vacillatory" government demands that have rendered the industry incapable of responding to the nation's energy needs.²⁴ The NGA institutionalized a defectively structured industry. One of the NGA's primary failings was its complex system of price controls.²⁵ These controls caused shortages of gas because producers refused to explore for new gas reserves with the promise of only a meager return under the regulatory scheme.²⁶ This shortage induced sharp competition among pipelines for secure, long-term supplies of gas.²⁷ The pipelines responded to this heightened competition by offering to producers what they could: the maximum lawful wellhead price for the gas and generous take-or-pay clauses.²⁸

Congress reacted to the failings of the NGA by enacting the Natural Gas Policy Act of 1978 (NGPA).²⁹ The NGPA reversed the trends that had spurred the pipelines' actions under the NGA by removing many of the

18. E. SANDERS, *supra* note 16, at 24.

19. *Id.*

20. "In the first years of the Great Depression, the natural gas industry was in chaos. In the East, it was marked by monopoly, shortage, and increasing prices. In the Southwest, there was an enormous oversupply; thousands of producers . . . [let] millions of cubic feet of gas escape into the atmosphere." E. SANDERS, *supra* note 16, at 24; *see also* Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 VA. L. REV. 63, 68 (1982) (discussing history behind producer price regulation).

21. Natural Gas Act, ch. 556, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C.A. §§ 717-717z (West 1976 & Supp. 1989)).

22. *See* S. WILLIAMS, *supra* note 16, at 1 (outlining the complex regulatory framework existing in 1985).

23. Moody, *supra* note 16, § 6.01, at 6-2.

24. Tannenbaum, *supra* note 17, at 771.

25. *See* S. WILLIAMS, *supra* note 16, at 1.

26. *See* E. SANDERS, *supra* note 16, at 125.

27. The gas industry traditionally operated under a structure of long-term supply contracts, *see* Moody, *supra* note 16, § 6.03, at 6-8, and economic conditions fostered unparalleled competition to secure these contracts. The contracts, as a result, became more producer-oriented. *See* S. WILLIAMS, *supra* note 16, at 6-8.

28. *See* S. WILLIAMS, *supra* note 16, at 7-8, 13 n.12 (arguing that take-or-pay provisions were the primary competitive tool for pipelines).

29. Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C. §§ 3301-3432 (1982)). The NGPA sought not only to unlock gas from the intrastate market to alleviate the regulation-induced interstate shortage but also eventually to deregulate all natural gas. For a complete analysis of the goals and provisions of the NGPA, *see* E. SANDERS and S. WILLIAMS, both *supra* note 16.

price controls on gas.³⁰ Within four years of passage of the NGPA, a gas glut existed.³¹ Prices naturally began to fall, and pipelines found that their generous take-or-pay contracts were financially burdensome. Many pipelines succeeded in renegotiating their contracts with producers, but others failed to win concessions. Rather than pay the price of continuing to operate under these burdensome contracts, those pipelines that had failed to win concessions chose to repudiate the contracts and litigate their validity.³² The following discussion outlines the primary issues raised in this litigation.

II. LEGAL SETTING OF THE TAKE-OR-PAY CONTROVERSY

Most take-or-pay litigation revolves around the numerous affirmative defenses³³ that pipelines have raised in an attempt to shield themselves from liability.³⁴ Most of the cases making their way to trial and resulting in published opinions have focused on the excuse defenses of force majeure and commercial impracticability.³⁵ This Comment addresses those defenses, focusing on the fundamental problem arising under contract excuse law: How should a court allocate the risk of changed circumstances that affect a party's ability to perform its take-or-pay obligations? This Comment shows why the courts have consistently answered that question by rejecting the force majeure and section 2-615 excuses and enforcing the take-or-pay con-

30. The partial deregulation provided by the NGPA spurred gas exploration and drilling activity. At the same time, fuel-switching customers reacted to the increasing gas prices by switching to alternative fuels, thereby reducing demand in the interstate gas market. Within a short time, perhaps as early as 1982, the shortage turned into a surplus. In addition, the Federal Energy Regulatory Commission (FERC), the regulatory body replacing the FPC, launched a new plan that attempted to create an unregulated gas market. See S. WILLIAMS, *supra* note 16, at 10.

31. The gas surplus prevented pipelines from marketing all the gas that they had under contract. See *id.* at 13.

32. See Moody, *supra* note 16, § 6.06[3], at 6-19 ("[P]ipelines are caught between their inability to market gas and their contract obligations to take-or-pay for gas. The . . . pipeline industry has responded . . . by . . . refusing to honor its take-or-pay contract obligations"); see also Medina, McKenzie & Daniel, *supra* note 2, at 192 (arguing that pipelines chose to breach their contracts and pay the expense of litigating them rather than continue to operate unprofitably under the contracts).

33. See, e.g., *Universal Resources Corp. v. Panhandle E. Pipe Line Co.*, 813 F.2d 77, 80 n.4 (5th Cir. 1987) (court noted defenses asserted at trial court but not raised on appeal, including "frustration, mutual mistake, impossibility, illegality, unjust enrichment, and . . . penalty"); see also Medina, McKenzie & Daniel, *supra* note 2, at 212-52 (discussing full range of generic defenses raised by pipelines, including force majeure, unconscionability, and commercial impracticability).

34. See Medina, *Take or Pay Oklahoma Style*, 60 OKLA. B.J. 705 (1989).

35. As one article points out, much of the authority addressing the take-or-pay controversy exists in unpublished slip opinions. Medina, McKenzie & Daniel, *supra* note 2, at 211. For a partial list of these cases see *supra* notes 12-15. Another author argues that the force majeure and commercial impracticability issues represent the primary contract issues to be resolved in the force majeure clause controversy. See Moody, *supra* note 16, § 6.05. Published opinions deciding force majeure or commercial impracticability issues in the take-or-pay context include: *Resources Inv. Corp. v. Enron Corp.*, 669 F. Supp. 1038 (D. Colo. 1987) (no relief afforded under commercial impracticability doctrine of UCC § 2-615); *Hanover Petroleum Corp. v. Tenneco, Inc.*, 521 So. 2d 1234 (La. App. 1988) (Louisiana law does not recognize the common law doctrine of commercial impracticability); *Golsen v. ONG W., Inc.*, 756 P.2d 1209 (Okla. 1988) (no relief afforded under force majeure and commercial impracticability defenses).

tracts according to their terms. This Comment also critiques several recent decisions that contradict the consistent trend in take-or-pay cases and approach the risk allocation problem with little regard to its fundamental role in excuse law.³⁶

A. Commercial Impracticability

1. Common Law

The doctrine of commercial impracticability is rooted in the English common law doctrine of impossibility. Under the early common law, English courts refused to excuse a party to a contract when an event occurred subsequent to the making of the contract that affected one party's ability to perform.³⁷ The courts required parties to perform absolutely, theorizing that the parties were capable of allocating the risks of "any accident by inevitable necessity."³⁸ Perhaps because this rule caused harsh results, the courts began to recognize certain exceptions to its strict application. The emerging exceptions became the law of "impossibility."³⁹

The common law recognized three exceptions to the general rule of absolute performance. First, courts acknowledged that the death of a party to the contract relieved his obligation to perform if performance required his presence or action.⁴⁰ Second, courts excused performance of the contract when governmental action rendered the contemplated performance illegal.⁴¹ Originally this exception allowed the excuse only if the governmental action took the form of a statutory prohibition of the performance, but courts subsequently relaxed the rule to include acts of government that either modified the nature of performance or imposed obligations upon performance that rendered the performance impossible.⁴² The celebrated case of *Taylor v. Caldwell*⁴³ recognized the third exception, that the destruction of the subject

36. For a list of these recent decisions, see *supra* note 14. The relevance of this Comment stems not only from the courts' willingness to depart from the precedential reasoning of earlier take-or-pay decisions, but also from the courts' misapplication of the law of force majeure and commercial impracticability. For good discussions of force majeure and commercial impracticability, see Carney, *The Nature and Extent of the Excuse Provided by a Force Majeure Event Under a Coal Supply Agreement*, 4 E. MIN. L. INST. § 11 (1984); Kirkham, *Force Majeure—Does It Really Work?*, 30 ROCKY MTN. MIN. L. INST. § 6 (1984); Marks & Martin, *Minerals Supply Contracts When the Market Goes South or North—Enforcement, Avoidance, and Renegotiation*, 32 ROCKY MTN. MIN. L. INST. § 5 (1986) (arguing that inclusion of force majeure provisions shows the need to go beyond remedies available under UCC § 2-615); Squillante & Congalton, *Force Majeure*, 80 COM. L.J. 4 (1979) (discussing issues arising under UCC § 2-615 and case law interpretation of force majeure clauses).

37. See *Paradine v. Jane*, 82 Eng. Rep. 897, 897 (K.B. 1647).

38. *Id.*

39. Professor Farnsworth's treatise on contracts provides an excellent summary of all the excuse doctrines, including mistake, impossibility, impracticability, and frustration. See E. FARNSWORTH, *CONTRACTS* §§ 9.1-9 (1982).

40. See *id.* § 9.5, at 672.

41. *Id.* (citing *Louisville & N.R.R. v. Mottley*, 219 U.S. 467 (1911), which held that passage of federal law that prohibited common carriers from issuing free travel passes discharged railroad's duty to honor such passes).

42. *Id.*

43. 122 Eng. Rep. 309 (K.B. 1863).

matter of the contract excused performance by the parties to the contract. The theory underlying the excuse in *Taylor v. Caldwell* maintained that although the contract did not provide for the contingency that occurred, its occurrence rendered performance impossible and justified the court's imposition of an implied term to the contract.⁴⁴

American courts have not been comfortable with the impossibility excuse,⁴⁵ but they have nonetheless reluctantly granted it. Generally, the courts have limited its availability to circumstances similar to those in the three traditional categories of impossibility in the common law.⁴⁶ Over the course of the scholarly and judicial debate surrounding this excuse, most authorities recharacterized the impossibility excuse as the doctrine of impracticability of performance.⁴⁷

2. Section 2-615

The Uniform Commercial Code codifies the impracticability doctrine in section 2-615.⁴⁸ As with the common law principle of impossibility, the UCC rationale rests on the theory that in some circumstances justice requires that a court allocate the risks of performance that has become more burdensome than originally contemplated and excuse performance under the contract.⁴⁹ At first glance the provisions of section 2-615 appear straightforward, but many issues arise out of the general wording of the provision. The

44. Professor Farnsworth has labeled the rule announced in *Taylor v. Caldwell* the "fountainhead of the modern law of impossibility." E. FARNSWORTH, *supra* note 39, § 9.5, at 673.

45. American courts have, however, generally recognized the excuse of frustration of purpose. *See id.* § 9.7, at 690. The factors necessary to establish this excuse differ little from those necessary to establish impossibility, but the party must show in addition that the occurrence of the event has frustrated its principal purpose in entering the contract. *See Lloyd v. Murphy*, 25 Cal. 48, 153 P.2d 47, 52 (1944) (Traynor, J.); *Valencia Center, Inc. v. Publix Super Mkts., Inc.*, 464 So. 2d 1267, 1269 (Fla. Dist. Ct. App. 1985); *Scullin Steel Co. v. Paccar, Inc.*, 708 S.W.2d 756, 762 (Mo. Ct. App. 1986); *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wash. 2d 558, 637 P.2d 647, 650 (1981).

46. The three categories consist of (1) death of the promisor, (2) illegality of performance, and (3) destruction of subject matter. *See* E. FARNSWORTH, *supra* note 39, § 9.5; *see also* 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 244 N.E.2d 37, 41 (1968) ("excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, *vis major*, or by law" (emphasis in original)).

47. Professor Farnsworth notes that both the first and second Restatements of Contracts use the term "impracticability" and that Williston, in his original treatise, referred to the impossibility doctrine as excusing a party when performance had become "impracticable in a business sense." *See* E. FARNSWORTH, *supra* note 39, § 9.6, at 679 n.12. The California Supreme Court in *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458, 460 (1916), stated that "[a] thing is impossible in legal contemplation when it is not practicable" (quoting 1 BEACH ON CONTRACT § 216 (1897)). Expanding on this notion, Judge Skelly Wright, in *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 n.1 (D.C. Cir. 1966), noted that "the concept of impracticability assumes performance was physically possible." The notion that performance could be physically possible yet unenforceable contradicts the underlying reasoning of the early common law exceptions, but courts apparently have not required strict impossibility since the relaxation of the rule in *Paradine v. Jane*, 82 Eng. Rep. 897 (K.B. 1647). *See supra* note 34 and accompanying text; *see also* E. FARNSWORTH, *supra* note 39, § 9.6, at 679 n.12.

48. For the relevant text of § 2-615, *see supra* note 2.

49. *See United States v. Wegematic Corp.*, 360 F.2d 674, 676-77 (2d Cir. 1966); E. FARNSWORTH, *supra* note 39, § 9.6, at 678.

following discussion outlines the elements required to excuse performance under section 2-615 and addresses the issues arising under its provisions.

Section 2-615 contains four elements: (1) the occurrence of an event must render performance as agreed impracticable; (2) the nonoccurrence of the event must have been a basic assumption of the contract; (3) the event must not have occurred due to the fault of the party claiming the excuse;⁵⁰ and (4) the party seeking the excuse must not have agreed to assume a greater obligation.⁵¹ Several issues arise in the application of these elements. First, under what circumstances will a court find performance impracticable?⁵²

a. Impracticability. The few cases that have allowed the commercial impracticability excuse of section 2-615 have done so on the same rationale that the early common law courts granted the impossibility excuse.⁵³ In *Asphalt International, Inc. v. Enterprise Shipping Corp.*,⁵⁴ for example, a ship charterer brought suit against the owner of the vessel for breach of the charter agreement, claiming that the owner failed to repair the ship in accordance with the charter contract. The ship had been loading cargo at a pier when another vessel rammed her amidship, inflicting substantial damage. The cost of repairing the vessel significantly exceeded the value of the ship. The owner defended its failure to repair the vessel by claiming an excuse under section 2-615.⁵⁵ Recognizing that section 2-615 applied exclusively to the sale of goods, the court nevertheless applied the principles of that section to excuse the owner.⁵⁶ Because requiring the owner to repair "would require a type of performance essentially different from that for which Asphalt contracted," the Second Circuit ruled that the complete destruction of the vessel rendered the owner's contractual duty to repair commercially impracticable.⁵⁷

In *Waldinger Corp. v. CRS Group Engineers, Inc.*⁵⁸ a prime contractor sued one of its subcontractors for breach of an agreement to supply specially engineered equipment for use in a sewage treatment plant. The contract

50. Because most cases raising § 2-615 issues do not address this third element, this Comment does not elaborate on it.

51. U.C.C. § 2-615. Courts differ on the number of elements that comprise the excuse afforded in § 2-615. *Compare In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440, 451 (E.D. Va. 1981) (claims of commercial impracticability raise four issues: (1) impracticability, (2) foreseeability, (3) basic assumption, (4) risk allocation) with *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 134 (N.D. Iowa 1978) (§ 2-615 requires proof of three elements: (1) whether the risk of an unforeseen contingency was assumed, (2) basic assumption, (3) impracticability).

52. Few defendants have successfully raised the impracticability defense, thus little authority exists to fully describe what constitutes impracticability. As stated *infra* note 62 and accompanying text, however, much authority exists to describe what does not constitute impracticability.

53. *See supra* notes 37-41 and accompanying text.

54. 667 F.2d 261 (2d Cir. 1981).

55. *Id.* at 266.

56. *Id.*

57. *Id.* (citing *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966), discussed *infra* notes 63-66 and accompanying text).

58. 775 F.2d 781 (7th Cir. 1985).

listed several restrictive specifications for the equipment under the contract. The subcontractor supplied equipment that met the performance requirements issued by the Environmental Protection Agency but that did not strictly comply with the engineering specifications listed in the contract. In defending the suit the subcontractor raised the impracticability defense of section 2-615, arguing that it had relied on the EPA rules prohibiting the type of restrictive specifications found in the contract and claiming that if it had complied with the restrictive specifications, its machine would not have performed in accordance with the government rules.⁵⁹ The Second Circuit agreed with the subcontractor and excused its nonperformance under the contract. The court stated that the subcontractor's "inability to supply a filter press that would both satisfy [plaintiff's] mechanical specifications and perform as required [by the EPA] is sufficient to establish that performance of its contract with [the plaintiff] was commercially impracticable."⁶⁰

The reasoning of both of the above decisions parallels the reasoning underlying the exceptions to the absolute performance rule of the early common law. In *Asphalt International, Inc.* the court excused the owner of the vessel because the subject matter of the contract had essentially been destroyed. In *Waldinger Corp.* the court excused the subcontractor because federal law prevented performance in accordance with the terms of the contract. Although neither decision discussed the common law exception that it implicitly incorporated, this omission is not surprising; the UCC supplied the tools necessary for the court to allocate the risks arising from each occurrence. These decisions are important because they reveal the similarity of the common law impossibility excuse and the section 2-615 excuse. The decisions bolster the argument that the two excuses are the same.⁶¹

While the occurrence of an event that falls within the three categories of common law impossibility appears to place a party under the protection of section 2-615, some limits exist. Nearly all courts agree that an event that merely renders performance more expensive or less profitable will not operate to excuse a party.⁶² During the Middle-East crisis that closed the Suez Canal in the late 1950s, for example, many shippers had to reroute around the Cape of Good Hope. The operator of the ship in *Transatlantic Financing Corp. v. United States*⁶³ sought to recover the extra costs attendant with its diversion around the Cape. The operator argued that the closure of the canal rendered the contemplated performance impossible and that the ship's

59. *Id.* at 784-86.

60. *Id.* at 789.

61. Commentators disagree on whether the impossibility excuse and the § 2-615 excuse differ. *Compare* Tannenbaum, *supra* note 17, at 783 ("the Code intended to adopt a more lenient standard for discharge") with E. FARNSWORTH, *supra* note 39, § 9.6, at 677 ("The common law development . . . is synthesized in UCC 2-615").

62. *See* Northern Ill. Gas Co. v. Energy Coop., Inc., 122 Ill. App. 3d 940, 461 N.E.2d 1049, 1061 (1984); Nora Springs Coop. Co. v. Brandau, 247 N.W.2d 744, 748 (Iowa 1976); *see also* E. FARNSWORTH, *supra* note 39, § 9.6, at 680 n.18 (citing numerous cases and articles discussing additional expense in light of § 2-615).

63. 363 F.2d 312 (D.C. Cir. 1966). This case was one of the first federal appellate decisions to address specifically the newly enacted § 2-615. *See also* United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966) (another early major case to address § 2-615 issues).

subsequent voyage around the Cape conferred a benefit for which the operator should recover.⁶⁴ In a well-reasoned opinion that characterized the commercial impracticability doctrine of section 2-615 as representing "the ever-shifting line . . . at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance,"⁶⁵ Judge Skelly Wright rejected the operator's claim of impracticability. Judge Wright concluded, in essence, that the disparity between the expected cost under the contract and the actual cost of the diverted voyage was not great enough to render the required performance impracticable.⁶⁶

The application of the impracticability doctrine to long-term contracts provides particularly helpful insight into the problems faced in the take-or-pay context. In *Missouri Public Service Co. v. Peabody Coal Co.*⁶⁷ a utility sought to require a coal company to perform its obligations under a long-term coal supply agreement. The coal company had informed the utility of its intention not to perform in the face of potential financial losses and argued that section 2-615 excused its obligation to supply coal at a financial loss. The court affirmed a lower court decree of specific performance, finding that the mere fact that the coal company made a bad bargain under which it might suffer financial loss did not render its performance commercially impracticable.⁶⁸

One might expect that a court would be more likely to grant a section 2-615 excuse to a party that cannot economically perform a long-term contract, because the length of time over which the party must continue to perform unprofitably magnifies the party's hardship.⁶⁹ The *Peabody Coal Co.* decision fairly reflects the disagreement that most courts have with that view: courts typically view the long-term contract as the method chosen by the parties to allocate the large economic risks of a transaction, and the courts simply will not disturb that allocation.⁷⁰

64. *Transatlantic Fin. Corp.*, 363 F.2d at 315.

65. *Id.*

66. *Id.* at 319 (quoting § 2-615 comment 4: "Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance.").

67. 583 S.W.2d 721 (Mo. Ct. App. 1979).

68. *Id.* at 728.

69. One famous decision indicates that increased cost may suffice to excuse a party to a long-term contract. See *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 78 (W.D. Pa. 1980). Although Judge Teitelbaum's decision in this case represents one of the most scholarly and succinct reviews of the law of excuse, his decision to reform the contract and allocate the burdens fairly among the parties has prevented the opinion from becoming the deserved foundation from which all analyses of § 2-615 derive.

70. See, e.g., *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986) (purpose of long-term fixed price contracts is to allocate risks attendant with modern economy; fluctuations in that economy cannot serve as excuse to "allow the buyer to walk away from the contract"); *Northern Ill. Gas Co. v. Energy Coop., Inc.*, 122 Ill. App. 3d 940, 461 N.E.2d 1049, 1061 (1984) (long-term fixed price supply contracts allocate the risk of a fall in prices to buyer, and court will not alter that allocation). The comments to § 2-615 state that market fluctuations are "exactly the type of business risk which business contracts made at fixed prices are intended to cover." U.C.C. § 2-615 comment 4 (1987).

This aspect of the section 2-615 excuse applies particularly to take-or-pay litigation. Most pipelines defend take-or-pay suits by claiming that the fall of natural gas prices renders their contractual obligations commercially impracticable to perform.⁷¹ Courts have summarily rejected the pipelines' claims, using reasoning similar to that in *Peabody Coal Co.*⁷²

Despite the seemingly clear conclusion that economic hardship does not render performance commercially impracticable, some uncertainty still exists about the role that the economic well-being of a party plays in the impracticability analysis. This uncertainty stems, in part, from the language of the comments to section 2-615.⁷³ Comment 4 states that "[i]ncreased cost alone does not excuse performance *unless* the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance."⁷⁴ This language intimates that section 2-615 may operate to excuse a party if that party would suffer such economic hardship in performing its contract that by forcing it to perform a court would be effectively writing a new contract for it.⁷⁵

This theory finds support in a pre-UCC case that was among the first to enunciate the impracticability doctrine. In *Mineral Park Land Co. v. Howard*⁷⁶ the California Supreme Court excused a party from its contractual obligation because the party could have further performed under the contract only at a "prohibitive cost . . . of 10 or 12 times as much as the usual cost."⁷⁷ The holding has proved to be a lasting part of American jurisprudence. Many defendants have relied on the California Supreme Court's recognition of the role that profit and expenses play in the impracticability analysis. Courts, while most often rejecting the excuse when sought on financial grounds, have had at least to acknowledge that such financial considerations play a role in the impracticability analysis.⁷⁸ While most

71. See Medina, McKenzie & Daniel, *supra* note 2, at 233.

72. See *Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98, 109 (W.D. La. 1985); *Challenger Minerals, Inc. v. Southern Natural Gas Co.*, No. 84-C-357-E, slip op. at 14-15 (N.D. Okla. Sept. 9, 1986), *withdrawn as settled* (Nov. 26, 1986); *Thomas N. Berry & Co. v. Northern Natural Gas Co.*, CIV-85-1430-R (W.D. Okla. May 13, 1986); *Reading & Bates Petroleum Co. v. Transok, Inc.*, No. CJ-85-1992, slip op. at 11 (Tulsa Cty. Dist. Ct., Okla. Jan. 27, 1987), *withdrawn as settled* (March 18, 1987); *Lone Star Gas Co. v. McCarthy*, 605 S.W.2d 653, 656-57 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

73. Although the UCC comments do not bind a court in its interpretation of the statute unless the legislature has adopted them as an expression of the meaning of the statute, many courts rely on them as evidence of the intent of the drafters of a particular section. *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 885 n.2 (10th Cir. 1985).

74. U.C.C. § 2-615 comment 4 (1988) (emphasis added).

75. Indeed, Judge Skelly Wright acknowledged in *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966), that "it may be an overstatement to say that increased cost . . . of performance never constitute[s] impracticability."

76. 172 Cal. 289, 156 P. 458 (1916).

77. 156 P. at 459.

78. See *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986); *Bernina Distribs., Inc. v. Bernina Sewing Mach. Co.*, 646 F.2d 434, 439 (10th Cir. 1981); *American Trading & Prod. Corp. v. Shell Int'l Marine Ltd.*, 453 F.2d 939, 942 (2d Cir. 1972); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966); *Printing Indus. Ass'n v. International Printing & Graphic Communications Union*, 584 F. Supp. 990, 1000-01 (N.D. Ohio 1984); *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 72

contractual relationships still fall within the standards applied by the *Peabody Coal Co.* court,⁷⁹ the specter of a relaxed view towards impracticability due to economic hardship looms in the background.⁸⁰

b. Basic Assumption. A party seeking the section 2-615 excuse must show that the nonoccurrence of the contingency was a "basic assumption" of the contract.⁸¹ Professor Farnsworth argues that the three fundamental exceptions to the common law rule of absolute performance⁸² represent the primary categories of basic assumptions.⁸³ Parties presume that they will be alive long enough to perform the contract, that the performance will remain legal, and that the incidents necessary for performance will remain in existence. Courts, however, approach the basic assumption issue by examining the foreseeability of the event in question.⁸⁴ Courts generally view the occurrence of a foreseeable contingency as a basic assumption of the contract, and they deny an excuse based on such a contingency on the presumption that the burdened party implicitly agreed to bear the risk occasioned by the event.⁸⁵

In *Northern Illinois Gas Co. v. Energy Cooperative, Inc.*,⁸⁶ for example, a purchaser of chemical feedstock entered into a long-term take-or-pay contract at a specified price. When the price of alternative fuels fell below the contract price of the chemical feedstock, the purchaser sought to abandon its performance by claiming that the shifts in the energy economy rendered performance commercially impracticable. The court denied the excuse, reasoning that adverse shifts in the energy economy were foreseeable and that the purchaser assumed the risk of the occurrence of those adverse shifts when it entered into the take-or-pay contract.⁸⁷ The reason for the court's refusal to find that the complained of contingency was unforeseeable was simple. The court could not employ section 2-615 to allocate the risk of the contingency

(W.D. Pa. 1980); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 136 (N.D. Iowa 1978).

79. See *supra* notes 67-68.

80. One academic favors a more relaxed view towards granting the excuse on financial grounds. He argues that the courts have too strictly applied § 2-615 to cases where granting the excuse appears the just result. Murray, *Long-Term Supply Contracts: Foreseeing the Unforeseeable*, 2 E. MIN. L. INST. § 2, § 2.02(7) (1981) (arguing that courts have been too preoccupied with "the sanctity of contract" to achieve a just resolution of the dispute where one party suffers from a dramatic change in market conditions).

81. See *supra* text accompanying note 50.

82. See *supra* notes 40-44 and accompanying text.

83. E. FARNSWORTH, *supra* note 39, § 9.6, at 683 n.28.

84. See *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 134 (N.D. Iowa 1978); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441 (S.D. Fla. 1975); *Northern Ill. Gas Co. v. Energy Coop., Inc.*, 122 Ill. App. 3d 940, 461 N.E.2d 1049, 1060 (1984). The comments to § 2-615 indicate that the relevant inquiry is whether the "contingency in question is sufficiently foreshadowed." U.C.C. § 2-615 comment 8 (1987). Although the term "foreseeability" may have lost its relevance for the purposes of UCC analysis, this Comment employs it because the courts continue to use it.

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

86. 122 Ill. App. 3d 940, 461 N.E.2d 1049 (1984).

87. 461 N.E.2d at 1060.

because the parties had already allocated that risk in the contract.⁸⁸ By allocating that risk the parties revealed that they foresaw the contingency and sought to avoid it.

c. Assumption of Greater Obligation. The excuse under section 2-615 is not available to a party if it has assumed a greater risk under the contract.⁸⁹ In most circumstances this analysis must rely on specific contract terms that allocate to one party or the other the risk that performance will become more difficult.⁹⁰ This analysis is essentially a mirror image of the foreseeability analysis above: If the contract terms indicate that a risk was foreseeable, the court will deny the excuse sought by the nonperforming party. When a party assumes a greater obligation under the contract, it indicates which foreseeable risks it is willing to assume.

The court's decision in *Bernina Distributors, Inc. v. Bernina Sewing Machine Co.*⁹¹ reflects this reasoning. An importer sought the impracticability excuse because fluctuating exchange rates had eroded its profit margin. The contract provision at issue allowed the importer to raise the price of the machines it sold to American distributors only to the extent that the price of the machines purchased by the importer increased. The importer desired to add a surcharge to the price it charged the American distributors in order to recoup the profit lost to the fluctuating exchange rates. In denying the excuse, the court reasoned that because the contract limited price increases to a specified type, the importer had assumed the risk that fluctuating exchange rates would reduce its profit.⁹² As support for its conclusion the court pointed to the fact that the importer had "clear foreknowledge of the possibility of currency fluctuations."⁹³

The element of section 2-615 that a party not assume a greater obligation under the contract is particularly applicable to take-or-pay contracts. In a take-or-pay contract a pipeline agrees to take gas, or if it does not take gas, to pay for a minimum amount of gas anyway. The court's formulation in *Bernina* indicates that if a pipeline has specifically contracted with regard to its ability to take or pay for gas, thus indicating that even if it does not need

88. The take-or-pay provision was designed to protect the buyer from shortages of supply and to insulate the seller from price fluctuations. *See id.* at 1061.

89. The excuse afforded under § 2-615 applies "[e]xcept so far as a seller has assumed a greater obligation." *See supra* note 3. Courts have occasionally questioned whether, in light of the specific mention of sellers, § 2-615 applies at all to buyers. *See Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 748 (Iowa 1976). Most courts, however, have determined that § 2-615 does apply to buyers. *See, e.g., International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (1985) (reversing lower court determination that § 2-615 does not apply to buyers), *cert. denied*, 475 U.S. 1015 (1986); *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 277 (7th Cir. 1986) (discussing whether Indiana applies § 2-615 to buyers); *Lawrance v. Elmore Bean Warehouse, Inc.*, 108 Idaho 892, 894, 702 P.2d 930, 932 (Idaho Ct. App. 1985) (concluding that § 2-615 applies to buyers). The courts addressing this issue rely on comment nine, which states that in certain circumstances "the reason of the present section may well apply and entitle the buyer to the [excuse]." U.C.C. § 2-615 comment 9 (1987).

90. *See E. FARNSWORTH, supra* note 39, § 9.6, at 683 n.36.

91. 646 F.2d 434 (10th Cir. 1981).

92. *Id.* at 439.

93. *Id.*

the gas it is willing to pay for it, then the pipeline cannot claim impracticability because subsequent events have altered its ability to take the gas.⁹⁴ Indeed, the court in *Northern Illinois Gas Co. v. Energy Cooperative, Inc.*⁹⁵ followed that reasoning and concluded that because the purchaser had entered a take-or-pay contract, it had guaranteed its performance without regard to whether it actually needed the chemical feedstock.⁹⁶

The question of whether one party has assumed a greater obligation under the contract focuses the excuse analysis on the root issue of risk allocation. The court denied the section 2-615 excuse to the importer in *Bernina* because the importer had agreed in the contract to bear the burden of fluctuating exchange rates. Similarly, the court in *Northern Illinois Gas Co.* refused to excuse the purchaser because the purchaser had explicitly bargained for the risk that subsequently made the contract unprofitable.⁹⁷ Long-term supply contracts are not the only means by which the parties allocate risk. The following discussion shows how a force majeure clause operates as a method of risk allocation. The discussion reveals the distinction between the section 2-615 excuse and the force majeure excuse and shows why the two excuses are mutually exclusive.

B. Force Majeure

A force majeure clause excuses a party on the happening of a force majeure event.⁹⁸ Parties include force majeure clauses in their contracts because they wish to limit the risk that a future event will prevent them from performing the contract and subject them to liability on the unperformed obligation.⁹⁹ The following discussion focuses on three important limitations that courts place on the force majeure excuse.

94. This is not to say that the pipeline cannot claim that its ability to pay has become commercially impracticable. As shown above, however, the courts are very unlikely to grant the § 2-615 excuse because performance has become unprofitable. See *supra* note 68 and accompanying text.

95. 461 N.E.2d 1049, 1060 (1984). For the facts of this case, see *supra* text accompanying note 86.

96. The purchaser had assumed an obligation to pay for the product even if subsequent events rendered its ability to take the product impracticable, or even impossible. 461 N.E.2d at 1060-61.

97. Most businessmen would probably acknowledge that commercial contracts involve trade-offs and compromises. One party agrees to accept some risk in order to achieve a potential benefit. The UCC recognizes that businessmen constantly take such calculated risks, and § 2-615 embodies the policy that the law should not, under most circumstances, alter the choices that the businessmen make. See U.C.C. comment 8 (1987) (commercial contracts contain a choice of risks as part of the "dickered terms").

98. See *supra* note 4 for a typical force majeure provision. It is dangerous to generalize about contract provisions that invariably differ between any two contracting parties. This Comment, while bearing in mind that danger, attempts to develop a generalized discussion of the judicial treatment of force majeure clauses, focusing particularly on their scope and application.

99. See Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75, 76 (1974). Parties to a contract include force majeure clauses primarily to allocate the risk of the future occurrence of some event that would render one of them unable to comply with its contractual obligations. See Kirkham, *supra* note 36, § 6.02[2] ("purpose of the force majeure concept in legal relationships is to provide an established legal standard by which the . . . risks inherent in everyday life can be allocated and managed"); Marks & Martin,

1. Catch-all Provisions

While the definition of a force majeure event varies depending on the subject matter of the contract, virtually all clauses include as a definition of a force majeure event any occurrence beyond the reasonable control of the parties.¹⁰⁰ The first limitation on the excuse under a force majeure clause is the scope of this catch-all language. A party often asks the court to grant the force majeure excuse because an event that the force majeure clause does not list but that allegedly falls within the catch-all provision of the clause has occurred and has adversely affected the party's ability to perform. Under the doctrine of *ejusdem generis*¹⁰¹ courts have denied the claimed excuse unless the allegedly excusing event is similar to or of the same nature as the events specifically listed in the force majeure clause.

In *Lanham-Hill Petroleum, Inc. v. Southern Fuels Co.*,¹⁰² for example, the court denied the force majeure excuse sought by a crude oil purchaser. The purchaser claimed that the Saudi Arabian effort to regain market share by flooding the market with crude oil and causing a dramatic fall in world oil prices prevented the purchaser from economically performing the contract. The court rejected the purchaser's claim and held that the alleged contingency did not constitute a force majeure event that triggered the excusing provision.¹⁰³ The court reasoned that if "fixed-price contracts can be avoided due to fluctuations in price, then the entire purpose of fixed-price contracts, which is to protect both the buyer and the seller from the risks of the market, is defeated."¹⁰⁴

Indeed, in virtually all decisions addressing force majeure claims based on an inability to make a profit because of some cause beyond a party's control, courts have rejected the application of the catch-all provision to excuse the party from its contractual obligation.¹⁰⁵ The cases that reject the force majeure excuse based on adverse economic events reflect the courts' tendency both to construe the provisions of a force majeure clause narrowly and

supra note 36, § 5.04(3)(b) ("force majeure clause is . . . an attempt to exclude risks that are not being assumed").

100. Indeed, the notion of force majeure arose originally to address those occurrences, such as acts of God, that humans had no power to control. *See supra* note 4.

101. *Ejusdem generis* is a rule of contract interpretation that limits application of general terms that follow specific terms to the same type or character as the specific terms. *See Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 988 (5th Cir. 1976); *Bumpus v. United States*, 325 F.2d 264, 266-67 (10th Cir. 1963).

102. 813 F.2d 1327, 1329-30 (4th Cir.), *cert. denied*, 108 S. Ct. 99 (1987).

103. 813 F.2d at 1329-30.

104. *Id.* at 1330.

105. *E.g.*, *Lanham-Hill Petroleum, Inc. v. Southern Fuels Co.*, 813 F.2d 1327, 1329-30 (4th Cir.), *cert. denied*, 108 S. Ct. 99 (1987) (rejecting force majeure defense and holding that world oil price shock, although financially harmful, did not prevent performance under contract); *Northern Ind. Pub. Serv. v. Cabron County Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986) (rejecting force majeure defense and holding that utility company's inability to pass fuel costs to consumers did not prevent utility company from complying with its contractual obligations); *Northern Ill. Gas Co. v. Energy Coop., Inc.*, 122 Ill. App. 3d 940, 461 N.E.2d 1049, 1057 (1984) (public utility commission denial of requested rate increase did not constitute force majeure and did not excuse party from its obligation despite fact that party may suffer financial loss).

to require that the clause state with particularity the events that will operate to excuse a party.¹⁰⁶ The cases also reveal how the courts construe the parties' agreed-upon allocation of risk. In *Langham-Hill Petroleum, Inc.*, for instance, the court essentially concluded that because the force majeure clause made no mention of adverse economic or market events, the contract had not removed that risk from the purchaser.¹⁰⁷

2. Causation of Event by Nonperforming Party

The second limitation on the force majeure excuse conditions the availability of the excuse on the behavior of the party claiming the excuse. Generally, courts require that the party claiming the force majeure excuse show that it did not cause the event that prevents its performance.¹⁰⁸ The rationale underlying this requirement is sound. Not only does this requirement recognize the explicit language of most force majeure clauses, it also prevents a promisor from evading its obligations by causing a force majeure event.

At least one court requires an additional showing that the party alleging the excusing event must prove that it took reasonable steps to prevent the occurrence of the excusing event.¹⁰⁹ Although less obvious, the rationale underlying this requirement is also sound. If the primary purpose of the force majeure clause is to aid a party when some event prevents its performance, the ability of the party to forestall the occurrence of the excusing event suggests that the event by itself did not really prevent the party's performance.¹¹⁰

106. See *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440, 459 (E.D. Va. 1981) (U.S. government's failure to authorize construction of nuclear fuel depositories and its action rendering illegal the reprocessing of spent nuclear fuel did not constitute force majeure event that prevented fuel supplier from performing its obligation to remove spent nuclear fuel from reactor site); *Golsen v. ONG W., Inc.*, 756 P.2d 1209, 1212-14 (Okla. 1988) (failure of demand for natural gas under take-or-pay contract did not constitute force majeure event preventing pipeline from making payments under the terms of the contract; "[s]uspension of the obligation . . . in the event of a partial failure of the market is contrary to the general purpose of the contract, and . . . would transform the contract to another creature entirely"); *Troxell v. Beacon Coal Co.*, 50 Pa. D. & C. 128, 131 (1943) (inability to market coal under take-or-pay contract does not constitute a force majeure event over which operator had no control); *Hawkland*, *supra* note 99, at 76.

107. See 813 F.2d at 1329 n.1 (text of force majeure clause), 1330.

108. See *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 123 (1943) (reversing Court of Claims decision excusing a party for occurrence of force majeure event that was within control of the party); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1540 (5th Cir. 1984) (determining application of California law on question of reasonable control).

109. See *Oosten v. Hay Haulers Dairy Employees & Helpers Union*, 45 Cal. 2d 784, 291 P.2d 17, 20-21 (1955); see also 6 CORBIN ON CONTRACTS § 1342 (1962) (and cases cited therein).

110. The next logical question is whether a party must also show that it could have reasonably prevented the effect of the excusing event, regardless of whether or not the party could have prevented the event itself. The authorities do not explore this question, perhaps because it implicitly raises the same issue addressed by the court in *Oosten*: If a party could prevent the effect of the excusing event, but did not, the scope of the party's duty would be measured by the same rule as when the party could have prevented the occurrence of the event itself, but did not. The tendency of this rule is to import into the force majeure provision a standard of good faith on the part of the party claiming the excuse. That is, a party must exercise good faith to

Most of the cases addressing this "reasonable control" issue involve a party seeking an excuse for some event not specifically listed in the force majeure clause.¹¹¹ The party usually claims that the event falls within the catch-all provision that purports to include all events beyond the party's control.¹¹² Occasionally, however, the party seeks an excuse based upon the occurrence of a specifically listed event. The question thus arises whether a party must satisfy the reasonable control rule in establishing a force majeure defense based on a specifically listed event rather than on the catch-all provision. Courts have clearly answered that question in the affirmative, holding generally that the reasonable control language modifies each event listed in the clause.¹¹³ Thus, a party seeking a force majeure excuse may not act so that the event occurs in response to the action, and, likewise, the party may not stand idly by and let an event occur when it could have prevented the event's occurrence through its own reasonable efforts.

3. *Excusing Event Must Prevent Performance*

In addition to the above two limitations, courts have imposed a strict causality requirement between the occurrence of the event and the claimed excuse.¹¹⁴ As a general rule a party claiming a force majeure excuse must demonstrate that the allegedly excusing event actually prevented performance.¹¹⁵ In *Wheeling Valley Coal Corp. v. Mead*,¹¹⁶ for example, a bank-

ensure performance. *Oosten*, 291 P.2d at 21; see *Butler v. Nepple*, 54 Cal. 2d 589, 354 P.2d 239, 244 (1960). Although this requirement potentially alters the elements necessary to establish a force majeure event, little authority exists outside of California to indicate that it is a general rule of construction applicable to force majeure clauses.

111. See *supra* note 107.

112. Courts, however, rarely grant the excuse based upon a force majeure that does not fall within the particular listing of events in the clause. See *supra* text accompanying note 100.

113. See *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1541 (5th Cir. 1984); see also *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 123 (1943) (adjective "unforeseeable," when used to describe type of event that would excuse a party, modifies each event listed in clause).

114. Many cases from the beginning of this century illustrate this point. *E.g.* *Swift & Co. v. Columbia Ry., Gas & Elec. Co.*, 17 F.2d 46, 48 (4th Cir. 1927) (under contract with electric company containing force majeure clause that excused cotton seed mill on occurrence of certain events preventing mill from receiving a minimum amount of electricity, cotton crop shortage did not excuse mill from obligation because shortage was not the cause of failure of mill to perform); *Berwind-White Coal Mining Co. v. Solleveld*, 11 F.2d 80, 83 (4th Cir. 1926) (in order for governmental restraint to excuse performance under force majeure clause of charter agreement, restraint must cause failure to perform agreement); *Kempner v. Goddard Grocer Co.*, 5 F.2d 807, 809 (8th Cir. 1925) (engine trouble at sugar refinery preventing seller from delivering sugar under contract did not suffice under force majeure provision to excuse non-delivery because seller did not show that engine failure in fact prevented delivery of sugar).

115. In his contracts treatise Williston writes:

It has become common for manufacturers and others to insert in their contracts clauses relieving them from liability in case of strikes and other unforeseen casualties. . . . [W]hile such agreements are legal, it is essential to prove that a strike or casualty comprehended within the terms of the clause in question was the actual cause of nonperformance.

3 WILLISTON ON CONTRACTS § 1968 (1920) (emphasis added). Professor Hawkland agrees and argues that the requirement that the cause actually prevent performance represents a fundamental limitation on the excuse, erected by courts through their skeptical approach to excuses for nonperformance. See Hawkland, *supra* note 99, at 76 nn.6-9.

116. 186 F.2d 219 (4th Cir. 1950).

ruptcy trustee of a mining company entered into a contract with the lessee of a mine. The contract provided for a minimum payment of royalties by the trustee to the lessee and included a force majeure provision that excused payment of the minimum royalty upon the happening of certain events, including interruption of mining due to governmental acts. Shortly after execution of the contract, the government enacted regulations that increased the cost of labor in the mines and limited the price that the trustee could charge for the coal. The lessee brought suit to recover arrearage in the payment of the minimum royalty, and the trustee defended by claiming that the governmental acts excused its performance under the force majeure clause.¹¹⁷ The court rejected the force majeure defense, concluding that the financial insolvency of the operator was the actual cause for the nonperformance of the minimum payment obligation.¹¹⁸ The court cited numerous cases in support of its reasoning that the allegedly excusing event must be "the actual cause of nonperformance."¹¹⁹

III. ANALYSIS

The above discussion reveals the fundamental distinction between the force majeure excuse and the section 2-615 excuse. The force majeure excuse arises directly from the contract between the parties and represents their agreement about how to allocate the risks of future adverse events.¹²⁰ The section 2-615 excuse, on the other hand, arises from the statutory determination that because the parties did not allocate a particular risk, the court should perform that task for them by excusing a party. Section 2-615 embodies the policy that, when egregious and unforeseen circumstances exist, fairness dictates that the court excuse the burdened party.¹²¹ A court should not combine the two excuses because the analyses underlying the excuses differ. Under section 2-615 a party does not have to show that it cannot perform its contract; rather, the party need only show that its performance differs markedly from what it originally contemplated.¹²² Under a force majeure clause, however, the party must show that it cannot perform the contract at all because a particular event has actually prevented performance.¹²³ Each excuse requires different proof regarding the effect of the complained of event. To grant a force majeure excuse upon a showing that the party could perform, but could perform only impracticably, confounds the analysis of the force majeure excuse. The following discussion critiques several recent decisions that have undertaken such a confused analysis.

In *International Minerals & Chemical Corp. v. Llano, Inc.*¹²⁴ the court

117. *Id.* at 221.

118. *Id.* at 223.

119. *Id.* (quoting 3 WILLISTON ON CONTRACTS § 1968 (1920)).

120. *See supra* note 98.

121. *See supra* note 65 and accompanying text.

122. *See supra* note 57 and accompanying text. Recall that increased cost does not make performance markedly different. *See supra* notes 62-66 and accompanying text.

123. *See supra* note 114.

124. 770 F.2d 879 (10th Cir. 1985).

ignored the above distinction and concluded, without considering the implications of its decision, that the analysis required under section 2-615 applied to the analysis of the force majeure excuse.¹²⁵ In this case an industrial buyer of natural gas entered into a take-or-pay contract with a producer to supply natural gas to the buyer's potash processing facility. The processing plant consisted of nine gas-fired boilers that the buyer used to manufacture fertilizer. At the time the parties entered into the contract, the emissions from the processing plant were not subject to environmental regulation. Six years later, however, the New Mexico Environmental Improvement Board promulgated a rule that severely limited the emissions allowed from the buyer's processing plant. The buyer attempted to reduce its pollution by various means, but it could not come within the limits specified by the regulatory board if it continued to use the gas-fired boilers. The buyer therefore shut down its boilers and consequently failed to take the minimum amount of gas under its contract with the producer.

The buyer sought a declaratory judgment, claiming that its action in complying with the environmental order excused its obligation under two force majeure provisions in the contract¹²⁶ to take or pay for the natural gas. The court analyzed the two force majeure provisions separately, recognizing that the case fundamentally presented a problem of contract construction.¹²⁷ The court had no difficulty construing the terms of the first generic force majeure provision.¹²⁸ It rejected the argument that the buyer's required compliance with the environmental order excused both its duty to take and to pay for the natural gas:

[E]ven if we assume . . . that [the order] prevented [the buyer] from taking the gas, [the order] would still pose no obstacle to [the buyer's] ability to pay. Since this is a "take or pay" contract, the buyer can perform in either of two ways. It can either (1) take the minimum purchase obligation of natural gas . . . or (2) pay the minimum bill. It is settled law that when a promisor can perform a contract in either of two alternative ways, the impracticability of one alternative does not excuse the promisor if performance by means of the other alternative is still

125. *Id.* at 886.

126. The pertinent parts of the two provisions stated:

15. FORCE MAJEURE: Either party shall be excused for delay or failure to perform its agreements and undertakings . . . when and to the extent that such failure or delay is occasioned by fire, flood, wind, lightning, or other acts of the elements, explosion, act of God, act of the public enemy, or interference of civil and/or military authorities . . . or other casualty or cause beyond the reasonable control of the parties, respectively, which delays or prevents such performance in whole or in part

16. ADJUSTMENT OF MINIMUM BILL: In the event that Seller is unable to deliver or Buyer is unable to receive gas as provided in this Contract for any reason beyond the reasonable control of the parties, or in the event of force majeure as provided in Section 15 hereof, an appropriate adjustment in the minimum purchase requirements . . . shall be made.

Id. at 882. The minimum purchase requirements provision provided that the buyer would take or pay for a minimum amount of gas during each calendar year. *Id.*

127. *Id.* at 884.

128. For the text of the first force majeure clause, paragraph 15, see *supra* note 126.

practicable.¹²⁹

The court concluded that the first force majeure provision could at most excuse only the buyer's duty to take the gas but could not excuse its duty to pay for gas not taken under the contract.¹³⁰

The court struggled with the construction of the second force majeure provision, which provided for adjustments to the minimum purchase obligation.¹³¹ The court noted that in order for the buyer to succeed on its claim of excuse under the second force majeure clause, the environmental order must have rendered the buyer unable to receive gas under the terms of the contract.¹³² The court then construed the word "unable" as "synonymous with 'impracticable,' as that term is used in . . . Section 2-615."¹³³ The court reasoned that in the literal sense of the second force majeure provision, the buyer would never be unable to take the gas because it "could always take the gas and vent it into the air."¹³⁴ Rather than read such a "simplistic" meaning in the terms of the force majeure clause, the court chose to construe "unable" according to the way that businessmen and attorneys presumably would construe it, that is, as impracticable.¹³⁵ In other words, the court imported into the force majeure provision the excusing burden of section 2-615 rather than construing the clause to require that the contingency actually prevent performance.¹³⁶

The *Llano* decision has a major fault. The court claimed to be construing the second force majeure provision according to commercial standards that were recognized as inherent parts of the common law by businessmen and attorneys, but the court missed a step in its logic. It bypassed any discussion of the common law, which should have applied since the parties by agreement went outside the UCC, and instead moved headlong into a discussion of the UCC, adopting the impracticability standard as the representative standard of force majeure clause construction. In this analysis the court discarded a well-established judicial practice of requiring that a claimed force majeure event actually prevent performance in order to excuse the party raising the force majeure defense. Perhaps the error can in part be explained by the fact that the court never explicitly recognized the so-called minimum bill provision as a force majeure clause.¹³⁷ The language of the minimum

129. 770 F.2d at 885.

130. *Id.*

131. For the text of the second force majeure clause, paragraph 16, see *supra* note 126.

132. 770 F.2d at 886.

133. *Id.*

134. *Id.*

135. The court stated that under the common law of New Mexico the term "unable" in a contract means impracticable. *Id.* The court, however, cites no authority for this conclusion, and, in addition, fails to note that the common law has traditionally construed the excuse language of a force majeure clause, whether couched as "prevented from" or "rendered unable," as requiring the event actually to prevent performance. See *Hawkland, supra* note 99, at 76.

136. In effect, the court interpreted the second force majeure provision to provide: "16. In the event that force majeure renders it commercially impracticable for Buyer to receive gas as provided in this Contract, an adjustment in the minimum purchase requirements shall be made."

137. 770 F.2d at 886.

bill provision clearly raises force majeure issues, because it speaks not only of nonperformance caused by events beyond the control of the buyer but also specifically incorporates the provisions of the preceding force majeure clause.¹³⁸

The court's asymmetrical analysis ignored the cross-reference included in the second force majeure provision. The second force majeure provision excused the buyer's obligation to take gas and accordingly adjusted his duty to pay when any reason beyond the buyer's control or any event of force majeure, as provided in the preceding paragraph, rendered him unable to take gas. Both paragraphs treated causes beyond the buyer's control as excusing events. According to the terms of paragraph 15, a force majeure event, whether a specific event or an event under the catch-all language, arose only if it "prevent[ed] such performance in whole or in part."¹³⁹ The court, therefore, should only have excused the buyer upon a showing that a force majeure event prevented its performance under the second clause.¹⁴⁰ Such a construction would have followed the traditionally accepted approach to contract force majeure clauses.¹⁴¹ Instead, the court excused the buyer under the force majeure clause because the buyer's performance had become commercially impracticable.

The Tenth Circuit's construction of the force majeure clause in *Llano* could potentially affect all litigation in which the force majeure defense plays a part, particularly if the force majeure provision in question uses the term "unable" to define the causation element required for the excuse. Indeed, the parties in two pending take-or-pay cases in Oklahoma have already experienced the effect of construing "unable" to mean "impracticable."¹⁴² In

138. See *supra* note 126.

139. 770 F.2d at 882.

140. The court explicitly notes that the buyer could have taken the gas under contract. See *id.* at 886. Under the terms of the second force majeure clause, the buyer would then have had the option under the contract to pay for the minimum amount of gas under the terms of the take-or-pay provisions without taking any gas. The fact that such payments might financially burden the buyer would create an issue under § 2-615, but, as shown above, courts are very unlikely to grant the § 2-615 excuse because of financial hardship. See *supra* notes 62-66 and accompanying text.

141. See *supra* note 99.

142. See *Dyco Petroleum Corp. v. ANR Pipeline Co.*, No. 86-C-1097-C (N.D. Okla. Sept. 1, 1988); *Burkhart Petroleum Corp. v. ANR Pipeline Co.*, No. 87-C-257-C (N.D. Okla. July 5, 1988). Both cases involved virtually identical facts and issues. The primary issue was whether a governmental order that excused the pipeline's customer from paying any minimum bill obligation, which requires the customer to pay for a minimum amount of gas whether or not the customer actually takes the gas, constituted a force majeure event that would excuse the pipeline from its take-or-pay obligation with the producer. The force majeure clause in each case read as follows:

If either Buyer or Seller is rendered unable . . . by force majeure or any other cause of any kind not reasonably within its control to perform or comply with any obligation or condition of this Agreement . . . such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period. . . . The term "force majeure" shall include, without limitation by the following enumeration, acts of God and the public enemy, the elements, fire, accidents, breakdowns, strikes . . . any act or omission (including failure to take gas) of a purchaser of gas from Buyer which

both cases a natural gas producer sought damages for an alleged breach by the pipeline of its take-or-pay obligations. In its defense the pipeline argued that FERC's promulgation of rule 380,¹⁴³ which excused pipeline customers from a duty to pay minimum bill obligations on their gas purchase contracts, constituted a force majeure event that triggered the excuse afforded in the clause. In rejecting the producers' motions for summary judgment in both cases, Judge Cook ruled, on the authority of the *Llano* decision, that the term "unable" in a force majeure clause means impracticable.¹⁴⁴ By construing the force majeure clause in this manner, Judge Cook may have altered the course of pending and future take-or-pay litigation.

Several problems arise in the analysis of the orders in these two cases. First, while changing the burden required to come within the excuse of the force majeure provision may have had no effect on the motion for summary judgment,¹⁴⁵ such a finding alters the nature of the proof required at trial, contrary to the law surrounding the force majeure excuse. Under Judge Cook's reading of the clause, the pipeline must show that while it could have performed its obligation to take or pay for gas, the changed circumstances render that performance commercially impracticable. Under the traditional reading of a force majeure clause, on the other hand, the pipeline would have to show that the governmental regulation excusing the pipeline's customer from taking gas actually prevented the pipeline either from taking or from paying for the gas under the contract with the producer. It would be difficult for the pipeline to make this showing.¹⁴⁶

The second problem inherent in Judge Cook's findings parallels a problem in the *Llano* decision. The claimed force majeure event, governmental regulation that excused a customer of the pipeline from paying for any gas it did not take, arguably falls within the terms of the clause. In order for the

is excused by any event or occurrence of the character herein defined as constituting force majeure . . . and any laws, order, rules, regulations, acts or restraints of any government or governmental body or authority . . .

Burkhart, No. 87-C-257-C, slip op. at 2 (N.D. Okla. July 5, 1988); *Dyco*, No. 86-C-1097-C, slip op. at 2 (N.D. Okla. Sept. 1, 1988).

143. Rule 380 provides:

(a) *Limitations.* (1) Effective July 31, 1984 any pipeline rate schedule or tariff governing the sale of natural gas shall be inoperative and of no effect at law to the extent it provided for recovery of purchased gas costs for gas not taken by the buyer.

(2) No rate schedule or tariff governing the sale of natural gas and filed on or after July 31, 1984 may provide for recovery of variable costs associated with gas not taken by the buyer.

18 C.F.R. § 154.111 (1988).

144. *Burkhardt*, No. 87-C-257-C, slip op. at 9 (N.D. Okla. July 5, 1988); *Dyco*, No. 86-C-1097-C, slip op. at 9 (N.D. Okla. Sept. 1, 1988).

145. A fact question exists whether the court requires the pipeline to show that the excusing event actually prevented its performance or whether the court requires the pipeline to show that the excusing event rendered its performance impracticable.

146. As the *Llano* case indicates, the Tenth Circuit would probably agree with this conclusion. See *supra* text accompanying note 130. Judge Cook's opinion also fails to address the law surrounding alternate performance. In order for the pipeline to succeed in its excuse, whether termed impracticability or prevention of performance because of force majeure, it must show that both alternatives of its promise suffer from the effect of the occurring event. See *Llano*, 770 F.2d at 885.

clause to excuse the pipeline, however, the pipeline customer's failure must have occurred as a result of a force majeure event, as defined in the contract.¹⁴⁷ While the contract includes as a force majeure event any governmental regulation, such regulation only operates as a force majeure event if it renders a party unable to perform its obligation.¹⁴⁸ The pipeline made no such claim, but instead asserted that the FERC action merely excused the customer's duty to pay for any gas not taken. The FERC action neither prevented the customer from taking gas nor rendered such taking commercially impracticable.

IV. CONCLUSION

In *Llano* the court's confusion of the force majeure and commercial impracticability excuses has blurred the line that has traditionally divided them. By so confusing the excuses, the court has altered the agreed-upon allocation of risk that inheres in all contracts that contain force majeure clauses, especially if the clauses contain the term "unable." Such an alteration has and will continue to affect take-or-pay litigation, perhaps reversing the consistent trend favoring producers and clearing a path for new and expensive litigation concerning the validity of pipelines' take-or-pay obligations. Perhaps, too, the court's alteration will spur lawyers and businessmen to include with much more specificity the causation necessary to trigger that excuse.

147. See *supra* note 142.

148. The causation element, "render unable," must accompany each and every listed event in order for the event to rise to the level of force majeure. That is, "any act or omission (including failure to take gas) of a purchaser of gas from Buyer which is excused by [any governmental order that renders the customer unable to take gas]" will excuse the pipeline's performance. See *supra* note 142. Any other construction would allow a party to claim that any act of government constitutes force majeure, whether or not such act has any bearing on the party's performance of the contract.

