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Commercial Impracticability—An Overview

Robert Sommer*

As shortages become more severe and prices continue to climb, both suppliers and purchasers are confronted with increasingly more burdensome performance arising from long-term, set-price contracts. As performance becomes more burdensome, greater numbers of beleaguered promisors will turn to § 2-615 of the Uniform Commercial Code in hopes of excusing nonperformance. The purpose of this article is to discuss the doctrine of impracticability as codified in § 2-615. This article will discuss the historical antecedents of the doctrine of impracticability, the mechanics set up by the Code to regulate the operation of the doctrine, case law applying the Code mechanics and, finally, a few questions left unanswered by the Code.

I. Historical Background

A. Overview

The early common law excused performance of duties imposed by law on grounds of impossibility but refused to excuse performance of contractual obligations on the same grounds.1 The theory was that a promise was absolute unless, and only to the extent, qualified by the promisor. According to Williston, the rule did not long remain absolute. The initial exceptions were illness or death of the promisor, and supervening statutory or governmental prohibition of the act to be performed.2 From the middle of the 19th century on, the development of the doctrine of impossibility, as summarized by Williston, was:

[The early cases] adopt[ed] a strict rule which . . . require[d] the parties, when they form[ed] a contract, to foresee its consequences as accurately as possible, though at the expense of serious hardship to one of them if unforeseen

2. 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1931 (rev. ed. 1938) [hereinafter cited as WILLISTON].
circumstances render[ed] it impossible to perform his promise . . . [The later cases adopted] a rule giving an excuse under such circumstances.\(^3\)

An early liberalization of the rule developed to deal with the situations where there was a destruction of the subject matter of the contract. It is now generally accepted that the destruction of the subject matter of the contract, if it involves no fault on the part of the promisor, excuses nondelivery.\(^4\) This extension was viewed with some suspicion, however, and as will be seen, the courts did not excuse nonperformance on grounds of impossibility unless the impossibility was objective (inherent in the general situation) rather than subjective (due to the capabilities of the given promisor). Thus, a widget manufacturer was generally not excused from supplying widgets if his plant burned down, as long as he could obtain the promised widgets in the market. Some courts refused to excuse nonperformance regardless of the drastic nature of supervening events or the fact that the impossibility was objective, so long as the court read the agreement to perform to be "absolute."\(^5\)

Because the doctrine of impossibility was so rigidly applied, the doctrine proved unworkable. Consequently, courts developed the theory of implied conditions. According to Williston, the doctrine of implied conditions developed as a means of avoiding the harsh results that flowed from a strict application of the narrow impossibility exceptions (death, government intervention, destruction of subject matter) to the general rule that a contractual obligation was not relieved by any supervening event.\(^6\)

As is often the case when a new doctrine is developed to avoid

\(^{3}\) Id. at 5407.

\(^{4}\) Id.

\(^{5}\) See, e.g., Broderick Wood Prods. Co. v. United States, 195 F.2d 433 (10th Cir. 1952).

\(^{6}\) Williston went on to say:

As in the case where the courts overturned the long prevailing doctrine of independency of promises in a bilateral contract, so in regard to the defense of impossibility it was found easier to evade the earlier doctrine by giving a new construction to certain promises than to overthrow the doctrine directly. It became a frequent mode of expression to say that where impossibility constitutes an excuse for failing to perform the terms of a promise, it is because there is an "implied condition" in the promise, without noting that such a condition is "constructive," that is, based on other reasons than the expressions of the parties.

In truth the foundation is the same as in the case of mistake; the two defenses are
problems created by an earlier one, the theory of implied conditions not only failed to ameliorate the harshness of the absolute, objective impossibility rule, it also created new problems. The determination of whether the promises were subject to implied conditions became dependent upon the overall result desired. When a court felt that the promisor should not be excused it found the promise to be "absolute" and thus not subject to any implied conditions.7 Judicial flexibility was achieved but legal precedent and predictability suffered.

Williston suggested that the best approach would be to determine what risks each party to the agreement had assumed. If it were determined that the party seeking to be excused had not assumed the risk of the events forming the basis for the excuse, then the analysis should proceed to determine whether those events were of such a nature as to excuse nonperformance. As to the second determination, Williston recommended that the court should determine whether the unforeseen events, which the party seeking to be excused had not assumed, rendered the promisor's performance vitally different from what the parties, at the time of the agreement, reasonably contemplated it would be.8 The language of the Restatement of Contracts9 and the Uniform Commercial Code10 would seem to indicate they have adopted this approach. As will be seen, however, the cases both prior to and under the Code have continued to rely on the older doctrines of absolute promise, subjective versus objective impossibility, absolute or scientific impossibility and the doctrine of implied conditions.

substantially identical in principle, and often the same situation will involve both. As the basis for the defense of mistake is the presumed assumption by the parties of some vital supposed fact, so the basis of the defense of impossibility is the presumed mutual assumption when the contract is made that some fact essential to performance then exists, or that it will exist when the time for performance arrives. The only evidence, however, of such mutual assumption is, generally, that the court thinks a reasonable person, that is, the court itself, would not have contemplated taking the risk of the existence of the fact in question.

WILLISTON, supra note 2, § 1937 (footnotes omitted).
8. WILLISTON, supra note 2, § 1932.
10. See text accompanying notes 43-68 infra.
B. Pre-Code Case Law

Regardless of which theory or approach was applied by the courts prior to the Code, the cases in which performance was excused cluster around five areas:

1) Impossibility due to change in law;
2) Impossibility due to death or illness;
3) Impossibility due to destruction of subject matter of the contract;
4) Impossibility due to failure of some means of performance; and
5) Those situations in which performance remains possible but the value of that performance to one or both parties has changed drastically due to an unforeseen event.

1. Change of Law

It is generally agreed that a contractual duty is discharged where performance is subsequently prohibited by a judicial, legislative, executive or administrative order.11 Where a statute has rendered illegal a performance that was legal when bargained for (the most typical situation) there is apparent unanimous agreement that the contractual duty of performance is discharged.12 Similarly, nearly unanimous authority exists for the proposition that performance is excused when governmental intervention makes performance impossible.13

In contrast to the problems of supervening government intervention stand the cases where the contracted performance was illegal

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11. See Restatement of Contracts § 458(b) (1932); Williston, supra note 2, § 1938.
12. For example, lessees have generally been discharged from the remaining terms of leases which provided that the premises were to be used solely as a tavern, when the local, state or national government subsequently prohibited the sale of alcoholic beverages. See Schaub v. Wright, 79 Ind. App. 56, 130 N.E. 143 (1921); Marshall v. Smith, 17 Ohio Op. 2d 173, 174 N.E.2d 558 (C.P. Miami Co. 1960); Stratford, Inc. v. Seattle Brewing & Malting Co., 94 Wash. 125, 162 P. 31 (1916).
13. In Texas Co. v. Hogarth Shipping Co., 256 U.S. 619 (1921), a ship owner had agreed to charter a ship for a particular voyage between Texas and South Africa. The ship owner was excused from liability for nonperformance because of the fact that the British Government had requisitioned the ship for war service shortly before the ship was to be delivered for charter. Analogously, in L.N. Jackson & Co. v. Royal Norwegian Gov't, 177 F.2d 694 (2d Cir. 1949), cert. denied, 339 U.S. 914 (1950), where a ship owner had contracted to carry copra from East Africa to New York, but subsequently was ordered by the Maritime Commission to carry wool because of the wartime wool emergency, the ship owner's nonperformance was also excused. See also Flaster v. Seaboard Gage Corp., 61 N.Y.S.2d 152 (Sup. Ct. 1946).
or prohibited at the time of the contracting. Here the courts’ analysis generally concentrates on whether the promisor assumed the risk of impossibility, and whether the promisor or promisee should have known that performance was not legally permissible. In *Partridge v. Presley*, a contract for the sale of real estate included a provision that vendor would acquire the necessary permit to change the house into a two-family dwelling. The vendor was excused not only from acquiring the permit but also from delivering the house because the applicable zoning ordinance restricted the area to one-family dwellings. The court ruled that the contract could not legally be performed through no fault of the vendor and the vendor’s failure to perform could not render him liable.

Such a result is open to criticism. It seems likely that the vendor obligated himself to obtain the necessary permit in spite of any zoning ordinance restrictions to the contrary. Surely one who buys and sells real estate is presumably aware of the fact that zoning ordinances control the uses to which a property may be put. Furthermore, one who promises to obtain a permit to change the use to which a dwelling is put must also presumably be aware that a permit may not be issued if the change is not in accord with the uses permitted by the zoning ordinance. Unfortunately, the court did not explain how it decided that vendor had not assumed the risk that the permit might not be granted.

*Partridge* and other cases like it are of questionable persuasiveness, however, in light of *Security Sewage Equipment Co. v. McFerren*, which indicates that before discharging a promisor from his obligation to perform, the court must scrutinize the agreement to establish whether or not the promisor assumed the risk of existing governmental prohibitions or regulations. This case will be more fully developed later.

2. *Death or Illness*

It is generally agreed that death or disabling illness of a promisor discharges his obligation to perform if the performance could only have been rendered by him. The issue in such cases usually is

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15. *Id.* at 648.
whether the performance was such that it could only have been rendered by the deceased or disabled promisor.\textsuperscript{18}

3.\textit{ Destruction of the Subject Matter of the Contract}

\textit{Taylor v. Caldwell}\textsuperscript{19} is perhaps the case most widely cited for the proposition that destruction of the subject matter of the contract discharges the obligation to perform. There an owner of a music hall was excused from furnishing the hall for plaintiff’s use on the dates agreed because prior to the date of performance the hall was completely destroyed by fire. The decision was based on the theory of implied conditions—that the duties under contract were subject to an implied condition that the hall continue in existence. The court’s analysis is noteworthy. It excused performance by finding that the promise had not been absolute; that instead it was subject to an implied condition of “continued existence” and that such condition having failed, the promisor was excused. As suggested above, this mode of analysis has proven unwieldy. The modern approach, now almost universally followed, is that destruction of specifically identified goods excuses promisor from performing except to the extent promisor has assumed the risk of such destruction by the terms of the agreement.\textsuperscript{20}

4. \textit{Failure or Destruction of the Means of Performance}

Later authorities expanded the holding in \textit{Taylor} to excuse non-performance where the promisor and promisee understood performance would be rendered via a given source and performance later became “impossible” because that source was destroyed.\textsuperscript{21} It is in reference to this class of cases that Williston and the Restatement argue that the term “impossible” be abandoned because performance usually remains possible, though it has become considerably more burdensome because of the depletion of the mutually assumed means of performance. The Restatement suggests that non-performance be excused where (1) the agreement provided or the parties contemplated at the time of the agreement that a specific thing was

\begin{itemize}
  \item \textsuperscript{18} \textit{Restatement of Contracts} § 459 (1932); \textit{Williston}, supra note 2, § 1940; Annot., 84 A.L.R.2d 12, § 8 (1962).
  \item \textsuperscript{19} 122 Eng. Rep. 309 (K.B. 1863).
  \item \textsuperscript{20} \textit{Williston}, supra note 2, § 1946; 67 AM. Jur. 2d Sales § 359 (1973); Annot., 84 A.L.R.2d 12, § 19 (1962).
  \item \textsuperscript{21} See text accompanying notes 25 & 26 infra.
\end{itemize}
necessary for promisor's performance, (2) that thing was subse-
quently destroyed or damaged to such an extent so as to render
performance materially more burdensome for promisor, and (3)
such destruction or damage did not involve fault on the part of
promisor seeking to be excused.\textsuperscript{22} Williston suggests the same ap-
proach.\textsuperscript{23}

There have been numerous cases discharging liability for the fail-
ure to deliver crops where both parties understood that the crops
were to be produced on certain land, where neither party assumed
liability for a natural calamity and where a natural calamity (such
as a flood) subsequently made it impossible to raise the crops.\textsuperscript{24}

This analysis has application to other problems relating to raw
material shortages. In \textit{Housing Authority v. East Tennessee Light & Power Co.},\textsuperscript{25} the promisor had agreed to supply natural gas to the
promisee for a five-year period. The continued availability and suf-
ficiency of gas from a particular field was found to be an implied
condition of the contract. The promisor was, therefore, excused from
performing when gas output at that field became seriously dimin-
ished.\textsuperscript{26}

Many cases indicate that the older notions of risk foreseeability
and subjective impossibility still creep into the decisions despite the
position of Williston and the Restatement. In \textit{El Rio Oils Ltd. v. Pacific Coast Asphalt Co.},\textsuperscript{27} the promisor was required to perform,

\begin{itemize}
\item \textsuperscript{22} Restatement of Contracts §§ 460-61 (1932).
\item \textsuperscript{23} Not only where a specific thing is itself to be sold or transferred, but wherever
a contract required for its performance the existence of a specific thing, the fortuitous
destruction of that thing, or such impairment of it as makes it unavailable, excuses
the promisor, unless he has clearly assumed the risk of its continued existence.
Williston, supra note 2, § 1948, at 5457 (citations omitted).
\item \textsuperscript{24} International Paper Co. v. Rockefeller, 161 App. Div. 180, 146 N.Y.S. 371 (1914), is a
typical example. There the promisor had contracted to deliver specific amounts of wood to
the promisee's mill over a five-year period. The court ruled that in light of the fact that both
parties understood that the wood was to be cut from a certain tract of land (the contract was
conditioned on seller's obtaining the land) the promisor was excused when a fire destroyed
all the wood on the land. \textit{See also} Annot., 84 A.L.R.2d 12, § 20 (1962).
\item \textsuperscript{25} 183 Va. 64, 31 S.E.2d 273 (1944).
\item \textsuperscript{26} Although the contract did not specify a particular nearby gas field as the source of
the gas, there was only one in the vicinity, and the court ruled that it was adequately
demonstrated that the gas to be delivered under the contract was to be produced by that
nearby field. Further it is noteworthy that the contract was qualified by a "force majeure"
clause and that prior to the execution of the contract, engineers had advised the promisor
that production of gas from the field would be ample to meet the requirements of the contract.
\textit{Id.} at 75, 31 S.E.2d at 277-78.
\item \textsuperscript{27} 95 Cal. App. 2d 186, 213 P.2d 1 (1949), \textit{cert. denied}, 340 U.S. 850 (1950).
\end{itemize}
though the case for excusing performance was more compelling than that in *East Tennessee Light & Power Co.* In *El Rio Oils* the promisor manufactured asphalt from oil which he obtained from a certain oil producer. The oil company refused to perform its prior agreement with the asphalt company to deliver oil. Consequently, the asphalt company (promisor) was unable to produce asphalt as per the agreement. The court ruled that the promisor was not excused from performing, in spite of the actions of the third-party oil company which cut off the very source of supply which both parties realized was essential to produce the asphalt. The decision was based on the subjective impossibility rule, that performance was not inherently impossible, but impossible only because of promisor's peculiar situation. It is entirely possible the court felt that the asphalt company should be held liable to its purchaser, because it could pursue whatever remedies it had against the oil company, which presumably was solvent. If that was the rationale, the court should have based the result on a finding that, as between the parties to the agreement, the asphalt company had assumed the risk of the oil company's nonperformance. The use of the subjective rule as the rationale for refusing to excuse the promisor's breach provides little insight into the court's thinking.

Similarly, in *Kentucky Lumber & Millwork Co. v. George H. Rommell Co.*, the court held that the promisor was not excused from delivering millwork, though subsequent to the making of the agreement his mill was completely destroyed by fire. While the court suggested that the promisor's mill had been destroyed as a result of his negligence, the court based its refusal to excuse promisor's non-performance on the theory that promisor's inability to perform was subjective, and performance remained objectively possible. Thus, when evaluating a situation involving failure or destruction of a specific means of performance, a court can short circuit an "impossibility" argument by applying the theory of subjective impossibility.

5. *Performance Remains Possible but the Cost of That Performance to Promisor or the Value of That Performance to Promisee Has Changed Drastically Due to an Unforeseen Event*

These situations, at times categorized under the theory of frustra-

28. 257 Ky. 371, 78 S.W.2d 52 (1934).
tion of contract, and at other times under the more general theory of implied conditions, have created the greatest confusion in this area of contract law. While subject to some noted exceptions,\textsuperscript{29} non-performance is rarely excused on grounds that performance has become extremely burdensome.\textsuperscript{30} Promisors have enjoyed considerably more success in avoiding liability for nonperformance in cases where performance is still possible but the agreement no longer has any value to the promisor because of a supervening event. La Cumbre Golf & Country Club v. Santa Barbara Hotel Co.,\textsuperscript{31} is a typical example. There a country club agreed to extend golfing privileges to the guests of a nearby hotel for a certain term for a monthly fee of $300. Shortly after the term began, the hotel was completely destroyed by fire through no fault of the owners. The hotel was excused from paying the monthly fee for the balance of the term on the basis that the agreement was subject to an implied condition that the hotel continue to have guests. Similarly, in Parrish v. Stratton Cripple Creek Mining & Development Co.,\textsuperscript{32} the promisor was excused because the agreement had become valueless to him. There,

\textsuperscript{29} An interesting example of this type of situation is Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916). There, the promisor had agreed to take from the land of the promisee all the gravel promisor needed to fulfill a supply contract for the construction of a bridge. After the promisor had removed a considerable amount of gravel the water table was reached. Though there was still sufficient gravel to fulfill the promisor's needs for the bridge construction, the cost of dredging and drying the underwater gravel was estimated at ten times the expense of procuring above-ground gravel from another source. The promisor was excused from liability for not procuring all his gravel from the promisee's land (the promisor had obtained the balance of gravel needed—another 50,000 cubic yards—from other, above-water sources). The court reasoned that when the parties stipulated that all of the earth and gravel required for the bridge project would be taken from the promisee's land, they assumed that sufficient quantities for that purpose were obtainable above the water line. The court indicated that the promisor could not have excused himself merely because the project had proved more expensive than anticipated, or merely because it had proved unprofitable. But where, as here, the difference in cost was so great as to have the effect of making performance impracticable, the promisor could be excused.

\textsuperscript{30} The general rule has been explained thusly:

It must be said, however, that the view to the effect that extreme impracticability of performance may be regarded, in law, as amounting to impossibility which excuses the promisor from liability for nonperformance, seems not to have been adopted very extensively, so far as the representative cases covered in this comment note indicate. Its application would seem to require a difficult distinction between mere difficulty, expense, or hardship (rather generally regarded as no excuse for nonperformance . . . ) and (in the Restatement's words) "impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."


\textsuperscript{31} 205 Cal. 422, 271 P. 476 (1928).

\textsuperscript{32} 116 F.2d 207 (10th Cir.), cert. denied, 312 U.S. 698 (1940).
a mining company had given a trucking company a contract to haul all of the coal from the promisor's mine which was destined for a certain milling company. Shortly thereafter the milling company became bankrupt. The mining company terminated its agreement with the trucking company, but was discharged from any resultant liability. Arguably, the mining company did not breach its agreement since it was found only to allow the hauling company to transport the coal destined for the milling company, and the court need not have reached the frustration question. The court ruled, however, that the mining company was excused because both parties had assumed that the milling company would continue to operate and the contract had become subject to that implied condition.

C. General Problems

The discussion has thus far been directed towards examining the various theories that have developed which excuse nonperformance on the basis that performance has become unduly burdensome, impractical, or impossible. The cases have been selected to exemplify the development of the various theories. As indicated, there is by no means general acceptance of any of the various theories, and this is especially true of the theories of implied conditions and of frustration. Even the more widely accepted bases for excuse (death or illness, supervening legal prohibition or destruction of the subject matter of the contract) are subject in some jurisdictions to severe restrictions which at times appear to swallow the exception. Therefore, it is appropriate to outline the kinds of problems encountered whichever theory is argued.

1. Assumption of Risk

If a court feels that the promisor, either by the terms or nature of the agreement, assumed the risk of the occurrence which subsequently rendered performance impossible, the promisor will not be discharged from liability for nonperformance. Wills v. Shockley\(^33\) illustrates the point. A contractor, experienced in salvage operations, agreed to raise a sunken boat and bring the boat to dock. After the agreement, the boat slipped from the rocks upon which it had come to rest, sank into deeper water and filled with mud. This made

\(^33\) 52 Del. 295, 157 A.2d 252 (1960).
it impossible to raise the boat. The court analyzed the assumption of risk issue in terms of promisor's undertaking and held that the promisor was not discharged. In *Broderick Wood Products Co. v. United States*, a similar result was reached by finding the promise to be absolute by the terms of the contract. The promisor was held liable for damages according to the liquidated damages provision of the agreement, even though the delay had been occasioned by extreme weather conditions. The *Wills* approach is, of course, preferable but the *Broderick Wood* approach is not atypical. In either case, careful drafting would have avoided the problem.

2. *Foreseeability of Event Rendering Performance Impossible*

The supervening event which renders the performance impossible or unduly burdensome will not excuse the promisor unless the court decides that the "promisor had no reason to anticipate [the occurrence] and for the occurrence of which [event] he is not in contributing fault." Thus, in *Sale v. State Highway & Public Works Commission*, promisor's buildings, an essential subject matter of the contract, were completely destroyed by fire due to promisor's negligence. The promisor's nonperformance was not excused. Similarly, where the promisor voluntarily discontinued its business operations, the promisor's contractual obligations were not excused, even though the contract was viewed as containing an implied condition that the promisor would continue in business.

*Powers v. Siats* is an example of the type of situation in which nonperformance is occasioned by an unanticipated event but the promisor is not excused because of his contributing fault. There, the promisor (carrier) contracted to deliver a certain quantity of eggs at a temperature of 50 degrees. The consignor delivered the eggs to the carrier at a temperature ten degrees warmer than agreed to. Although aware of this fact the defendant carrier made no successful efforts to reduce the temperature of the eggs while in transit. The eggs reached their destination at a temperature of 62 degrees; the purchaser refused to accept them and sued for damages. The court ruled that the defense of impossibility had no merit because the

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34. 195 F.2d 433 (10th Cir. 1952).
38. 244 Minn. 515, 70 N.W.2d 344 (1955).
defendant was in contributing fault, as it could have taken other steps to avoid delivering the eggs at an unacceptable temperature.

3. Unduly Burdensome Performance

Perhaps the most important caveat is that the position taken by Williston and the Restatement (that performance need not be scientifically impossible in order for nonperformance to be excused) has not been widely adopted. The generally applied rule still appears to be that:

[Un]expected difficulty, expense, or hardship will not excuse a contractual promisor from performing his undertaking, where the contract does not provide otherwise and the difficulty does not make performance objectively impossible. 39

In Wilson & Co. v. Fremont Cake & Meal Co., 40 the promisor was not excused in spite of the fact that performance became very burdensome. There, promisor, a producer of soybean oil, had promised to deliver 36 tank cars of oil over a 12-month period, at a rate of three tank cars per month. The agreed price was 11.75 cents per pound or the O.P.A. ceiling price in effect at time of shipment. Promisor had yet to deliver six tank cars of oil when O.P.A. removed the ceiling price on soybeans entirely, causing the price of soybean oil to rise to 25 cents per pound. The promisor did not receive any benefit from the contract escalator clause because the price ceiling had been eliminated instead of raised. The court ruled that the promisor was not excused merely because performance had become more expensive than anticipated, and despite the fact that it became more expensive because of unanticipated government regulation.

This "absolute" approach seems to be the general rule in agreements concerning the delivery of unidentified goods. Thus it has been said:

Under an executory contract of sale relating to unidentified property which might be fulfilled by the delivery of any property of the kind and quantity stipulated for, the seller as a general rule assumed absolute liability to make delivery, and was not excused from nonperformance by the happening of

unforeseen events or accidental causes preventing his filling the contract in the manner he might have contemplated. 41

D. Summary Of Historical Background

The early common law doctrine held impossibility to be no excuse for nonperformance of a contractual obligation. That position did not long remain absolute. Gradually, it became accepted that death or debilitating illness of the promisor was an excuse when performance depended on promisor's unique abilities. Destruction, without fault, of the specified thing to be made available also came to be recognized as an excuse, as did supervening prohibition by the government of the act to be performed. Even these limited exceptions, however, were restricted by the doctrine of objective impossibility, and by the doctrine of assumption of risk.

In order to avoid the harshness of a narrow application of the doctrine of impossibility, the courts developed the theory of implied conditions. As an unfortunate corollary to this theory, the courts developed the theory of the absolute promise. Under that theory, before examining an agreement to see if it was subject to any implied conditions, the courts would first decide whether promisor had made an absolute promise to perform. This analysis became very confusing. Williston and the Restatement suggest that the analysis should involve two steps. First, what risks had each party assumed? This, Williston suggests, would clarify the real issue at the heart of the absolute promise cases. Second, did any unforeseen risk, not assumed by the promisor, make his performance vitally different from that which both parties reasonably contemplated? The attempt here was to avoid the harshness of the rule that (even under the implied conditions theory) the supervening event had to make performance objectively and scientifically impossible.

The more liberal approach suggested by Williston does not appear to have been widely accepted. Perhaps the widest acceptance is found in those cases dealing with the failure of a specified source of supply. In order for such an occurrence to excuse nonperformance, the following requirements must be met: (1) the particular source must have been specified in the agreement or at the very least

contemplated by both parties; (2) no other source must have been contemplated by the parties; (3) the source's depletion must not have been foreseeable by the promisor; and (4) the depletion must not have occurred as a result of any fault of the promisor. Furthermore, promisors have had little success in avoiding liability when the source failed because of a breach by a third party or due to prolonged strikes, for these are generally considered risks the promisor should have foreseen.

Finally, courts have seemed reluctant to abandon the notion of scientific impossibility. Few courts have accepted Williston's concept of "vitaly different performance." This reluctance is especially marked when dealing with situations concerning the delivery of non-identified goods. Courts have generally limited the doctrine of excusable breach to conditions which render performance objectively and scientifically impossible.

II. IMPRACTICABILITY UNDER THE CODE

With this background in mind, the Uniform Commercial Code is now considered. Section 2-613 codifies the generally accepted rules as to casualty to identified goods. It provides that casualty to identified goods avoids the contract if the loss is total. It gives the buyer the option, if the loss is partial, of avoiding the contract entirely or accepting the partially damaged goods or that part of the goods not damaged, with due allowance in the contract price. In order to be excused the promisor must show (1) the goods contracted for were identified when the contract was made; (2) the goods were damaged without fault of the promisor; (3) the promisor had not assumed the risk of loss to the goods; (4) the contract requires for its performance the identified goods; and (5) the risk of loss had not yet passed to the buyer.

More noteworthy is the Code's treatment of impracticability problems. Section 2-615 of the Code provides that nonperformance will be excused if nonperformance is occasioned by the occurrence of a contingency (1) the nonoccurrence of which was a basic assumption on which the contract was made; (2) the risk of which had not
been assumed by the promisor; and (3) which renders performance impracticable. Section 2-615 also excuses nonperformance occasioned by good faith compliance with any applicable foreign or domestic governmental regulation or order, whether or not it later proves to be invalid.

The language of § 2-615 and the official commentary thereto indicate a strong preference on the part of the drafters for the Williston and Restatement approach to this area. Impossibility is rejected in favor of "impracticability." The language of the introduction to § 2-615 also seems to indicate that promisees have the burden of proving that promisors assumed the risk of the contingency which has rendered performance "impracticable."

The comments make it clear that the term "impracticability" was chosen to emphasize the drafters' intention that courts look to the commercial setting in which a problem arises rather than apply absolute or scientific (objective) impossibility notions. Given that the commercial setting is to be emphasized, and given also that something less than scientific impossibility will excuse the promisor's performance, the crucial question becomes the meaning of "impracticability." Comment 4 suggests that in determining whether an unforeseen contingency has rendered performance impracticable two factors must be weighed: (1) the nature of the contingency; and (2) the effect the contingency has had on the

45. Section 2-615 provides:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

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

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

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

Uniform Commercial Code § 2-615.

46. Id.
47. See id., Comment 8.
48. Id., Comment 3.
promisor's ability to perform. The comment points out that a drastic change in the market is not of itself sufficient to excuse nonperformance—the drastic change must be caused by some unforeseen contingency (e.g., war, embargo, failure of source of supply, etc.). It appears that the more likely it is that the promisor was aware of the possibility of the supervening event, the more critical the event's effect on promisor's ability to perform must be in order to excuse nonperformance. Conversely, the more unexpected the supervening event, the less drastic its effect on the promisor's ability to perform must be in order to excuse nonperformance.

Source of supply cases are afforded special treatment under the Code. Where it can be shown that: (1) the parties assumed a particular source of supply for the promisor's performance; (2) the promisor has taken proper steps to assure himself access to necessary supplies; and (3) the assumed source fails without fault on the part of the promisor, then the promisor will be excused. This comment also suggests a solution to the El Rio Oils type problem—that the promisor be excused but that he transfer his rights against his defaulting supplier to the promisee.

In the depleted source of supply situation the emphasis of the analysis is on whether the parties contemplated a particular source of supply for performance. If they did, and the source fails, the element of "impracticability" seems to be assumed. It would seem to follow that one seeking to excuse nonperformance would be well advised to characterize supervening events as having interfered with or destroyed a contemplated source of supply (rather than having drastically altered the general market) so as to render the promisor's performance commercially impractical. In the latter situation the promisor must explain the impact of the unforeseen events on his ability to perform in very persuasive terms since courts rarely excuse

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

Id., Comment 4.

50. Id., Comment 5.

51. See text at note 27 supra.
Commercial Impracticability

nonperformance merely because performance has become more costly.

One final note on the official commentary is appropriate. Comment 6 to § 2-615 states:

6. In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of "excuse" or "no excuse," adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.52

This comment seems to suggest that at times the best solution would be a modification of the contract price rather than a ruling of "excuse" or "no excuse." As will be discussed, however, this suggestion has not yet been followed.

In spite of the language of § 2-615 and the official commentary thereto the reported cases which have applied the Code provisions indicate that "impracticability" still translates into something akin to "impossibility." In Transatlantic Financing Corp. v. United States,53 the court, while not basing its decision on § 2-615 (the transaction occurred prior to the adoption of the Code), did look to that section as an indication of the current state of the law. The promisor had agreed with the government to transport wheat from Texas to Iran, for an agreed consideration of approximately $200,000. Prior to the completion of the voyage, the Mideast crisis of 1956 broke out, and the Egyptian government nationalized and blocked the Suez Canal. As a result, the voyage was routed around the tip of Africa, adding an estimated cost of $43,000. The shipper sued the government for the added cost on the theory that when the Egyptians blocked the canal the contract became impossible to perform. Shipper's decision to go around Africa was, it was argued, a rendition of services divorced from the original contract for which shipper should recover on a theory of quantum meruit. After commenting on § 2-615 of the Code, the court said:

While it may be an overstatement to say that increased cost

52. UNIFORM COMMERCIAL CODE § 2-615, Comment 6.
53. 363 F.2d 312 (D.C. Cir. 1966).
and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone.\footnote{Id. at 319 (citations omitted).}

The court, therefore, ruled that the contract never became "impossible" and denied plaintiff any recovery for the added costs. While it may be granted that the voyage was at all times possible, it seems clear that a voyage from Texas to Iran via the Suez Canal is a far different undertaking than a voyage from Texas to Iran around the tip of Africa. They would appear to be essentially different undertakings. Yet the court ruled that "price alone" was not enough, even though the added costs exceeded 25% of the originally projected costs.

The test of "impracticability" thus remains a difficult one to meet. Furthermore, the case indicates that promisors may have a difficult time establishing that they did not assume the risk of the supervening event, for the court did not make it clear why it felt that the promisor had assumed "some degree of abnormal risk."\footnote{Perhaps the most disappointing aspect of the Transatlantic decision is that the court made no reference to the suggestion in Uniform Commercial Code § 2-615, Comment 6 that there be an equitable adjustment in price, though the fact situation seems tailor-made for it. Rather, the court resolved the problem in terms of "excuse" or "no excuse" and may, therefore, be assumed to have rejected Comment 6 as too vague and indefinite of application.}

*United States v. Wegematic Corp.*\footnote{360 F.2d 674 (2d Cir. 1966).} is perhaps a better illustration of the assumption of risk problem. There, Wegematic had promised to produce and deliver a computer with certain capabilities to the Federal Reserve Board. Subsequent to the agreement but prior to the date of delivery, Wegematic claimed that the technological problems had become insurmountable, and did not deliver. When sued by the government, Wegematic defended on the grounds that performance had become impracticable. The court concluded that the federal law should follow the Code since the Code had been widely adopted. But it rejected, on two bases, Wegematic's defense that technological difficulties made performance "impracticable" within the meaning of § 2-615. The Federal Reserve Board, in seeking bids from manufacturers to furnish a particular computer, con-
templated that it would be furnished the computer—it did not contemplate that Wegematic perform only if Wegematic might technologically succeed in producing the computer it promised. Furthermore, though the prospect of Wegematic having to expend $1,000,000 to $1,500,000 on redesign might make performance unattractive, additional expenditure of such sums did not make performance prohibitive in light of the patented gross of the entire computer program.57

The opinion is of particular interest because of its analysis of the question of assumption of risk and its analysis of the meaning of "impracticability." The case strongly suggests, as did Transatlantic, that although the Code seems to liberalize the rules concerning impossibility, it will remain difficult for nonperforming promisors to establish commercial "impracticability." The opinion is also useful in terms of its analysis of the non-assumption of risk element of the promisor's case. The opinion looks to both the nature of the promisor's representations and the nature of the promised undertaking in arriving at the conclusion that the promisor bore the risk of the technology proving inadequate.

As discussed above, the comments to § 2-615 suggest that cases involving failure of sources of supply are particularly appropriate for excusing nonperformance. The cases have followed that suggestion. In SCA International, Inc. v. Garfield & Rosen, Inc.,58 the promisor was excused from liability for not delivering a certain quantity and quality of shoes because

manufacturing operations were disrupted by unprecedented floods which occurred in the region of Florence in the early part of November 1966. The factories in which the shoes were being manufactured were damaged, as were some of the necessary

57. The court stated:

Beyond this the evidence of true impracticability was far from compelling. The large sums predicted by defendant's witnesses must be appraised in relation not to the single computer ordered by the Federal Reserve Board, evidently for a bargain price, but to the entire ALWAC 800 program as originally contemplated. Although the record gives no idea what this was, even twenty-five machines would gross $10,000,000 if priced at the level of the comparable IBM equipment. While the unanticipated need for expending $1,000,000 or $1,500,000 on redesign might have made such a venture unattractive, as defendant's management evidently decided, the sums are thus not so clearly prohibitive as it would have them appear.

Id. at 677.

supplies of leather, linings, soles and inner soles. These conditions made impossible the completion and delivery of the shoes within the time stipulated in the orders.\textsuperscript{59}

It was not clear whether the contract itself specified these particular factories as the source of supply, but the court did find that both parties understood that the shoes to be delivered would be produced at these factories.

Similarly in \textit{Low's EZY-Fry Potato Co. v. J.A. Wood Co.},\textsuperscript{60} promisor was excused from performance for not delivering a certain quantity of potatoes because extreme weather conditions made it impossible to raise potatoes to the standards specified in the contract. The decision is an indication of how § 2-615 can be read as having codified the theory of implied conditions. The decision states:

\begin{quote}
that if the parties contemplate a sale of all or a certain part of the crop of a particular tract of land, and by reason of drought or other fortuitous event, without fault of the seller, the crop of that land fails or is destroyed, non-performance is to that extent excused; the contract, in the absence of an express provision controlling the matter, being considered as subject to an implied condition in this regard.\textsuperscript{61}
\end{quote}

This administrative decision is significant in that it suggests that the "absolute promise" approach has been dropped as Williston suggested it should be quite some time ago. The Code language in issue is the introductory clause to § 2-615 stating: "Except so far as seller may have assumed a greater obligation . . . ." That language is not very instructive on the question of how to determine whether or not a larger obligation has been assumed. The approach of the \textit{EZY-Fry Potato} decision is that in the absence of an express condition in the contract the seller is presumed not to have assumed the greater risk. It should be noted, however, that the decision deals with damage to crops or crop-producing land, and it had become generally accepted prior to the Code that in such a situation the risk of crop damage was borne by the purchaser.

Whether the presumption will be extended to other situations remains to be seen. \textit{SCA International} did not face the issue

\begin{flushleft}
\textsuperscript{59} \textit{Id.} at 249-50.  \\
\textsuperscript{60} \textit{26} Agri. Dec. 583, \textit{4} UCC REP. SERV. 483 (1967).  \\
\textsuperscript{61} \textit{Id.} at 585, \textit{4} UCC REP. SERV. at 485.
\end{flushleft}
squarely but that decision does seem to indicate that destruction of the source is a risk assumed by the purchaser. The Code language, however, does not preclude a court from applying the absolute promise rule and holding that where the promisor's obligation was not expressly qualified, he has assumed the risk under § 2-615 and will not be discharged, regardless of whether performance has become impracticable or impossible.

Deardorff-Jackson Co. v. National Produce Distributors, Inc.\(^2\) indicates that the failure of the source of supply will not excuse the promisor if the promisor was in any way at fault for that failure. There the promisor had agreed to deliver 50 carloads of a certain grade of potatoes, but was unable to deliver a substantial number of the carloads. The Agriculture Department rejected the seller's defense of impracticability because it found that the seller knew, at the time of contract, that his source of supply would be inadequate to meet his obligations under the contract.

The issue of impracticability due to government regulation was considered in Security Sewage Equipment Co. v. McFerren.\(^3\) There, Security had agreed to deliver and install, at a particular location, a sewage disposal plant for McFerren, a real estate developer. The State Department of Health refused to approve the plans submitted by McFerren's engineer for the site of the treatment facility. Instead, the Department required an alternative plan which would have necessitated the purchase of 2,500 extra feet of pipe and the rights of way over land between the development tract and the Ohio River. Consequently, the facility was not built. Security sued McFerren for failure to purchase, and McFerren counterclaimed for Security's failure to install. The court noted that Security possessed greater knowledge of Health Department requirements than McFerren, and held Security liable, pointing out that under Comment 10 to § 2-615, governmental interference will not excuse performance where it does not interfere to an extent beyond the seller's assumption of the risk.\(^4\)

The court's analysis of why it felt Security had assumed the risk is noteworthy. Because security had agreed "to install . . . com-

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\(^{63}\) 14 Ohio St. 2d 251, 237 N.E.2d 898 (1968).
\(^{64}\) The court concluded:

Ordinarily, when one contracts to render a performance for which a government license or permit is required, it is his duty to get the license or permit so that he can
plete and make it ready for use, and operation by the buyer, at the
delivery address specified." and because it knew it could not pro-
vide and install the plant until the plans therefor had been approved
by the State, it assumed the risk of rejection of those plans.

The decision leaves some questions unclear. For example, it can-
not be ascertained from the decision whether the plans for the treat-
ment facility were not approved because of regulations existing prior
to the execution of the agreement or because of regulations adopted
subsequent thereto. Nor is there any indication of whether the unex-
pected burden of additional pipeline and right of way purchases
satisfied the "impracticability" test of § 2-615. Indeed, that is the
disquieting facet of the case. The court never reached the impracti-
cability question because it decided that the seller had assumed the
risk of government rejection. There is an indication that the court
did consider the seller more familiar with the particular governmen-
tal regulations than the buyer. But it appears to have based its
determination that the seller assumed the risk of state rejection
solely on the fact that the seller had agreed to install the sewage unit
without any reservation as to government regulation. It seems safe
to say that sellers will have a more difficult time excusing nonper-
formance because of existing governmental regulations of which nei-
ther party was aware than excusing nonperformance occasioned by
supervening regulations.

Section 2-615 is also designed to apply to situations involving the
doctrine of commercial frustration. Comment 9 suggests that a
buyer is excused where the reasonable commercial understanding of
the agreement is that the buyer agreed to purchase for a particular
purpose and that purpose has been frustrated. But, buyers will

\[\text{id. at 254, 237 N.E.2d at 901.}\]
\[\text{id. at 253, 237 N.E.2d at 900.}\]

\[\text{Uniform Commercial Code § 2-615, Comment 9 provides in part:}\]

\[\text{Exemption of the buyer in the case of a "requirements" contract is covered by the}\]
\[\text{"Output and Requirements" section both as to assumption and allocation of the rele-
\text{vant risks. But when a contract by a manufacturer to buy fuel or raw material makes}\]
\[\text{no specific reference to a particular venture and no such reference may be drawn from}\]
\[\text{the circumstances, commercial understanding views it as a general deal in the general}\]
\[\text{market and not conditioned on any assumption of the continuing operation of the}\]
\[\text{buyer's plant. Even when notice is given by the buyer that the supplies are needed to}\]
\[\text{fill a specific contract of a normal commercial kind, commercial understanding does}\]
\[\text{not see such a supply contract as conditioned on the continuance of the buyer's further}\]
nevertheless have difficulty in establishing commercial frustration as a defense.

The issue is clearly posed in *Prescon Corp. v. Savoy Construction Co.* The promisor had agreed to purchase steel girders meeting certain unique standards from a supplier. Both parties knew the purchaser intended to use the girders to meet his obligations as a subcontractor on a construction project. After the execution of the agreement between the purchaser and supplier, the purchaser was informed by the general contractor that the girders would not be used since the engineers had changed the plans. The purchaser was not excused from performance. In addressing itself to the requirements issue the court said:

There remains one further item requiring comment. The appellee made a contrived effort to characterize the contract between the parties as a “requirements” type contract. It further contends that such a contract under § 2-615 of the Uniform Commercial Code may, in good faith, be discontinued by the purchaser when the “requirements” are no longer needed. The trial judge rejected this construction of the contract and we agree with that conclusion. A reading of the clear language of the contract makes it obvious that this is not a “requirements” contract. Hence there is no need to review the contract in relation to the referred section of the Uniform Commercial Code.

Thus, a buyer seeking to avoid performance on the basis of commercial frustration must deal with the courts’ lack of willingness to characterize the transaction as being designed for a particular purpose.

III. PROBLEMS NOT CONSIDERED

The Code does not address itself to the problem of temporary impossibility. Suppose, for example, promisor has agreed to supply

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68. *Id.* at 62, 267 A.2d at 228.
certain materials or products at a set price over a long term. Suppose further that due to market shortages the government regulates use of the materials or distribution of the products during a part of the term of the contract. The problem raised is whether the temporary impossibility discharges or merely suspends the obligation to perform during the period of impossibility. In other words, will the promisor be required to make up for the excused deliveries once the regulations have been lifted? While the Code and comments are silent in this regard, there is a well developed body of pre-Code law on the subject.

The Restatement of Contracts addresses itself to the issue of temporary impossibility, approaching the issue from the standpoint of two situations. The first is called temporary impossibility, and involves situations in which performance was to occur at a given time or over a given time period. If performance was impossible when it was to be rendered, but would be possible at a later time, § 462 of the Restatement applies. That section provides that the promisor is not obligated to perform once performance becomes possible, if performance at the later date would impose “a substantially greater burden” on the promisor than performance at the originally contemplated time.

69. **Restatement of Contracts** § 462 (1932).
70. The Restatement provides:

Temporary impossibility of such character that if permanent it would discharge a promisor’s entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed upon him had there been no impossibility; but otherwise such temporary impossibility suspends the duty of the promisor to render the performance promised only while the impossibility exists.

*Id.* The comments explain:

a. The rule stated in the Section is concerned only with the duty of a promisor whose performance has become temporarily impossible. Whether a return promisor is discharged from his duty on account of the temporary impossibility depends on whether the temporary delay involves essential injury to him or loss of the object for which he bargained (see §§ 274-76). Cases may arise, however, where the return promisor will suffer little or no loss by the delay, but the party whose promise has become temporarily impossible will be penalized if he is held bound to perform when the impossibility ceases. Since the impossibility is, under the rule stated in the Section, of such character as to discharge the promisor if it were permanent, he is not required to undergo serious disadvantage if it is temporary; so that, if the delayed performance would impose a substantially greater burden upon him than he would have incurred if there had been no impossibility, he is entirely free from duty.

b. Temporary impossibility is not the same as partial impossibility. Though the rules governing the two situations are quite similar (see § 463), it is desirable to
The other type of situation considered by the Restatement is where performance is to be rendered over an extended period. If in that situation performance is rendered impossible early in the term of the agreement, and performance becomes possible once again within the term specified in the agreement, § 463 of the Restatement of Contracts applies. That section provides that the promisor must perform for the balance of the term unless the partial impossibility has rendered performance of the balance of the agreement materially more burdensome.72

The principle difference between § 462 and § 463 is best illus-

71. RESTATEMENT OF CONTRACTS § 463 (1932).
72. The Restatement provides:

Where impossibility of performing part of the performance promised by a party to a bargain is of such character that if it related to the entire performance it would prevent the imposition of a duty or would discharge a duty that had arisen, and the remainder of the performance is not made materially more difficult or disadvantageous than it would have been if there had been no impossibility, the existence of duty is affected only as to that part; and if performance of the whole contract is possible with only an unsubstantial variation, the promisor is under a duty to render performance with that variation.

Id. The comments explain:

a. The rule stated in the Section deals only with the effect of impossibility of part of the performance due from a promisor upon the promisor's own duty; and this duty is qualified by the rule stated in § 460 (2) to the effect that the party whose performance is not impossible must be ready and willing to perform in full the agreed exchange in order to be entitled to the partial performance. If the contract is divisible the agreed exchange may be only a portion of the total performance promised. The effect on the duty of a return promisor is stated in § 274. As in the case of temporary impossibility, whether a return promisor is discharged depends on whether he will suffer essential harm if the contract continues in force.

b. Unlike temporary impossibility, impossibility of performing part of a promise rarely discharges a promisor beyond the extent of the impossibility. It will seldom throw a greater burden on him to perform part of what he has promised than to perform the whole of it; and if the equivalent of the part that is impossible to perform can be
trated by the use of an example. Assume that $A$, a contractor, has contracted to build a school. Subsequent to the making of the contract a hurricane strikes the region leaving the area flooded. Until the waters recede, it is impossible for $A$ to perform and the duty to perform is suspended. When the waters do recede, 3 months later, $A$ finds that the price of materials has increased substantially and seeks to be discharged from the contract. It would seem that under §462 he should be discharged because he has shown that the burden of performance is substantially greater as a result of the temporary impossibility.

Rearranging the facts slightly, a case of partial impossibility can be constructed. Assume that the flooding only affected that portion of the construction site that was to be the school parking lot. The parking lot cannot be constructed because of the condition of the land after the flood waters have receded. Unless $A$ can show that performance of the remainder of the contract has been rendered materially more burdensome because of the inability to construct the parking lot, he will have to build the school.

Consequently, it seems that gaining a total discharge of the obligation to perform is more likely in the case of temporary impossibility than in a partial impossibility situation. Comment $b$ to §463 supports this conclusion. It states that

Unlike temporary impossibility, impossibility of performing part of a promise rarely discharges a promisor beyond the extent of impossibility. It will seldom throw a greater burden on him to perform part of what he has promised than to perform the whole of it;[^73]

Section 462, on the other hand, makes no such assumption. So long as the temporary impossibility is

of such a character that is permanent it would discharge a promisor's entire contractual duty, [it] has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than

[^73]: Id., comment $b$. 

[^73]: Id., comment $b$. 

[^73]: Id., comments $a$ & $b$.
would have been imposed upon him had there been no impossi-
(bility ... 74

Partial impossibility, however, does not preclude a total discharge of the obligation. The case of Edward Maurer Co. v. Tubeless Tire Co., 75 though decided prior to the development of the Restatement is a good example of this. There the plaintiff had agreed to sell and defendant had agreed to purchase certain tonnages of rubber to be delivered in monthly installments from May to December of 1918. The agreement was expressed in two written contracts. Both con-
tacts contained force majeure clauses that excused nonperform-
ance occasioned by government regulation. Both parties were aware of the fact that rubber importation was likely to be regulated. Shortly after the contracts were signed (May, 1918), the government did issue regulations concerning the distribution of rubber. Rubber already in the United States or on the high seas bound for the United States was “free” rubber and could be disposed of in any fashion. All other rubber was regulated rubber and could be sold only to those users who had a permit. Rubber was allocated on the basis of prior use, and since defendant’s plant was experimental and had been in operation for a very short time it qualified for only 180 pounds of rubber per month. Because of these regulations no deliv-
(eries were made in June, July or August. In September, however, plaintiff tendered delivery of a quantity equal to one monthly in-
:allment under the contract, and defendant refused to accept deliv-
ery. 76 After the war and after the regulations had been lifted plaintiff again tendered delivery, and defendant again rejected. Plaintiff was forced to sell the rubber at less than the contract price because the market price had fallen considerably. Plaintiff sued defendant for the difference between the contract price and the sale price.

Plaintiff argued that the wartime regulations had merely sus-
pended the obligation to perform. The trial court decided, however, that the obligation had been discharged. The court held that in the absence of express agreement where performance is rendered impos-
sible as a result of governmental act or regulation passed subsequent to the making of the contract, the parties are discharged. 77 The trial

74. Id. § 462.
75. 272 F. 990 (N.D. Ohio 1921), aff'd, 285 F. 713 (6th Cir. 1922).
76. Plaintiff was able to make this rubber available because he obtained “free” rubber.
77. The court expressed its reasoning as follows:
The applicable law seems to be well settled. If performance is made impossible by a
court also found that it had been the parties' intention that in the event of government regulation obligations would be discharged, not just suspended.

The Sixth Circuit affirmed,78 agreeing that the parties had intended that the obligations be discharged, not merely suspended. More important for purposes of the discussion, the circuit court also analyzed the problem of the September delivery, an issue which the trial court had not addressed. The court determined that defendant did not have to accept any haphazard deliveries of "free" rubber because the government regulations discharged defendant's obligation to purchase.79

While the court's analysis is not as explicit as it could be, the decision does indicate that the court found that the defendant was not obligated to accept the September shipment because his performance had become materially more burdensome (in the sense that the plaintiff's performance was of no value to defendant) because of the earlier partial impossibility of performance.

Thus, when analyzing an "impossibility" or "impracticability" situation, one must always bear in mind that having first established "impracticability" one must proceed to establish the duration of the "impracticability" and the impact it has on the promisor's performance in both the long and the short run.80

IV. Summary and Observations

The threshold problem for any promisor attempting to avoid per-

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272 F. at 993.

78. 285 F. 713 (6th Cir. 1922).

79. If it were conceded that this was free rubber, either in the United States or en route to the United States, when the contracts were made, and that defendant then had the right to purchase and use it in its factories, nevertheless, long before delivery of this shipment was tendered, the government had refused to permit the plaintiff to import and sell to the defendant any rubber on either or both of these contracts in excess of 180 pounds per month. In our opinion that was the virtual end of these contracts, and the defendant could not be expected, nor would it have been possible for it, without the raw material, to keep its factory open and in operation, so as to be in position to accept delivery of whatever free rubber that might occasionally be obtained by plaintiff long after the parties knew that the contracts could not be performed within the intent and purpose of the contracting parties.

Id. at 717.

80. For other cases applying the Restatement type of analysis see Kunglig Jarnvägsstyr-
formance under § 2-615 will be to establish that the promisor has not assumed the risk of the supervening event claimed to have rendered performance impracticable. The relevant language of the Code is "Except so far as seller may have assumed a greater obligation ... ."81 Official Comment 8 to § 2-615 indicates that assumption of risk is to be found in the circumstances surrounding the contract, trade usage, etc., as well as the express terms of the agreement. Even this directive leaves room for a court to hold that all risks have been assumed by the promisor if it construes his promise to be absolute. The doctrine of absolute promise has had a long history, and still obtained in a number of jurisdictions prior to the adoption of the Code. As indicated earlier, there is some suggestion in cases applying § 2-615 that, although the doctrine of absolute promise may not have been incorporated into the Code, the burden of establishing non-assumption of risk will continue to be a difficult one.

The promisor who survives the rigors of the assumed risk test must still establish that performance has become impracticable. It appears clear from pre-Code case law, the language of the Code, the intent of the drafters, and the cases under the Code, that the "impracticability" test is similar to Williston's "vitaly different" test. The Code omitted use of the term "impossibility" because it was generally agreed by the drafters that in some situations nonperformance should be excused even though it had not become scientifically impossible. The cases applying § 2-615 indicate, however, that "impracticability" is a test met only in extreme circumstances. Thus the defense will continue to be a difficult one under the Code.

It is noteworthy that promisors who have characterized the interfering, supervening event as one disrupting a contemplated source of supply have generally had more success in having their nonperformance excused than have promisors whose performance has simply been rendered more expensive by the event. The lesson seems to be that promisors seeking to be excused from unexpectedly burdensome performance should isolate as narrowly and specifically as

81. UNIFORM COMMERCIAL CODE § 2-615.
possible the factors that have rendered performance more burdensome.

If impracticability has been demonstrated, attention must be directed, especially in situations involving long term contracts, to the effect of the supervening events. Care must be taken to distinguish temporary from partial impossibility. Performance is temporarily impossible when performance is impossible during the term of the agreement but becomes possible after the term has expired. Performance is partially impossible when part, but not all, of the performance is rendered impossible during the term of the agreement. Temporary impossibility generally excuses that part of the performance rendered impracticable but does not excuse that performance which remains practicable. In the partial impossibility situation, the only way to avoid performance entirely is to convince the court that the remaining performance has become materially more burdensome as a result of the supervening partial impossibility. Edward Maurer suggests that the promisor will be excused if he can demonstrate that, in light of his capital expenditures for the project as a whole and his intention to spread costs over the entire project, partial performance has become materially more burdensome, that to require the promisor to perform would be to require him to allocate the same costs over a much smaller project than was originally conceived.

Finally, all parties should consider the suggestion made in Comment 6 to § 2-615. A realignment of prices in line with present commercial reality might be in everyone's better interest than an "excuse" or "no excuse" decision.82

82. A final note. For an excellent overview of the general problems discussed above see Restatement (Second) of Contracts, ch. 11 (Tent. Draft No. 9, 1974). The Tentative Draft consolidates the Restatement's treatment of impossibility problems. The Tentative Draft abandons "impossibility" in favor of "impracticability" to emphasize the drafters' agreement with the UCC approach. The Tentative Draft approves and enlarges upon the UCC approach to impracticability problems which is not surprising since the UCC codified many of the suggestions made by the Restatement of Contracts. It remains to be seen just how much impact the Code and the Tentative Draft will have on the general judicial attitude of hostility toward the "impracticability" defense. The current economic dislocation should provide sufficient opportunity to test the willingness of the judiciary to liberalize its approach.