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INTRODUCTION

What does it mean to say that the doing of something has been made impracticable? Recourse to a dictionary is of no help in answering this question. Intuitively, this concept would seem to denote a course of action which, although not being impossible, is difficult to actualize. But even with this enlightenment one is left with a rather vague idea of what this word implies.

The above question is addressed in this essay. This essay will be concerned with the impracticability doctrine as it is codified in section 2-615 of the Uniform Commercial Code (the “Code”). Specifically, subsection (a) of this section will be analyzed.

The mode of this essay is the critical analysis of current law, a proposed remedy and justifications for this remedy. First, the essay will explore the judicial interpretation and application of the im-

1. The dictionary posits that impracticability means “not practicable [or] incapable of being performed or accomplished by the means employed or at command.” Webster’s New Collegiate Dictionary 577 (Merriam-Webster Inc., 1974). The latter definition is synonymous with the meaning of “impossible.” Yet, common intuition would indicate that impracticable means something different from impossible.

Further, since “practicable” is defined as “feasible,” id at 902, impracticable means “not feasible.” The question then becomes “What does feasible mean?” The same dictionary tells its readers that “not feasible” means something akin to impossible. Id at 419 (not “capable of being done or carried out”). But, again, this seems intuitively wrong.


3. Subsection (a) of section 2-615 provides in part:

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 non-occurrence of which was a basic assumption on which the contract was made . . .

Id at section 2-615(a).
practicability doctrine. The test that the courts have developed will be criticized as both unrealistic and lacking a proper foundation in the intent of the drafters. Next, in light of this intent, the purpose of section 2-615(a) will be discovered and a new statute will be proposed which will better effectuate this purpose. The new statute will be shown to be in congruence with the commercial philosophy of Karl Llewellyn, the principle drafter of section 2-615. Furthermore, it will be demonstrated that most contracts sought to be brought within the impracticability doctrine are "relational" in nature, and that the new statute promotes the norms associated with this type of agreement. In addition, it will be argued that application of the new statute is fair, and that the statute tends to create certainty with respect to transactional planning. Finally, it will be shown that the new statute is efficient.

ANALYSIS OF CURRENT CASE LAW

There is an identifiable procedure courts will utilize when analyzing a case under the impracticability doctrine. Courts will answer one or two questions in determining if the defense of impracticability exists. A court faced with this issue will first consider whether the disruptive event, that is, the event which has allegedly made performance impracticable, was reasonably foreseeable by the parties at the time of contracting. If the event is deemed to have been foreseeable, then this "fact" is dispositive, thereby foreclosing discharge. However, if the court believes that the disruptive event was not reasonably foreseeable, then the impracticability defense may be established - depending. In this latter situation, the court will query whether the occurrence of the disruptive event made performance impossible. If performance has not been made impossible, then the defense has not been established and the promisor's contractual obligations will not be discharged. Thus, the impracticability defense will be established if, and only if, the disruptive event was not reasonably foreseeable and if the event made

4. See notes 13 to 32 and accompanying text.
5. See notes 33 to 102 and accompanying text.
6. See notes 103 to 163 and accompanying text.
7. See notes 164 to 178 and accompanying text.
8. See notes 179 to 187 and accompanying text.
9. See notes 188 to 242 and accompanying text.
10. See notes 243 to 250 and accompanying text.
11. See notes 251 to 255 and accompanying text.
12. See notes 256 to 289 and accompanying text.
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performance impossible.

The Judicial Two-Prong Inquiry

The excuse of impracticability in contracts for the sale of goods is codified in section 2-615 of the UCC. Subsection (a) of this section delineates the requirements necessary to establish this excuse. With but little variation, courts have interpreted this section as requiring two conditions which must be met before performance is excused. "First, the performance must have become 'impracticable.' Second, the impracticability must have been caused 'by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made.'" If these two conditions are met, then performance will be discharged pursuant to the impracticability doctrine.

The condition that the disruptive event be one that the parties assumed would not occur is (or is not) established by reference to a foreseeability test. To provide a basis for excuse the disruptive event must not have been foreseeable. This requirement determines which party assumed the risk of the occurrence of the disruptive event. As one court noted, "certain risks are so unusual . . . that they must have been beyond the scope of the assignment of risks inherent in the contract. . . ." Thus, if the occurrence of the disruptive event was not reasonably foreseeable, then the promisor cannot be deemed to have assumed the risk.

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13. Mishara Construction Co. Inc. v Transit-Mixed Concrete Corp., 365 Mass 122, 127, 310 NE2d 383, 386 (1974). Accord Iowa Electric Light & Power Co. v Atlas, Corp., 467 F Supp 129, 134 (N D Iowa 1978) (court requires these two conditions and adds the condition that the promisor must not have assumed the risk of the disruptive event); Barbarossa & Sons, Inc. v Iten Chevrolet, Inc., 265 NW2d 655, 658 (Minn 1978) (court requires these two conditions and adds the condition that seller must seasonably notify buyer that performance has been made impracticable); Neal-Cooper Grain Co. v Texas Gulf Sulphur Co., 508 F2d 283, 293 (7th Cir 1974) (court requires these two conditions and adds that the contingency must occur).

14. Mishara, 310 NE2d at 367 (the court states, with respect to this requirement, that "[t]he question is . . . was the contingency which developed one which the parties could reasonably be thought to have foreseen as a real possibility which could affect performance?"); Northern Illinois Gas Co. v Energy Cooperative, Inc., 122 Ill App 3d 940, 954, 461 NE2d 1049, 1060, 38 UCC Rpt Serv 1222, 1232 (1984) ("The question of whether the nonoccurrence of an event was a basic contract assumption is a question of foreseeability."); Louisiana Power & Light Co. v Allegheny Ludlum Industries, Inc., 517 F Supp 1319, 1323 (E D LA 1981) ("The rule has also been stated as 'excus[ing] delay or nondelivery when the agreed upon performance has been rendered 'commercially impracticable' by an unforeseen supervening event. . . .'" (quoting Eastern Air Lines, Inc. v McDonnell Douglas Corp., 532 F2d 957, 988 (5th Cir 1976)).

15. Mishara, 310 NE2d at 367.
with the occurrence of the event. On the other hand, if the disruptive event was foreseeable, and the promisor failed to protect himself by means of an express provision in the contract, then the risk of the disruptive event will be deemed to have been assumed by the promisor. That is, "if a contingency is foreseeable, the section 2-615 defense is unavailable. . . ." This is because the "promisor can protect himself against foreseeable events by means of an express provision in the agreement." The failure of the promisor to contractually insulate himself from a foreseeable event is an implicit assumption of that risk.

Further, "[t]he foreseeability requirement does not entail contemplation of a specific contingency; rather, it is sufficient that the contingency that eventually occurred could have been foreseen as a real possibility that would affect performance." This means that the relevant judicial inquiry is not whether the parties actually foresaw a certain contingency, but rather whether they could have foreseen the event as a possibility. Thus, the foreseeability requirement is an objective standard.

In addition, courts tend to investigate the foreseeability requirement before considering whether performance has been made impracticable by the occurrence of the disruptive event. This is because the latter question need only be addressed if the disruptive event is deemed unforeseeable. As one court posited, "[w]here the occurrences complained of are in some degree foreseeable . . . it becomes unnecessary to reach the question of how much increase constitutes impracticability." Therefore, a positive answer to the foreseeability question is dispositive.

If the disruptive event is deemed to have been foreseeable, then contractual obligations will not be discharged pursuant to the impracticability doctrine. Many cases support this conclusion. In Harper & Associates v Printers, Inc., a defendant-printer agreed to supply the plaintiff-seller with high quality fine art posters.

16. Waldinger Corp. v CRS Group Engineers, Inc., 775 F2d 781, 786 (7th Cir 1985).
17. Waldinger, 775 F2d at 786.
18. Id.
20. Bende And Sons, Inc. v Crown Recreation, Inc., 548 F Supp 1018, 1022 (E D NY 1982); United States v Wegematic Corp., 350 F2d 674 (2nd Cir 1966) (defendant electronics manufacturer ought to have foreseen that possible engineering difficulties would be encountered in developing a new computer system).
22. 46 Wash App 417, 730 P2d 733 (1986).
Thereafter, the defendant supplied the plaintiff with two printings of the poster, but these were timely rejected by the plaintiff for poor craftsmanship. Subsequently, the plaintiff sued the defendant for breach of contract.

The defendant alleged that performance had been made impracticable because of difficulties in attaching a required foil overlay to the poster. Yet, the Harper court noted that "[t]his potential problem was known and was discussed prior to the contract being made." That is, this "potential" contingency was foreseeable. Consequently, the defendant's duty was not discharged.

Selland Pontiac - GMC, Inc. v King, is a case where the disruptive event was not foreseeable. In this case the defendant was to supply the plaintiff with four school bus bodies. Subsequently, Superior, the company who was to manufacture and supply the bodies to the defendant, went bankrupt. As a result, the bodies were never manufactured and the defendant could not fulfill its obligations under the contract. The plaintiff sued the defendant for breach of contract.

The Selland court held, inter alia, that the defendant did not breach the contract because performance had been made impracticable by the manufacturer going out of business. In reaching this conclusion, the court reasoned that "both parties testified that they had no knowledge of Superior's questionable financial circumstances when they contracted. . . ." That is, the possible bankruptcy was not foreseeable by the parties at the time of contracting.

The substantive result in these two cases is not atypical. If the disruptive event is deemed to have been foreseeable, performance will not be excused under the impracticability doctrine. However, if the disruptive event was unforeseeable at the time the parties entered the contract, then the court will further investigate the event alleged to have made performance impracticable.

At this point, a court will query whether performance has been made impracticable by the occurrence of the disruptive event. Case law indicates that a court will allow a discharge of performance under the rubric of impracticability only if performance has been forcibly prevented by the disruptive event, as defined in Harper.

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24. 384 NW2d 490 (Minn App 1986).
25. Selland, 384 NW2d at 493.
26. Arguably, a co-contractor's potential bankruptcy is always foreseeable. That is, this contingency is a logical possibility. See notes 33 to 78 and accompanying text for criticism of the judicial foreseeability prong.
made impossible. In applying 2-615(a) one court has expressly stated this rule: "A distinction is also drawn between impracticability which is 'subjective' and 'objective'. This has been described as the difference, respectively, between 'I cannot do it' and 'the thing cannot be done. . . .'. Only objective impracticability may serve to relieve a party of his or her contractual obligation." Reported decisions have generally substantiated this distinction. Thus, the impracticability defense will only be established if performance has been made impossible.

In *Gaddard v Ishawaijma - Harima Industries Co., Ltd.*, the defendant agreed to furnish the plaintiff with quantities of small boats as the plaintiff would order. Nineteen days after the contract was entered, the defendant's factory where the boats were manufactured was completely destroyed by fire. In this case the court excused the defendant's contractual performance pursuant to section 2-615. That is, the destruction of the defendant's factory excused the defendant's performance.

Likewise, in *Federal Pants, Inc. v Stocking*, the defendant's contractual performance was discharged pursuant to section 2-615 because that performance has been made impracticable. In this case the defendant had obtained a right to buy sport shoes and athletic apparel from the Nike Corporation. Only authorized dealers could buy goods from Nike. The plaintiff was not authorized to buy goods from Nike.

Subsequently, the plaintiff and defendant entered an agreement whereby the plaintiff agreed to post a letter of credit which would enable the defendant to purchase Nike products. In consideration for the posting, the defendant agreed to resell the Nike products to the plaintiff, or a person designated by the plaintiff. However, when Nike discovered that the defendant was selling Nike products to unauthorized dealers, Nike terminated the contract it had with the defendant. Thereafter, the plaintiff sued the defendant for breach of contract stemming from the defendant's failure to resell Nike settlement goods to the plaintiff.

The court ruled that the defendant had not breached its contract with the plaintiff. After determining that Nike's termination of the defendant's status as an authorized dealer was not foreseeable, the court held that this event made the defendant's perform-

28. *29 AD 754, 287 NYS 754 (1986).*
29. *762 F2d 561 (7th Cir 1985).*
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ance impracticable. The defendant’s obligation to supply Nike goods to the plaintiff could not be performed since only authorized dealers could buy Nike goods. That performance became impossible when Nike terminated the defendant’s status as an authorized dealer.

Waldinger Corp. v CRS Group Engineers, Inc.\textsuperscript{30} is an appropriate case to illustrate the two-prong test thesis. In this case the defense of impracticability was permitted. Therefore, according to the proposed thesis, the court must have concluded (i) that the disruptive event was not foreseeable at the time the parties entered the contract and (ii) that the occurrence of the disruptive event made performance impossible.

One of the two defendants in Waldinger was an engineering company, Dietz, who prepared specifications for two waste water treatment facilities. The plaintiff, Waldinger, was a mechanical subcontractor who agreed to supply the mechanical portions for the project. Ashbrook, the second defendant, was a company that had contracted with the plaintiff to supply “sludge dewatering equipment” for the project. The contract between Waldinger and Ashbrook required that the equipment supplied by Ashbrook had to meet with Dietz’s approval. In addition, Ashbrook was contractually required to guarantee that the machinery supplied would satisfy the project’s performance specifications.

In preparing specifications for the project, Dietz had used a “Carter” sludge dewatering machine as the model. This Carter machine had never been built before, but Dietz “took the Carter performance claims at face value, making no independent study of them.”\textsuperscript{31} Further, Dietz required Ashbrook to literally comply with the project specifications. Thus, the Ashbrook-supplied equipment had to meet both the project’s performance and mechanical specifications. Although Ashbrook built a machine that could meet the performance specifications, it was only the “Carter” machine that could satisfy the mechanical specifications of the project. Consequently, Ashbrook notified both Waldinger and Dietz that it could not guarantee the performance of a machine built to the project’s mechanical specifications. Subsequently, Ashbrook informed Waldinger that it could not fulfill its contract because it could not supply a machine that met both the performance and mechanical specifications of the project. Thereafter, Waldinger sued Ashbrook

\textsuperscript{30} 775 F2d 781 (7th Cir 1985) (cited in note 16).

\textsuperscript{31} Waldinger, 775 F2d at 784.
for breach of contract.

The Waldinger court found that Ashbrook’s contractual obligations were discharged pursuant to section 2-615(a). Initially, the court considered whether the occurrence of the disruptive event was reasonably foreseeable at the time of contracting. The court concluded that the disruptive event was not foreseeable. The disruptive event in this case was Dietz’s requirement that Ashbrook literally comply with the project specifications. In reasoning that this event was not foreseeable, the court noted that “specific mechanical subsystems were ordinarily waived by an owner’s engineer if a supplier could show that its equipment met performance specifications. . . .” Also relevant to the foreseeability issue were EPA regulations which required that specifications foster free and open competition, and that specifications not be exclusionary. Since Dietz’s project specifications could only be satisfied by use of the Carter machine, its insistence on literal compliance with these specifications contravened these EPA regulations. Thus, the court concluded that it was not reasonably foreseeable that Dietz would violate EPA standards and not adhere to industry custom. The implication of these facts is that it was not foreseeable that Dietz would require strict adherence to the project specifications.

After disposing of the foreseeability issue, the court addressed the question whether the occurrence of the disruptive event made performance “impracticable.” Because Ashbrook was contractually required to guarantee performance of the machine it supplied, which it could not do if it built the machine according to the project’s mechanical specifications, the court held that Ashbrook’s performance was made impracticable by Dietz’s insistence on literal compliance with the project specifications. Thus, Ashbrook’s performance was made impossible by the occurrence of the disruptive event. It was impossible for Ashbrook to guarantee performance and at the same time literally adhere to the project specifications. True, Ashbrook could have built a Carter machine, but since such a machine had never been tested before, Ashbrook could not guarantee the machine’s performance.

32. Id.
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Criticism of the Two-Prong Impracticability Inquity Utilized by the Courts

Criticism of The Foreseeability Prong

The foreseeability prong of a tribunal’s inquiry into the existence of impracticability is inadequate for several reasons. First, the text of section 2-615 does not expressly refer to a foreseeability-based test which must be satisfied in order to establish the defense. This fact appears to indicate that the foreseeability test was never intended to be determinative. One would expect that if foreseeability was intended to be conclusive, then some express mention of this test would be drafted into the statute. Yet, the word “foresee” (or any of its variations) does not appear in the text of section 2-615.

If the foreseeability test is not explicitly stated in the statute, then from where do courts derive this standard? The answer to this question is that courts derived this test from the official comments to section 2-615. A requirement of this statute is that there occur “a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . .” In explanation, Official Comment 1 states that these are “unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.” The concept of an “unforeseen contingency” is also mentioned in Comment 4, which states that the impracticability must result from “some unforeseen contingency which alters the essential nature of the performance.”

The courts have given these two comments an unusual interpretation. The comments require that the disruptive event be “unforeseen.” Courts, however, have required that the event be “unforeseeable.” The point is that “unforeseen” and “unforeseeable” are two different words. “Unforeseen” means that which is not or should not be expected; that which is not reasonably possible. In

35. UCC § 2-615(a).
36. Id, Official Comment 1 (emphasis added).
37. Id, Official Comment 4 (emphasis added).
38. See notes 14 to 26 and accompanying text. The negative implication of this requirement is that the defense is not available if the disruptive event was “foreseeable.”
contrast, "[u]nforeseeable . . . is defined much more restrictively and means 'incapable of being foreseen, foretold or anticipated.'"\(^\text{40}\) Consequently, in this respect, the courts have interpreted these two comments in an overly restrictive manner.\(^\text{41}\)

The implication of this discovery is that the impracticability defense will be established less often than the comments seem to infer. This is because a contingency may be unexpected, that is unforeseen, and at the same time be a logical possibility, that is foreseeable. For example, in *Bende & Sons, Inc. v Crown Recreation, Inc.*,\(^\text{42}\) a defendant-seller alleged that a train derailment made impracticable the defendant's performance, i.e., the delivery of combat boots to the Government of Ghana. The court held that the defendant had not established the defense because "the derailment was not unforeseeable."\(^\text{43}\) In this respect the *Bende* court said, "Although it did not appear that Bende[, the plaintiff,] and Kiffe[,] the defendant[,] ever contemplated a train derailment . . . common sense dictates that they could easily have foreseen such an occurrence."\(^\text{44}\) Thus, the court recognized that the parties did not expect a train derailment to occur. This event was unforeseen by the parties. However, since the train derailment was a logical possibility, the court deemed that event to be foreseeable. The point is that the comments and the court's interpretation of section 2-615(a) seem to diverge on whether the disruptive event must be unforeseeable, or merely unforeseen, for relief to be granted.

The rational behind the foreseeability test frustrates, at least in part, a purpose behind section 2-615. As indicated above, some courts have reasoned that a disadvantaged party's failure to contractually insulate himself from the occurrence of a foreseeable contingency is *ipso facto* an assumption of that risk.\(^\text{45}\) According to this rational, the only way a promisor can have protection against

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40. Bloomfield, 21 S Tex L J at 447 (cited in note 39) (quoting Webster's Third New International Dictionary of the English Language 2496 (1971) (emphasis added) (footnote omitted)); Walter, 61 St John's L Rev at 236-37 (cited in note 33). "Contingencies that are unforeseen refer to actualities, that is, did the parties actually foresee the particular contingency at the time of contract, whereas the foreseeable events standard assumes a more objective test." Id.

41. Prance, 19 Ind L Rev at 487 (cited in note 34). The author comments that the only references in Comments 1 and 4 are to the word "unforeseen," which is considerably narrower in scope than "unforeseeable." The word "unforeseeable" appears nowhere in the text or comments.

42. 548 F Supp 1018 (1982).

43. *Bende*, 548 F Supp at 1022.

44. Id.

45. See notes 14 to 19 and accompanying text.
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foreseeable contingencies is to describe generally those contingencies whose occurrence will discharge contractual performance. Yet, as one commentator points out, "[t]hat could not have been the drafter's intent because section 2-615, by its terms, applies when the contract is silent." Therefore, to the extent the foreseeability test is based on the "premise that a party can be expected to deal in appropriate language with all situations he can foresee," then to that same extent is the foreseeability test at odds with the proper operation of section 2-615.

Furthermore, the foreseeability test lacks a realistic foundation. It is not a necessary inference that, because a party was silent in the face of a foreseeable contingency, the party intended to assume the risk that the contingency would occur. There are a multitude of reasons why the promisor remained silent. The promisor may have believed that, although the disruptive event was foreseeable, the likelihood of its occurrence was so remote as not to justify the additional transactional costs required to provide for the event in the contract. Alternatively, in this situation the promisor may have wanted to avoid the additional strain on the relationship with the promisee entailed in further contractual negotiations. There may also not have been enough time at the negotiation stage to provide for the contingency. Possibly, the parties omitted express reference to the allocation of a risk because they were unable to agree as to which party would bear the risk. In any of these situations, a failure to contractually provide for a foreseeable contingency is not necessarily an indication that the parties intended that the promisor bear the risk of the occurrence of the disruptive event. Such an inference would be illogical.

47. E. Allan Farnsworth, Disputes Over Omission in Contracts, 68 Colum L Rev 860, 885 (1968).
49. Sirianni, 14 UCC L J at 63 (cited in note 48).
51. Irving M. Copi, Introduction to Logic 206 (MacMillan 1968). This is the Fallacy of Affirming the Consequent. The argument "if P then Q, Q, therefore P" is an invalid argument. Thus, if a party had intended to assume a risk, he may not have contractually allocated that risk. But, mere contractual silence does not necessarily mean that the party
In addition, the foreseeability test has been criticized as being ambiguous. The ambiguity in the application of the foreseeability test is the product of the varying degrees of specificity with which this inquiry may be posed. Suppose, for example, that a shipper had contracted to transport wheat from the United States to Iran. Let us further stipulate that after the parties had entered the contract, the Suez Canal closed. This event drastically increased the prospective cost of the shipper’s performance. Thereafter, the shipper claims that his contractual performance has been made impracticable by virtue of the Suez Canal closing. This essay posits that a court, in considering the shipper’s impracticability defense, will initially investigate whether the occurrence of the disruptive event (i.e., the closing of the Suez Canal) was foreseeable by the shipper (and charterer) at the time the parties entered the contract.

The above fact situation confronted the Second Circuit Court of Appeals in *Transatlantic Financing Corporation v United States.* Since the shipper had assumed “abnormal risks,” the court concluded, he was not relieved of his contractual obligations. In arriving at this conclusion, the *Transatlantic* court reasoned “that the parties were aware that the Canal might become a dangerous area.” That is, the court deemed the disruptive event to have been foreseeable.

But what aspect of the disruptive event will a court consider in determining foreseeability? Did the court query whether the shipper foresaw Israel’s invasion of Egypt, and Britain and France’s invasion of the Suez Canal Zone? In order to foreclose relief, did the shipper have to foresee that in response to these acts the Egyptian Government “would obstruct the Suez Canal with sunken vessels and close it to traffic”? Or, is it sufficient to foreclose discharge that the shipper was aware at the time of contracting that the Egyptian Government “nationalized the Suez Canal Company,” and that this had created an international crisis? Given

intended to assume an undisclosed risk.

52. Sirianni, 14 UCC L J at 58 (cited in note 48).
53. These facts are taken from *Transatlantica Financing Corp. v United States*, 363 F2d 312 (2nd Cir 1966).
54. 363 F2d 312 (2nd Cir 1966).
55. *Transatlantic*, 363 F2d at 319.
56. Id at 314.
57. Id.
58. Id.
59. Similarly, to foreclose discharge must the shipper have foreseen the disruptive
the same fact situation, a court may conclude that the shipper did not foresee the specific cause of the disruptive event; but, nonetheless, the shipper could have anticipated the occurrence of this kind of event.\textsuperscript{60} Therein lies the ambiguity. "A situation may be foreseeable generally but not specifically."\textsuperscript{61}

This discovery is important. "Whether a contingency will be deemed 'foreseeable' will turn on how many questions similar to those put above are addressed by the court."\textsuperscript{62} The specificity of these questions may be conclusive as to the existence of the defense. If a court conducts the foreseeability inquiry by means of specific questions, then there is a greater probability that the occurrence of the disruptive event will be considered to have been unforeseeable at the time of contracting. On the other hand, "[t]he more superficial the inquiry, the more likely it is that the contingency will be deemed 'foreseeable.'"\textsuperscript{63} Thus, given any fact situation, a disruptive event may be deemed foreseeable or unforeseeable depending on what aspect of the disruptive event the court examines in determining foreseeability.

Case law indicates that the relative specificity of the foreseeability inquiry is within the "discretion"\textsuperscript{64} of the court. Consider, for example, \textit{Eastern Airline, Inc. v Gulf Oil Corp.},\textsuperscript{65} where the plaintiff and defendant had entered a requirement contract for aviation fuel. Subsequently, the defendant claimed that his performance had been made impracticable because of the Middle Eastern oil embargo and government price control. Disagreeing with the defendant, the court held, among other things, that the disruptive event was foreseeable. The court reasoned that "[t]he record [was] replete with evidence as to the volatility of the Middle Eastern situation ... [and] that oil [had] been used as a political weapon with increasing success by the oil producing nations for many event's actual impact on the contract, or is it sufficient that the shipper was cognizant of the fact that if the disruptive event occurred, the cost of performance would increase?

\textsuperscript{60} Or, the shipper could not have foreseen that the disruptive event would have a specific effect on the contract; but, the shipper was aware that a disruptive event of a certain nature would lead to increased cost of performance.

\textsuperscript{61} Farnsworth, 68 Colum L Rev at 886, n.130 (cited in note 47).

\textsuperscript{62} Sirianni, 14 UCC L J at 59 (cited in note 48).

\textsuperscript{63} Id at 59.

\textsuperscript{64} "Discretion" is used in the weak sense. In this sense the word simply entails "that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment." Ronald W. Dworkin, \textit{Taking Rights Seriously} 31 (Harvard, 1977). Discretion used in this sense, however, is not tantamount to license.

\textsuperscript{65} 415 F Supp 429 (S D Fla 1975).
years." In addition, the court noted that, although the specific government price regulation could not be envisioned ex ante, continual and changing government regulation was foreseeable since government regulation of oil had taken place before the contract was entered. Thus, in Eastern, the court focused on the general aspects of the disruptive event in determining foreseeability.

It is interesting to compare the court’s foreseeability investigation in Eastern with the court’s analysis in Aluminum Company of America v Essex Group, Inc. In ALCOA, the plaintiff had contracted to convert stated amounts of alumina into aluminum for the defendant. The contract contained indexes to adjust the contract price in proportion to the plaintiff’s production costs. Unfortunately, one index failed to accurately reflect the plaintiff’s non-labor costs when the 1973 oil embargo and adherence to new pollution regulation drastically increased the plaintiff’s cost of performance. The court held in this respect that “the parties could not possibly have known of the sudden inability of the . . . price index to reflect ALCOA’s non-labor costs . . . [A] 500% variation of costs to Index must be deemed to be unforeseeable, within any meaningful sense of the word.” Unlike Eastern, the ALCOA court focused on the specific effect the disruptive event had on the performance of the contract in determining whether the disruptive event was foreseeable.

The foreseeability test also suffers from the criticism that “hind-sight is 20/20.” “Events that have become part of history, especially if of major significance, have a way of seeming not just foreseeable but inevitable.” This problem stems from the very real possibility that a tribunal, in determining whether a disruptive event was foreseeable, cannot totally disregard facts it knows concerning the “postcontract world.” Since the disruptive event has already occurred, a court cannot view the event with only the information the parties possessed at the time of contracting. Consequently, possibilities which seemed remote to the parties at the time of contracting may appear to have been patently foreseeable.

68. Alcoa, 499 F Supp at 65.
69. Walter, 61 St John’s L Rev at 239 (cited in note 33).
70. Sirianni, 14 UCC L J at 61 (cited in note 48). Hurst, 54 NC L Rev at 568 (cited in note 48). Professor Hurst notes that “there is a danger that, once a contingency has occurred, it will appear in retrospect to have been reasonably foreseeable although prior to its occurrence it was in fact foreseen by few, if any, persons.”
ex ante.

One commentator has posited that an event can be deemed foreseeable when there is information available at contract formation that would have allowed the promisor to anticipate the occurrence of the disruptive event. This analysis appears to be the way courts generally address the foreseeability prong. If some amount of information exists concerning the contingency at the time of contracting, then the contingency will generally be deemed foreseeable. For example, in Maple Farms, Inc. v City of Elmira School District, the court found “that the contingency causing the increase of the price of raw milk was not totally unexpected [because] any businessman should have been aware of the general inflation in this country during the previous years and the chance of crop failures.” Yet, the problem with this analysis is that there is almost never a lack of information concerning a future possibility. In this sense, virtually all disruptive events are foreseeable.

Indeed, there is usually too much information concerning future possible states of affairs. Take, for example, a prediction involving the behavior of the stock market. There is probably data available sufficient to support any prediction concerning the movement of the market. Yet, even with this information “sophisticated investment analysts are wrong at least as often as they are right.” This implies that it is not a necessary inference that simply because information concerning the disruptive event was in existence ex ante the event was reasonably foreseeable.

Criticism of the Impossibility Prong

The second prong of a court’s impracticability analysis - that the promisor’s performance be made virtually impossible by the occurrence of the disruptive event - does not comport with the drafter’s intent of section 2-615. The principle drafter of Article 2 was Pro-

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72. Id at 59. The author says that “[i]t appears that a contingency will be deemed foreseeable if there was any glimmer at the time the contract was made that any event slightly resembling what actually occurred might have been possible.” Id (footnote omitted).
73. 76 Misc 2d 1080, 352 NYS 2d 784 (1974).
74. Maple Farms, 352 NYS at 789.
76. Id at 61-2.
77. Id (author uses this example).
78. Id at 62. The author cites William A. Kent, The Smart Money - How to Invest in the Stock Market Like an Insider 60 (1972) as authority for this proposition.
A proper interpretation of this section must be consistent with Llewellyn's purpose in drafting section 2-615. Where is this intent to be found? One commentator has suggested that "[t]he most obvious manifestation of Llewellyn's intent appears in the . . . official comments to section 2-615." One could argue that the official comments are of no authoritative relevance inasmuch as they are not part of the text of any statute. Furthermore, it could be argued that since the drafters had deleted a provision of an earlier draft of the Code, which had made express reference to the authority of the comments as an aid in the interpretation of the text, then the comments ought not to be consulted in ascertaining the intent of the drafters. But these arguments are wrong. The official comments to Article 2 are significant for several reasons. First, Llewellyn himself recognized the value of the comments. He said that "[a] commentary is thus an integral part of . . . a Code." Professor Llewellyn believed that a "sound development" of the law could only be achieved if there existed adequate commentary to guide a court's interpretation of the relevant statute. Llewellyn's thoughts on this subject can be found in other contexts. In a draft comment of section 1 of the Revised Sales Act, he stated that "'[t]he comments are further designed to state with clarity and precision the intent of each section. . . .'" Likewise, in an appendix to the Uniform Revised Sales Act, Third Draft, Llewellyn stated that "'[t]he Official Comments . . . aim at straight exposition of purpose and effect of the section and of its relation to prior law. . . .'" This latter statement is especially significant because the Uniform Revised Sales

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80. Prance, 19 Ind L Rev at 462 (cited in note 34). Professor Prance instructs his readers that "'[a]. . . goal of statutory interpretation is that the interpretation be consistent with the intent of the drafter." Prance cites C. Dallas Sutherland, *Statistics & Statutory Construction* § 48.12 (1973), as authority for this proposition. Prance, 19 Ind L Rev at 462.
81. Id.
85. Id at 327.
86. Id.
Act was the embryonic version of Article 2. Thus, it appears that the drafter of section 2-615 envisioned that the official comments would play an important role in the section’s interpretation.

More generally, the official comments were written by the people who participated in the drafting of the Code or were associated with those who did. The implication of this is that the comments “may be viewed as part of the legislative history of the Code,” because the statute and accompanying comments stem from the same source. The natural inference from this fact is that the same purpose guided the drafting of both.

In addition, it is not insignificant that commentators have recognized the importance of the comments. One commentator has advocated that “[t]he main function of the comments is as an aid to interpretation. . ..” Another reasoned that “[a] thorough job of construing the Code calls for using the comments to make sure one has found the pertinent language of the statute, as a double-check on a tentative construction, and as a secondary aid where the language of the statute is ambiguous.” One professor argued that the comments “form a treatise on the Code, and may be consulted as any other treatise, standing on its own merits.” Another professor maintained that “the comments were intended by the drafter of the Code to assist the courts in applying and interpreting commercial law. . . .” It is apparent, therefore, that many scholars have imputed the comments with importance.

The courts’ reaction to the commentary of the Code is of paramount interest, because the relevant “question is what courts will do, rather than what they should do.” Case law indicates that courts are very receptive to the comments as an explanatory device. As one court put it, “[t]he purpose of the comments is to explain the provisions of the code itself, in an effort to promote uniformity of interpretation.”

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88. Skilton, 1966 Wis L Rev at 602-03 (cited in note 82); Twining, Llewellyn at 329 (cited in note 83). Professor Twining argues that since the comments “bear the imprimatur of the responsible for the code... they have strong claims to be authoritative.” Id.
89. Skilton, 1966 Wis L Rev at 602 (cited in note 82).
90. Twining, Llewellyn at 329 (cited in note 83).
92. Skilton, 1966 Wis L Rev at 603 (cited in note 82).
94. Skilton, 1966 Wis L Rev at 598 (cited in note 82).
95. Burchett v Allied Concord Financial Corp., 74 NM 575, 578, 396 P2d 186, 188
Clearly, the comments are relevant to the proper interpretation of section 2-615. It is just as clear that the comments "advance a broad reading of the statute." This can be garnered from the express language of the comments. The second sentence of Official Comment 3 contrasts commercial impracticability "with 'impossibility,' 'frustration of performance' or 'frustration of venture.'" Comment 6 can be read as to suggest that loss-splitting may be appropriate. Further, delay in performance as a consequence of seeking adjustment of the contract in light of a contingency may be excused.

Thus, the comments indicate that Llewellyn intended the Code impracticability defense to be available in more situations than the common law impossibility doctrine would allow. Unfortunately, "[i]n spite of the intent of the draftsmen of section 2-615 to achieve innovation and liberalization of the law, the judiciary . . . [has] shut the door to further judicial interpretation and expansion." This means that courts have treated "Code impracticability [to be] very much like the common law doctrine of impossibility." Consequently, the courts' interpretation of section 2-615(a) has not been true to the drafters' intent.

A NEW INTERPRETATION OF SECTION 2-615(A)

General Principles of Statutory Construction

Karl Llewellyn believed that a statute "must be read in light of some assumed purpose." "A statute," Llewellyn advocates, "merely declaring a rule, with no purpose or objective, is non-

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(1964).

96. Prance, 19 Ind L Rev at 462 (cited in note 34).
98. Id, Official Comment 6. Note, however, Comment 6 does not expressly say that loss-splitting is appropriate. The comment says that when neither "excuse" or "no excuse" will serve the ends of justice, adjustment of the agreement based on equitable principles may be appropriate.
99. Id, Official Comment 7.
100. Prance, 19 Ind L Rev at 463 (cited in note 34); Frederic K. Spies, Article 2: Breach, Repudiation And Excuse, 30 Mo L Rev 225, 255 (1965). Spies says that "[t]he examples given in the [comments to section 2-615] suggest that the conditions intended to be covered must be something more prosaic, although the cases cited in [Llewellyn's notes] suggest that Professor Llewellyn was seeking the widest possible application of this section." Id.
101. Walter, 61 St John's L Rev at 259 (cited in note 33).
102. Id.
sense.” Furthermore, “[i]f the statute is to be merged into a going system of law . . . the court must do the merging, and must in so doing take account of the policy of the statute. . . .” Thus, the purpose of a statute is the ingredient which makes a court’s interpretation of that statute sound.

This principle of statutory construction is expressly included within the Code. Section 1-102 mandates that Code sections be applied in a way that effectuates their purpose and policies. Furthermore, the comments to section 2-615 suggest that the “Section . . . is to be interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose.” Apparently, in order to interpret section 2-615(a) correctly, Llewellyn’s philosophy and the Code mandate that one comprehend the purpose of this statute.

One Interpretation of Section 2-615(a)

Karl Llewellyn utilized a unique drafting technique in writing Article II. He believed that “‘[e]very provision should show its reason on its face. Every body of provisions should display on their face their organizing principle.’” The reason for this mode of drafting was that “uniform interpretation by judges of different schooling, learning and skill is tremendously furthered if the reason which guides application is the same reason in all cases.”

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104. Llewellyn, 3 Vand L Rev at 400 (cited in note 103).
105. Id (emphasis added); Mentschikoff, 27 Mod L Rev at 170 (cited in note 79). Mentschikoff said “that proper construction [of a Code section] follows the reason and is limited or extended by it.” Id.
106. UCC § 1-102 (1987). In explanation, the official comments to this section require that “[t]he text of each section should be read in light of the purpose or policy of the rule or principle in question. . .and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes or policies involved.” Id, Official Comment 1.
107. UCC §2-615, Official Comment 2.
108. Gedid, 29 Wm & Mary L Rev at 371 (cited in note 93); see also, Mentschikoff, 27 Mod L Rev at 168, n.3 (cited in note 79). Professor Mentschikoff comments that “[d]espite the numbers of persons involved in the drafting of the Code, the extent to which it reflects Llewellyn’s philosophy of law and his sense of commercial wisdom and need is startling.” Id.
109. Twining, Llewellyn at 321-22 (cited in note 83) (quoting Karl N. Llewellyn, Papers at 5 (1944)); Mentschikoff, 27 Mod L Rev at 170 (cited in note 79). Professor Mentschikoff, while discussing the Code drafting technique, said “[t]he attempt, therefore, has been to draft rules so that both the situation being covered and its reason tend to appear on the face of the language. . . .” Id.
110. Twining, Llewellyn at 322 (cited in note 83) (quoting Llewellyn, Papers at 5); Mentschikoff, 27 Mod L Rev at 170 (cited in note 79). Professor Mentschikoff said in regards to this, that “[t]he most important drafting concept rests on the belief that relative certainty and uniformity of construction depend on the court’s perception of the situation.
This technique is called the principle of patent reason. A requirement of a statute drafted with a patent reason is that a proper interpretation of it "must make some kind of sense in terms of the reason." Furthermore, the official comments are relevant to ascertaining the purpose of a Code section. Thus, the purpose of section 2-615(a) may be found in the text and official comments to this section.

In analyzing section 2-615(a), one is immediately struck with the realization that this law is an "excuse" provision. The language of the statute supports this proposition. For example, the title of this section begins with the word "Excuse." A title is commonly thought of as a synopsis of what the titled entity covers. Thus, an entity entitled "Excuse" would seem to involve that concept. Further, the first official comment begins, "This section excuses . . ." This makes plain that the statute involves a type of excuse of performance.

The textual organization of 2-615(a) amplifies its nature as an excuse provision. Excuse of performance is not a mere exception to the statute with "no excuse" being the norm. There is an except clause in 2-615(a) which delineates the situations where performance is not discharged. One would believe that exceptions to a law are qualifications to the main concept of the statute. These provisions merely indicate in what situations the main concept does not apply. Consequently, the result obtained when an exception is applicable is contrary to the kind of end the main concept of the statute sought to achieve. If the exception to the law is "no excuse," then it follows logically that the main idea of the statute represented by the rule and the reason the rule was adopted. . . ."

111. Twining, Llewellyn at 321 (cited in note 83). Commentators have differed as to the scope of this principle. Some have gone as far as to claim that "Llewellyn consciously included reason, purpose and policy in each section as part of the major drafting technique in the Code." Gedid, 29 Wm & Mary L Rev at 372 (cited in note 93). However, other commentators have found that "only sparing use was made of the device of incorporating specific statements of purpose in the [Code] rules themselves." Twining, Llewellyn at 323 (cited in note 83). For purposes of this essay it will be assumed that this latter technique was used in drafting section 2-615(a).

112. Twining, Llewellyn at 322 (cited in note 83) (quoting Llewellyn, Papers at 5 (cited in note 109)).

113. Twining, Llewellyn at 322 (cited in note 83).

114. UCC § 2-615 (1987). The title of section 2-615 is "Excuse by Failure of Presupposed Conditions".

115. Id, Official Comment 1 (emphasis added).

116. UCC § 2-615 (1987). Section 2-615 begins with the qualification, "Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance."
is "to excuse." Thus, the dominant theme of section 2-615(a) is to discharge performance.

In addition, the location of section 2-615 in Article II is revealing as to its nature. This section is located in Part Six of Article II and is entitled "Part 6 Breach Repudiation and Excuse." As the title indicates, this part of the Code contains, among other things, sections dealing with excuses to performance. In fact, the last four sections of Part Six are excuse provisions. Not too surprisingly, section 2-615 is one of these latter sections. Consequently, this section is primarily an excuse provision.

The official comments to section 2-615 bespeak the commercial character of this statute. The comments indicate that the basic policy of the statute is to use commercial impracticability as a test for excusing contractual performance. Official Comment expressly tells its readers that the "test of commercial impracticability ... has been adopted in order to call attention to the commercial character of the criterion chosen by this Article." Furthermore, the comments explain that this section ought to be interpreted in light of commercial practices. Evidently, commercial understanding was meant to play a major role in the interpretation and application of section 2-615(a).

Another Interpretation of Section 2-615(a)

Thus far, section 2-615 has been interpreted as an excuse provi-

117. Copi, Logic at 249 (cited in note 51). This is merely an expression of the logical inference Modus Tollens. If P then Q. Q. Therefore, P.
118. This end will be actualized unless (i) an exception applies or (ii) the conditions of 2-615(a) are not satisfied.
121. UCC § 2-615, Official Comments 1, 10. Comment 1 states that "[t]his section[,] section 2-615[,] excuses a seller ... where his performance has become commercially impracticable." Comment 10 tells its readers that 2-615 "[f]ollow[es] its basic policy of using commercial practicability as a test for excuse."
122. Id, Official Comment 3; see also, Official Comment 8 wherein the drafters wrote "this section itself sets up the commercial standard for normal and reasonable interpretation."
123. Id, Official Comment 8. The comment infers that "this section [is] to be read in the light of mercantile sense and reason."
sion which is commercial in character. This interpretation was de-

rived by use of the "Patent Reason Technique." But is this in-

terpretation correct? One way to demonstrate that the present

interpretation is correct is to show that a different interpretive

technique would yield the same or similar interpretation. "An al-

ternative technique to . . . statements of purpose 'consists in mak-

ing the purpose of a provision appear on its face by the choice of

language and by the organization of the thought in light of the sit-

uation." In this manner, purpose is derived from the statute's

choice of words, textual organization and articulation of "situation-

sense." As section 2-615's choice of language and textual organiza-

tion have already been examined, this essay will now only explore

Llewellyn's notion of situation-sense. Situation-sense is a difficult

concept to understand. According to Llewellyn, situation-sense is an

idea which entails the persuasiveness of certain facts in a spe-

cific context, and the subjective lens, fashioned by knowledge and

experience, with which a judge or court views these facts. In ex-

planation, Llewellyn quoted the German legal scholar, Hermann

Levin-Goldschmidt:

Every fact pattern of common life . . . carries with itself its appropriate, natural rules, its right law. This is a natural law which . . . rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of time and space: it is thus not eternal or changeless nor everywhere the same, but is in-dwelling in the very circumstances of life.

124. See notes 108 to 123 and accompanying text.
125. Twining, Llewellyn at 324 (cited in note 83) (quoting Llewellyn, Papers at 6 (cited in note 109). See also, Llewellyn, 3 Vand L Rev at 401 (cited in note 103). Professor Llewellyn urged that, to make a specific canon of statutory construction apply to the statute in question, "[t]he good sense of the situation and a simple construction of the available language to achieve that sense, by tenable means, out of that language" must be argued. Id.
126. Twining, Llewellyn at 324 (cited in note 83). This essay assumes that there is a close nexus between "situation-sense" and statutory interpretation. That is, situation sense should be referred to in the interpretation of an Article 2 code provision.
127. See notes 114 to 120 and accompanying text.
128. Jay M. Feinman, Promissory Estoppel and Judicial Method, 97 Harv L Rev 678, 698 (1984): "Situation-sense is among the most confusing concepts created by Llewellyn." Twining, Llewellyn at 217 (cited in note 83): "Situation-sense' is made a key concept in The Common Law Tradition; unfortunately it is one of the most obscure."
129. Karl N. Llewellyn, The Common Law Tradition at 60 (1960). In defining this concept, Llewellyn says, "Situation-sense will serve well enough to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with what ever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with, and to judge with."
130. Twining, Llewellyn at 217 (cited in note 83) (quoting Llewellyn, Common Law at 122 (cited in note 129). Professor Feinman claims that "Llewellyn purports to translate from
Goldschmidt coined this the "immanent law." Further, Llewellyn believed that the task of a court was to discover and implement this "immanent law." In order to achieve this goal, a court must "truly understand" and "rightly evaluate" the "facts of life." In so doing, a court should "fashion a rightly sound rule" to apply in the case at hand.

The meaning of these passages has received the attention of various scholars, and an examination of the literature apparently discloses little harmony among the interpretive conclusions reached. At first blush, the Levin-Goldschmidt passage seems to imply "a species of natural law theory that is intuitionist and metaphysical." However, scholars have not tended to equate Llewellyn with a natural law theorist.

Generally, there are three dominant interpretations of situation-sense. One interpretation holds that the concept entails one of two possible, mutually exclusive meanings. Situation-sense can mean either that policy or principle which guides a court's decision-making or judicial familiarity with commercial mores and practices. On the other hand, Professor Twining sees no reason why situa-

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a 'preface' to Goldschmidt, *Der Entwurf eines Handelsgesetzbuchs fur die Preussischen Staaten* (pt 2), 4 Kritische Zeitschrift Fur Die Gesammte Rechtswissenschaft 289 (1857), but the nature and location of this preface are not apparent from the sources." Feinman, 97 Harvard L Rev at 699, n.93 (cited in note 128).

A more telling quotation appears in another of Llewellyn's writings, wherein he says: case-law doctrine in Contract is built around the facts of adjudication, and is likely both to reflect life-conditions and to stay moderately close to them. When in doubt whether a given body of Contract doctrine is case-law doctrine, one very helpful approach is to examine the fact-conditions to which the doctrine purports to apply. If it fits those conditions, it is likely to fit the cases, more or less roughly; if it does not, it does not.


131. Llewellyn, *Common Law* at 122 (cited in note 129): "'The highest task of Law-giving consists in uncovering and implementing this immanent law'" (quoting Levin-Goldschmidt, *Der Entwurf* at 289 (cited in note 130)).

132. Twining, *Llewellyn* at 217 (cited in note 83) (quoting Llewellyn, *Common Law* at 127 (cited in note 129): "Only as a judge or court knows the facts of life, only as they truly understand those facts of life, only as they have it in them to rightly evaluate those facts and to fashion a rightly sound rule and an apt remedy, can they lift the burden Goldschmidt lays upon them; to uncover and to implement the immanent law." Id.

133. Id.


135. Id at 219. "Llewellyn often criticized the idea that there should necessarily be a single just solution or correct answer to every legal problem." Id.

tion-sense cannot encompass both these meanings at once. In this vein, situation-sense involves both the formulation of relevant policies or principles and the appreciation of commercial mores and practices. The third dominant interpretation of this concept posits that it entails solely the "law merchant," that is, the customs, usages and practices of the commercial agent. Of course, there are other interpretations of situation-sense, but these interpretations do not appear to have attracted many followers.

Which interpretation most accurately reflects Llewellyn's ideas, this paper proposes, is a moot question. The issue is moot because the three dominant interpretations are compatible with one another. They are compatible in that all the interpretations necessarily involve recognition of commercial norms. Situation-sense, when defined as the guiding principles or policies in judicial decision-making, necessarily entails a tribunal's familiarity with commercial mores. Llewellyn believed that the principles or policies a court uses in deciding a commercial case ought to be based upon commercial practices and mores. He said that "policy and principle must fit the facts, and must be rebuilt to fit changing facts." The apparent conflict between the various interpretations

137. Twining, Llewellyn at 222 (cited in note 83).
138. Id.
139. Richard Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 Stan L Rev 621, 626 (1975); Professor Danzig comments that "Article II frequently speaks as though courts should discover the law merchant from a careful, disinterested examination of custom and fact situations. . .[and] the intention of this Act is to use the standards of current commerce." Id. See also, Chris Williams, The Search for Basis of Decision in Commercial Law: Llewellyn Redux, 97 Harv L Rev 1495, 1499 (1984). Professor Williams says that situation-sense "meant an understanding of the usages and practices common in the trade." Id.
141. Professor Twining notes this point when he says "it would be artificial and misleading to separate the formulation of policy from the classification of facts, because they are to a large extent interdependent." Twining, Llewellyn at 223 (cited in note 83).
142. Karl N. Llewellyn, On Warranty of Quality and Society, 37 Colum L Rev 341, 409 (1937). Llewellyn claimed that "[t]oday's policy and principle will be outdated, within a generation. But guidance it gives when, and as long as, it fits the facts. And surely the lesson remains that policy and principle must fit the facts, and must be rebuilt to fit the changing facts." Llewellyn, 37 Colum L Rev at 409 (emphasis added).
143. Id.
of this concept is, therefore, no real conflict, since each interpretation involves the appreciation of commercial mores and practices. Thus, at its core, situation-sense involves commercial reality.

More importantly, however, situation-sense, when defined as an understanding and appreciation of commercial practices, makes sense in light of the Goldschmidt quotation and Llewellyn's thoughts on the subject. This definition of situation-sense is clearly derivable from the relevant passages. When Llewellyn speaks of "'the life conditions of time and place,'"1 this plausibly refers to the current practices common in the trade. So, to "uncover and to implement the immanent law"15 this is to use these commercial facts as a basis for "fashion[ing] rightly a sound rule"16 to control the disposition of a commercial case. In so doing, a tribunal "truly understand[s]" or appreciates current commercial mores and practices.

If situation-sense is defined in this manner (i.e., an understanding and appreciation of the uses and practices common in a trade), then the second interpretive technique indicates that section 2-615(a) is predominantly an excuse provision that is commercial in nature. This is the same interpretation as that reached by analyzing section 2-615 in light of Llewellyn's "patent reason" technique.148 As a result, this fact tends to support the conclusion that this essay's interpretation of 2-615 is an accurate reflection of the drafter's purpose.

The Purpose of Section 2-615 Defined

The purpose of section 2-615 is relevant because an interpretation of this law must be made with reference to that purpose, and the application of this law must effectuate that purpose. This essay proposes that the purpose of section 2-615 is to excuse performance whenever that performance has been made commercially unreasonable. In this sense, commercial reasonableness is defined, not in terms of the present or past desires of the individual parties to the contract, but with reference to the law merchant - the customs, usages and practices that are common in the trade.149 The reasona-
Determine what exactly are "common" or "reasonable" commercial practices would not be difficult, or uncertain, since this determination would involve an objective standard. The inquiry would be whether a representative sample of those who practice within the trade believe that the conduct in question was a reasonable commercial standard. If the majority of the sample answers this question in the affirmative, then the conduct in question should be deemed a reasonable commercial standard. Of course, if the majority answers in the negative, then the practice will not be considered commercially reasonable. The answer to these types of questions would be obtained from either expert testimony or empirical studies.

An illustration will help make this point clear. In *Asphalt International, Inc. v Enterprise Shipping Corp.*, the court addressed the issue "whether the owner of a vessel rammed amidships may treat the vessel as a total loss and be excused from further liability pursuant to the . . . agreement, where the cost of repair exceeds the vessel's pre-collision fair market value. . . ." Under the contract, the owner had the obligation to repair the vessel, but "the contract stated that '[s]hould the vessel be lost, hire shall cease at

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Mooney seems to recognize this issue. He said that "[c]ommercial law in this country is or soon will be the Uniform Commercial Code and thus is firmly rooted in the rich soil of the 'life-situation' of business agreements made in the context of the contemporary processes of the primary commercial activity in this country." Mooney, 11 Vill L Rev at 220.

150. Several cases have implicitly recognized this point. *Asphalt International, Inc. v Enterprise Shipping Corp.*, 667 F2d 261, 265 (1981) ("Custom and Trade in the industry also provides a basis for allocating risk of loss."); *Transatlantica Financing Corp. v United States*, 363 F2d 312, 315 (1966).

151. Obviously, the test could be changed to require two-thirds, or any other suitable fraction, of a representative sample vote in the affirmative for a practice to be recognized as common in a trade.

152. This method is premised on the proposition that "[t]he Code is a commercial act drawn against a competitive market situation where the grosser abuses tend to be self-defeating and where self-interest tends to produce standards of behavior which are within the tolerances of decency." Mentschikoff, 27 Mod L Rev at 171 (cited in note 79). Thus, the fear that a purely analytical standard, as opposed to a normative one, would not promote social productivity and virtuous behavior is weakened.

153. Of course, an empirical study would have to satisfy some minimum type of requirements so as to insure quality and comprehensiveness of research. For example, a requirement may be that empirical studies must be based on a sample comprised of a requisite number of commercial agents.


155. *Asphalt*, 667 F2d at 263.
noon on the day of her loss. . . . ’”156 Although the ship could be repaired in this case, the court concluded that the vessel had been lost. In light of the mandates of business sense then, when the vessel was deemed a constructive total loss, the owner's duty to repair its vessel was discharged. This custom dictates "that when a shipowner is insured and the cost of repairs . . . exceed the repair value of the ship, the owner may ‘abandon’ the vessel to the insurer as if it were a total loss.”157 Since the vessel had been lost, the owner's contractual obligations were discharged. What is important in this case is that the court used maritime custom to settle the case.158

Establishing a line of demarcation between different trades would not be difficult. The dictionary defines trade as, among other things, “[a] line of work . . . pursued as a business or calling, as for a livelihood or profit; . . . anything practiced as a means of getting a living, . . . or the buying and selling, or exchanging, of commodities, either by wholesale or retail within a country or between countries.”159 Using this definition as a guide, judges must utilize "their intuition and life experiences”160 to ascertain the division between various trade groups. Application of this definition is not likely to be difficult.

One could argue that distinguishing between different types of trade will be more difficult than this essay seems to propose. But that point is debatable. In the vast majority of cases it will not be difficult to distinguish one trade from another. For example, it is common knowledge that a plumber occupies a different trade than a carpenter. In more difficult cases, the court could define a trade with reference to the majority view of a representative sample of commercial agents who are suspected members of that trade. Of course, in some cases delineating a trade will be difficult and yield a murky answer. But complex and indefinite issues are not new in the law nor is a court unfamiliar with this task. In the final analysis, a court must simply do its best in deciding the difficult cases and hope that these cases are few and far between.

In an effort to create as much certainty as possible in the appli-
cation of this new standard, this essay proposes that performance should be discharged, in whole or in part, whenever the essential nature of the contract is commercially recognized as having been significantly altered. This proposition finds support in the comments to section 2-615. Comment 4 alludes to this conclusion when it states that a "contingency which alters the essential nature of performance" will bring a contract within the ambit of section 2-615. Further, at least one court has implicitly recognized this test. The Fifth Circuit Court of Appeals stated in Eastern Air Lines, Inc. v McDonnell Douglas Corp. that "[t]he rational for the doctrine of impracticability is that the circumstance causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably thought to govern."

Empirical study concerning the attitude of business people toward commercial agreements also indicates that "[a]lthough the parties [may] fail to cover all foreseeable contingencies, they will exercise care to see that both understand the primary obligation on each side." This finding infers that the primary obligation of the contracting parties, that is the essential nature of the contract, is the item which is most relevant to the parties. Consequently, when the primary obligation or essential nature of the contract is altered, a colorable argument exists that the contract does not effectuate the intention of the parties. This is a good reason why the terms of the original contract should no longer be binding. In any event, this proposal does have a basis in the Code, case law, and commercial reality.

Redrafting of Section 2-615(a)

Section 2-615(a) ought to be altered to implement the above ideas. The redrafted statute should be susceptible to an interpretation which more adequately reflects the intent of the original drafters. The practical consequence of this proposal would be that a court's application of section 2-615(a) would be consistent with Llewellyn's commercial philosophy. Further, such a reformulation would effectuate the presumable expectation of the parties and

161. 532 F2d 957 (5th Cir 1976).
162. Eastern Air Lines, 532 F2d at 991 (citing S. Willston, Contracts §1963 at 5511 (1938)).
create certainty in business transactions, as well as promote efficiency in commercial contracts. Consider the merits of this possibility:
IF
(1)(A) Performance, by a party to a contract, has been made more difficult by the happening of an unexpected event;
OR
(1)(B) Performance, by a party to a contract, has been made more costly by the happening of an unexpected event;
AND
IF, AND ONLY IF,
(2)(A) The event, alleged to have made performance more difficult, was deemed unexpected according to customs, usages and practices in the trade;
AND
(2)(B) The customs, usages and practices common in the trade indicate that the essential nature of the contract has been changed by virtue of the happening of the unexpected event;
THEN
(3) Delay or nonperformance, in whole or in part, is not a breach of contract.

As far as possible, the proposed reformulation attempts to use simple language in order to make the meaning of the text plain. In this sense, "plain meaning" refers to words whose meaning is easily available to the reader. Of course, it is a fiction to believe that any group of words necessarily have only one meaning. Therefore, in interpreting this statute, a court ought to prefer the ordinary and common meaning of the words. As such, there are no stipulative definitions in the conditions of the statute and the words of the statute should be given their ordinary meaning.

164. Mentachikoff, 27 Mod L Rev at 172 (cited in note 79). Professor Mentschikoff, in discussing the Code provisions on excuse in part six of Article II, said "[t]he Code for the first time deals broadly with the problem of adjustment or cancellation of the contract in view of the unexpected occurrence." Id. "Unexpected" is used to indicate that just because a disruptive event was a logical possibility does not necessarily entail that it was expected.
165. "OR" means "[A] or [B]" or "[A] and/or [B]."
166. See Stephen M. Ross, On Legalities And Linguistics: Plain Language Legislation, 30 Buffalo L Rev 317, 331 (1981): "Plain language legislation ultimately seeks to insure that the meaning of a written agreement will be easily available to both parties."
168. Id (author cites 17 Am Jur 2d Contracts § 247 (1964) as authority for this proposition).
169. But, see notes 173 to 178 and accompanying text. Although the conditions of the statute contain no stipulative definitions, this essay does stipulate definitions for the syntax.
The new statute was written by using normalized drafting.\textsuperscript{170} Normalized drafting "may be described in a general way as a consistent combination of a limited set of standard legal syntax terms with traditional typographic techniques such as capitalization, outline labeling with letters and numbers, and indentation of text."\textsuperscript{171} The benefit of this kind of drafting is, among other things, that breaking a statute into its component parts makes the law easier to read and apply.\textsuperscript{172}

In normalized drafting, capitalized syntax terms have special meanings.\textsuperscript{173} Some syntax terms introduce statements of conditions. For example, "IF" indicates that the following condition(s) are necessary to produce the stated result(s) if not qualified by some preceding or immediately following syntax term.\textsuperscript{174} That is, the operation of "IF" conditions are subject to other syntax terms. Thus, in the reformulation conditions (1)(A) and (1)(B) are potentially necessary conditions of the statute. The syntax term "IF, AND ONLY IF" is used to denote necessary condition(s) to produce the stated legal result(s).\textsuperscript{175} Conditions (2)(A) and (2)(B) in the reformulation are, thus, necessary conditions for relief to be granted.

Other syntax terms connect propositions expressing conditions. "OR" connects conditions which are alternatives for reaching the stated results.\textsuperscript{176} Consequently, in the redrafted statute either (1)(A) or (1)(B) must be obtained before relief can be granted. All conditions which are connected by "AND" must be satisfied to produce the stated legal result.\textsuperscript{177} Therefore, conditions (1)(A) or (1)(B), and (2)(A) and (2)(B) must occur for their to be contractual discharge. Finally, "THEN" is used to introduce statement(s) of


\textsuperscript{171} Gray, 54 Tenn L Rev at 435-36 (cited in note 170).

\textsuperscript{172} Id at 434-35.

\textsuperscript{173} Professor Gray defines "syntax" as referring "to structural relationships between and among grammatically complete propositions." Gray, 54 Tenn L Rev at 434.

\textsuperscript{174} Id at 437.

\textsuperscript{175} Id.

\textsuperscript{176} Id at 438.

\textsuperscript{177} Id.
legal result(s). This syntax term means that the statements which follow it are "the legal results of fulfilling the preceding conditions." In the reformulated statute, "THEN" introduces the excuse from performance.

THE CONGRUENCE BETWEEN KARL LLEWELLYN'S COMMERCIAL PHILOSOPHY AND THE NEW STATUTE

Karl Llewellyn's Commercial Philosophy

The new standard seems to comport with Llewellyn's commercial philosophy. Llewellyn believed that the principle source of commercial law was the reality it sought to govern. This was because it is not safe to reason about business cases from cases in which an uncle became interested in having his nephew see Europe, go to Yale, abstain from nicotine, or christen his infant heir 'Alvardus Torrington III'. And it may be even urged that safe conclusions as to business cases of the more ordinary variety cannot be derived from what courts or scholars rule about the idiosyncratic desires of one A to see one B climb a fifty-foot greased flag-pole or push a peanut across the Brooklyn Bridge.

Yet, Llewellyn recognized that much of legal doctrine was inconsistent with commercial reality. For example, he contrasted the way in which the law viewed obligation with the way commercial agents viewed obligation, and found that the two were not the same. One aspect of this difference is "the difference in content between the running, flexible obligation understood in fact by the parties and the rigid, stereotyped obligation which the law will recognize." In explanation, Llewellyn elaborated that, where as le-

178. Id at 438.
179. In Gedid, 29 Wm & Mary at 362 (cited in note 93), Professor Gedid said, "Llewellyn . . . believed that business thinking, custom and practice were inherently one of the principle sources of commercial law." In Mooney, 11 Vill L Rev at 218 (cited in note 149), Professor Mooney stated that Llewellyn "emphasized that business arrangements . . . are a more reasonable foundation upon which theories of contract should be based." In Danzig, 27 Stan L Rev at 624 (cited in note 139), Professor Danzig stated, "Llewellyn saw law as an articulation and regularization of unconsciously evolved mores - as a crystallization of a generally recognized and almost indisputable right rule (a "singing reason"), inherent in, but very possibly obscured by, existing patterns of relationships." (Footnote omitted.)
183. Id at 712-13.
gal obligation calls for "some single definite manner and quality of performance," non-legal obligation encompasses "a range within which one party or the other or both can demand an alteration of terms, which will shift the whole belt of performance; this may run to delay, to shift in quantity or quality, even to outright cancellation."¹⁸⁴

This dichotomy concerned Llewellyn. He believed that the law must be changed if it was to realistically govern and reflect business life.¹⁸⁵ In such a change, Llewellyn argued that legal doctrine must "include great blocks of what we know as property, and equity, and remedies, to cover as well the most significant parts of business associations, and who knows what besides."¹⁸⁶ Further, if this change were not implemented, the law would remain chaotic and futile.¹⁸⁷

**The Relationship Between The New Statute and Llewellyn's Philosophy**

The new standard is compatible with Karl Llewellyn's commercial philosophy. Since the reformulated version is based on commercial facts, it skirts many of the problems identified by Llewellyn. Further, the new standard attempts to incorporate the business understanding of commercial obligation. This is accomplished by making excuse for delay or nonperformance, in whole or in part, dependent on commercial mores and practices. That is, legal obligation now reflects commercial practices. The implication of these conclusions is that Llewellyn would be sympathetic to the reformulated version of section 2-615(a). This probability is important because, inasmuch as the new standard drastically alters Llewellyn's version of the impracticability statute, it demonstrates that the new standard reflects the drafter's ideas on commercial law. Thus, the new standard is not susceptible to the criticism that it diverges from the intent of the drafter.

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¹⁸⁴. Id at 723, n.45.
¹⁸⁵. Id at 751. Llewellyn advocated that "[o]verwhelming is the certainty that any synthesis which is to match with the meaning of the law in life must expand beyond the futile limits set by present legal theory." Id.
¹⁸⁶. Id.
¹⁸⁷. Id. "Overwhelming in no less measure is the conviction that broad forms of words are chaos, that only in close study of facts salvation lies." Id.
The Impracticability Doctrine

RELATIONAL CONTRACT THEORY AND THE NEW IMPRACTICABILITY STATUTE

Relational and Discrete Transactions

Contemporary contract scholarship has classified exchange into two rough categories. An exchange may be discrete or it may be relational in nature. A discrete exchange is a transaction which is relatively free from relations except those created by a common language, social structure and a monetary system. This relation has "two general characteristics dominating the transaction: it is short; it is limited in scope." In this sense, a discrete exchange would involve parties with no significant past relations and would "happen quickly lest the parties should develop some kind of a relation."

An example will help illuminate this type of transaction. Suppose a person makes a cash purchase of gasoline at a station on a turnpike. Let us further stipulate that this road is rarely traveled by the buyer. This would be a very discrete exchange. The exchange is both short and limited in scope. "A few minutes measure its duration, and no one, even the most gregarious, enters into anything approaching a total human relationship in such a situa-

188. This essay assumes a rather naive view of commercial reality. That is, the forthcoming discussions do not consider the effects of a monopoly in the market place, or a less than ideally competitive market place, or special transactions that involve the interrelation of relational and discrete exchanges. This essay deals with generalizations. The new theory does not purport to provide an answer for all transaction types or various degrees of type transactions. It is sufficient that this theory resolve commercial transactions that occur most of the time.

189. Of course, this position does not have the unified support of all contemporary contract scholars. See for example, Charles Fried, Contract As Promise: A Theory of Contractual Obligation (Harvard, 1981). Professor Freid argues that contractual obligation is derived from the moral force to fulfill one's promises. This force is constant no matter whether the exchange is deemed "discrete" or "relational."

190. Strictly speaking, an exchange is not merely one or the other type. It may well be more accurate to say that a transaction may be classified as either predominantly discrete or predominantly relational. This is because "discrete" and "relational" occupy opposite ends of a continuum, and it seems contingently true that most contractual obligations may be located somewhere between the poles. Nonetheless, this essay will argue that most exchanges are predominantly relational in character. See notes 210 to 223 and accompanying text.

191. Ian Macneil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law, 72 NW Univ L Rev 854, 856 (1978): "A truly discrete exchange transaction would be entirely separate not only from all other present relations but from all past and future relations."


194. Id at 857. Author uses this example.
Furthermore, there are no past or likely future relations between the parties; this is indicative of discreteness. Generally, then, a discrete transaction involves an exchange between parties who have minimal interaction other than the exchange itself.

There are several norms associated with discrete transactions. These norms are to enhance discreteness and to promote "presentiation." "Presentiation is . . . a recognition that the course of the future is bound by present events, and that by those events the future has for many purposes been brought effectively in the present." Contract law promotes presentiation by strictly enforcing bargains made after mutual assent is given. Consequently, when [A] promises [B] to do [X] at sometime in the future, contract law not only permits, but enforces [A's] and [B's] decision to presently determine and control the future. As indicated above, "[d]iscreteness is the separating of a transaction from all else between the participants." Although its ideal may not be reached in reality, this norm is enhanced by minimizing the contact and relation between the parties both before and after the contract is entered.

A relational transaction is very different from a discrete transaction. It is characterized by an on-going relationship and not a single deal. As one commentator put it, "[i]n the 'relational' view . . . parties treat their contracts more like marriages rather than like one-night stands." Thus, if [A] and [B] enter into a long-term requirements contract, it is largely a relational agreement they enter and not one which is largely discrete.

A relational transaction is characterized by two unique transactional norms. These are "(1) harmonizing conflict within the internal social matrix of the relation . . . and (2) preservation of the

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202. Id.
205. Macneil, 72 NW Univ L Rev at 862 (cited in note 191).
The Impracticability Doctrine

These norms may entail, among other things, the anticipation of future cooperation by the contracting parties in light of a disruptive event, and the realization of the limited bindingness of the contractual relation. 207

The New Impracticability Statute's Effect on Discrete Transactions

The new impracticability statute does not significantly promote the norms associated with discrete transactions. These norms would require that change in contractual performance be minimized. 208 Yet, the application of the reformulated statute may require significant change in contractual obligations ex post. 209

This criticism of the redrafted statute may be less weighty than it initially appears. If relatively few discrete transactions will be involved in the application of the impracticability doctrine, then concern with whether the statute enhances or detracts from the vivacity of discrete norms will largely be irrelevant. It will largely be irrelevant because few discrete norms will be involved in the impracticability context if the vast majority of exchanges sought to be brought within the impracticability rubric are relational.

The Relative Number of Discrete Exchanges to be Brought within the Impracticability Doctrine

Very few economic exchanges involve a predominantly discrete transactional pattern. 210 This is largely because discrete exchange "can play only a very limited and specialized function in any economy, no matter how market-oriented that economy may be." 211 The function of a discrete exchange in the economy is the transfer of control of capital and labor between quasi-independent entities. 212 But this function alone cannot account for the production,

206. Id at 862, n.24.
208. Macneil, 72 NW Univ L Rev at 859 (cited in note 191). "Within itself, a discrete transaction is rigid, there being no intention to achieve internal flexibility." Id.
209. Arguably, the statute does not enhance or detract from the discrete norm to enhance discreteness. In any event, the new statute definitely contravenes the discrete norm to promote "presentation." This is because relief under the statute will alter contractual obligations.
210. Ian Macneil, Relational Contract: What We Do and Do Not Know, 1985 Wis L Rev 483, 487 (1985), wherein the author posits that "discrete exchanges are always relatively rare compared to patterns of relational exchange." (Footnote omitted.)
212. Id. Of course, "[t]hat transfer of control of goods and services is one economic
distribution and consumption of goods and services. These processes can only occur in one of two ways. Either "one person applies his hands and mind over time to available tools and materials to change them to more economically useful forms, or . . . a number of people working together do the same." In neither situation is discrete exchange implicated. The first case does not involve an exchange at all. Thus, discrete exchange cannot be found in that phase. The second case does involve an exchange, but it is relational instead of discrete. Consequently, discrete exchange is not itself physically productive, and thus, plays only a limited role in the economy.

In the sale of goods likely to fall under Article 2, the occurrence of discrete exchanges will be rare relative to relational exchanges. This is because discrete exchanges perform only the transfer-of-control function in the economy, and are thus only minimally related to the production of goods and services. That is, there are two ways by which resources can gain value: (1) the resources' conversion into goods and services (i.e., physical production) and (2) the transfer of these goods and services to people who value them more than the transferor (i.e., transfer of control). Both these processes must occur for resources to obtain their maximum value. The point is that discrete exchanges do not contribute very much to the actualization of step one. Since relational transactions can perform the transfer-of-control function, and are more closely related to the production of goods and services than discrete exchanges, it may be inferred that relational exchanges are more prevalent in society.

There is a more specific reason why discrete transactions are unlikely to be involved in the impracticability context. Rarely will there exist within a discrete transaction a conflict between contractual obligation and changed circumstances. There are two rea-

function essential to production." Id (footnote omitted).
214. Id at 486.
215. Id.
216. Id.
217. Id at 487.
218. Id.
219. See notes 210 to 216 and accompanying text.
221. Macneil, 72 NW Univ L Rev at 860 (cited in note 191). "Only rarely in a discrete transaction will the items contracted for become useless before the forward contract is performed or become of such lessened value that the buyer either will not want them or will want them in a greatly changed form." Id.
The Impracticability Doctrine

sons why this is true. First, discrete transactions occur quickly. There is simply not enough time within a discrete relation for a conflict to arise. Suppose, for example, that [A] goes to a fast-food restaurant to order a meal. This is a very discrete transaction. After ordering, [A] immediately tenders cash payment, and [A] promptly receives his food in return. The transaction is likely to be completed before a disruptive event occurs. Now, if [A] did not perform immediately, that is, if there was any sort of temporal delay between entering an agreement and performance of contractual obligations, then that contractual relationship is not so discrete, but is more relational.222

The second reason why discrete transactions are unlikely to be the focus of an impracticability inquiry is that they tend to be limited in scope. A discrete exchange envisions a single transaction. Intuitively, the probability of a conflict arising which adversely affects contractual performance is directly proportional to the number of obligations in the contract. A greater number of obligations increases the opportunity for a conflict to materialize. For example, a disruptive event is more likely to arise in a long-term supply contract which envisions many contractual obligations than in a single sale of a chattel. Since discrete transactions involve only one exchange, they are relatively less likely to be the object of conflict.

The implication of the foregoing discussion is that the vast majority of contractual exchanges sought to be brought within the impracticability doctrine will be relational in character. Thus, concern with whether the new statute effectuates discrete norms is largely irrelevant. If this is true, then the new impracticability statute must show adequate deference to the relational norms.223

But are these relational norms valid? Arguably, a statute should strive to enhance these norms if, and only if, they are an accurate reflection of reality. To the extent these contractual norms have no empirical basis, then to that same extent will the argument in favor of a statute purporting to promote these norms be weakened. Of course, the converse of this is true. Mainly, if the relational norms are founded in real experience, and if the new statute pro-

222. Macneil, 60 Va L Rev at 596, n.22 (cited in note 199). "Moreover, no exchange projected into the future by a promise can ever occur in the absence of at least some relational framework, since some basis for expecting the promises to be performed must exist." Id.

223. This proposition assumes that statutes affecting contracts ought to effectuate the predominant contractual norms. This seems true. In any event, this essay proceeds on the assumption that this proposition is true.
motes these norms, then this is a good reason to accept the redrafted statute. The issues then become whether the relational norms accurately reflect commercial reality and, if so, whether the redrafted version promotes these norms.

Empirical Evidence of Commercial Practices and Relational Contract Norms

The relational norms do appear to have empirical support. One of the central themes of research in this area is that contracting parties do not diligently plan their relationship in light of legal requirements and the chance of nonperformance. From a commercial perspective, it is not too important that a contractual agreement may not be legally binding. Business people are not interested at what point in time their contract with another is formed. For example, one commentator found that “[b]usinessmen often prefer to rely on ‘a man’s word’ . . . , a handshake, or ‘common honesty and decency’ - even when the transaction involves exposure to serious risk,” rather than a legally enforceable contract. This attitude exists because the belief among many commercial agents is that the contract creates a type of partnership for a specific purpose. This belief is intensified by the fact that most commercial contracts are not discrete transactions, but involve more lengthy commitments.

Further, the parties’ contractual obligations tend to be vague. Often performance is left indefinite purposely. This is because minor details are expected to be worked out between the parties at a later date. In addition, contracting parties may tacitly expect

224. Stewart Macaulay, An Empirical View of Contract, 1985 Wis L Rev 465, 467 (1985). The assumption that parties plan their contracts in light of legal requirements is “just wrong or so greatly overstated as to be seriously misleading.” Id.

225. Lawrence M. Friedman and Stewart Macaulay, Contract Law and Contract Teaching: Past, Present and Future, 1967 Wis L Rev 805, 814 (1967). “In most kinds of transactions, businessmen are very unlikely to worry about whether the contract that they are negotiating is cast in proper form to make it legally enforceable.” Id.

226. Friedman, 1967 Wis L Rev at 814 (cited in note 225). In fact, “they are very likely to start performing before all the necessary contract ‘formalities’ are complied with.” Id.


229. Id. Authors comment that “there are relatively few one-shot . . . deals.” Id.


231. Friedman, 1967 Wis L Rev at 814 (cited in note 225); Macaulay, 28 Am Soc Rev at 64 (cited in note 163). “Businessmen may welcome a measure of vagueness in the obligations they assume so that they may negotiate matters in light of the actual circumstances.”
that industry norms will flesh out their express agreement. In fact, it appears that the only necessary condition for the existence of a commercial agreement is that both parties understand their primary obligation. The vagueness and flexibility of real commercial agreements is reflected in the belief of many business people that "they have the right to cancel a contract before significant, tangible reliance has occurred."

If a conflict arises within the life of a contract, it is rarely settled by adjudicating the matter in a legal forum. The reason for this is that there are many non-judicial means of dispute resolution. First, business culture may indicate what the parties should do when a conflict arises. For example, there is a business norm that one should not welsch on a deal unless absolutely necessary. Or, parties will often simply "work things out" when a conflict materializes. "One important businessman said . . . if something comes up, you get the other man on the telephone and deal with the problem." This attitude stems from the desire to continue successfully in business. This goal is promoted if business people remain relatively flexible to the needs of their co-contractors. Otherwise, one's business will not get repeat customers and the business' general reputation will suffer.

Empirical data suggests that the contracting parties have an expectation that commercial practices are more important in the formation of an agreement than contract law. For example, the presence of offer, acceptance and consideration does not necessarily determine when a commercial agreement exists, but a businessperson's handshake will achieve this end. In addition, the data indicates that contractual obligations are to be refined as a commercial

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233. Id at 62. "Although the parties fail to cover all foreseeable contingencies, they will exercise care to see that both understand the primary obligation on each side." Id.
236. Id at 510.
237. Macaulay, 1985 Wis L Rev at 467 (cited in note 224). "There are business cultures defining . . . what should be done when things go wrong." Id.
240. Id.
241. Macaulay, 28 Am Soc Rev at 63 (cited in note 163). "Both business units involved in the exchange desire to continue successfully in business and will avoid conduct which might interfere with attaining this goal." Id.
242. Id.
contract matures. Furthermore, if a conflict arises, it is usually settled within the confines of the relationship itself. These general conclusions tend to support the relational norms.

Business people tend to act in conformity with the relational norms; they tend to resolve disputes within the context of the relation and act in such a way that promotes the existence of the relation. For example, the adequacy of "loose" contractual requirements (for example, a business agreement based on another's word and not the formal legal requirements) will promote the relationship, by not requiring many procedural hurdles to be overcome in the creation of the agreement. Fewer requirements result in a greater likelihood that a relationship will spring into existence and, once in existence, will flourish. This is because there is relatively less of an opportunity for an agreement to miss having a necessary element when it has few requirements. These probabilities are enhanced by the existence of a common goal between the parties. Furthermore, a relatively flexible contractual obligation allows the parties to adjust performance in light of events which arise ex ante. This tends to preserve the contractual relationship. If adequate contractual performance is composed of fewer requirements, then the likelihood that the contract will be performed and not breached is increased. Finally, the finding that most conflicts arising within the life of a commercial contract are settled within the confines of the relation needs no explanation, since this is one of the relational norms.

**The New Impracticability Statute's Effect on Relational Norms**

The proposed redrafted version of section 2-615(a) effectuates the relational norms. This is largely accomplished by basing the operation of the new statute on current commercial mores and practices. This statute promotes the harmonizing of conflict within the contractual relation by promulgating, before litigation is initiated, that the statute will view commercial practices as determinative. This creates an incentive for contracting parties to resolve a conflict by not resorting to litigation. Since application of this statute will merely enforce what the parties should do themselves,²⁴³

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²⁴³. In effect, a resort to litigation forces the parties to do that which ideally they ought to do, which is to use current commercial practices to guide their conduct. Since a majority of commercial agents adhere to current commercial norms, a colorable claim exists that all business people should act in this way. Uniformity in commercial practice would create more certainty in commercial transactions and would effectuate the expectations of co-contractors.
they will avoid the cost of litigation by acting in a way that adheres to current commercial practices. If the contracting parties act in a way that conforms to these practices, then they will likely resolve disputes within the confines of the relation.\footnote{244}

Note that by effectuating the first relational norm, the second norm is also promoted. That is, by enhancing the harmonizing of conflict within the bounds of the relation, the second norm, the preservation of the relationship, is also promoted. This is because the degree or preservation of the relationship is directly proportional to the amount of harmonizing of conflict that arises within the relation. The fewer conflicts that go unresolved, the more likely it is that the relationship will be preserved.\footnote{245}

In any event, the new impracticability statute tends to enhance the second relational norm directly as well. One way the statute accomplishes this end is to allow performance to be discharged in part. Partial discharge leaves the contractual relation intact. It only modifies one (or both) party's contractual obligation. If the relationship is left intact, it then has the potential to prosper.

Further, since relief pursuant to the new statute is premised on current commercial mores, it is likely that the party seeking to enforce the co-contractor's obligation will be more receptive to a judgment discharging, in whole or in part, his co-contractor's contractual obligations. This is because the current commercial practices embody how commercial agents \textit{ought} to act.\footnote{246} These practices are normative in the sense that the business community expects its members to comply with current business practices.\footnote{247} This normative quality of commercial norms will go a long way in making the judgment acceptable to the advantaged party.

There are other reasons why the new statute would facilitate the advantaged party's\footnote{248} acceptance of an adverse decision. First, the
judgment, in a sense, would be self-imposed. To the extent the advantaged party's commercial conduct contributes to current commercial practices, then to that same extent must the advantaged party condone a judgment resulting from the application of the new statute. This is because the new statute makes current commercial practices determinative as to whether relief will be granted. Since the advantaged party's acts help comprise the domain of current commercial practices, it is not unrealistic to say that this party "caused" the outcome of the case. Schematically, we have:

(advantaged make up (current determine (outcome of
party's actions) commercial practices) litigation)

Thus, it is not entirely inaccurate to say that the advantaged party willed the court's adverse ruling.

Even if the advantaged party was atypical, that is, his commercial behavior was not in accord with current commercial practices, a judicial decision based on commercial mores would still be relatively more acceptable than one that was not based on such practices. This is because the advantaged party will not feel that some outside third party has dictated an adverse decision which he must now accept. Quite the contrary, it is the commercial community, the advantaged party's true peers, which, through current commercial custom, has decided the case adversely to him. Thus, it is not a police person, but a family member, who has dictated that the advantaged party must act in a certain way. This recognition will make an adverse decision more readily acceptable to the advantaged party.

In addition, an adverse decision will be more readily acceptable by the advantaged party if he knows that such a decision was not arbitrarily made, and that this "rule of law" would apply to all commercial agents similarly situated. A decision derived from the application of the new statute would not be arbitrary, because the decision is based on objective criteria - the customs, usages and practices current in a trade. Objective criteria can be applied in a neutral fashion. Further, the statute indicates how this objective criteria is to be applied. These are characteristics of non-arbitrariness. Also, since the application of the statute is not arbitrary,
commercial agents know that all commercial parties similarly situated will be affected in the same way by the application of the new statute.

The point is that if an adverse judgment is made easier to accept by the advantaged party, then the judgment itself will be less likely to disrupt the contractual relationship. In this way, the relationship is preserved.

FAIRNESS AND CERTAINTY

The foregoing discussion indicates that the new impracticability statute is fair. A rule that is not arbitrary and is applied to all persons similarly situated would seem to embody elements of fairness. The dictionary defines "fair" as, inter alia, "Having the qualities of impartiality and honesty." The application of the new impracticability statute comports with this definition. Since the application of the statute is not arbitrary, that is, it does not depend on the whim of the judicial tribunal, it is impartial. Further, because the statute is based on commercial facts, it can be characterized by "honesty." It appears, then, that application of the new statute is fair.

The new impracticability statute allows for certainty in commercial transactions. Since the statute is based on objective facts, the outcome of the application of the statute is easily predictable. All one must know to anticipate this outcome is the statute itself and current commercial practices within the trade. A commercial agent will likely be aware of these practices, and he can easily become familiar with the statute given its plain language drafting. Thus, a decision derived by the application of the statute can be very predictable.

When something is predictable, it lends certainty to transactions that involve, or may involve, that something. For example, if [A] contracts to sell corn to [B], the fact that the price per bushel or the quantity of corn involved is absolutely predictable

... [or] depending on the will alone." Black's Law Dictionary 96 (West, 5th ed 1979).
252. See Legal Thesaurus 29, 260 (West, 1980) ("impartial" is synonymous with "detached", "disinterested" and "objective", and these concepts are contrary to being "arbitrary" which means "according to desires").
253. Webster's New Collegiate Dictionary 549 (Merriam-Webster Inc., 1974). Honesty means "adherence to the facts." Thus, if something adheres to the facts it has elements of honesty.
254. Williams, 97 Harv L Rev at 1497-498 (cited in note 139).
tends to promote certainty with respect to that facet of the transaction. This is because a conflict between the parties concerning that aspect of the exchange will not arise \textit{ex post}.\footnote{255} If, in the example, the price of corn increases between the times of contracting and performance, and both [A] and [B] predicted at the negotiation stage that this would occur, then it is unlikely that a dispute will arise concerning this aspect of the transaction, since the parties entered the agreement based on the assumption this event would occur. Consequently, when an aspect of a transaction is predictable, it tends to promote certainty with respect to that aspect.

Because the outcome of the application of the new statute is predictable, it creates certainty with respect to that outcome. A derivative effect of this conclusion is that transactional planning is facilitated. If contracting parties can predict \textit{ex ante} the type of circumstances which will excuse one (or both) of the party's contractual obligations, then they could take these circumstances into account and plan their contract accordingly. Therefore, the new statute facilitates long-term contractual planning.

\section*{ECONOMIC ANALYSIS OF LAW}

\textit{Contract Law and Economics}

Richard Posner has suggested that economic theory can help explain and predict contract theory.\footnote{256} Posner begins with the observation that "man is a rational maximizer of his ends in life."\footnote{257} As such, "if a person's surroundings change in such a way that he could increase his satisfactions by altering his behavior, he will do so."\footnote{258} Posner believes that three fundamental principles of economics may be derived from this conclusion.\footnote{259}

The "Law of Demand" is the first economic principle.\footnote{260} According to this proposition, there exists an inverse relationship between the price charged and the quantity demanded.\footnote{261} In other words, if

\footnotesize
255. This assumes that the something that is predictable is absolutely predictable. This is not always true. Nonetheless, even if something is only very, and not absolutely, predictable this would still entail that an \textit{ex post} conflict concerning this something would be unlikely.


258. Id at 4.

259. Id.

260. Id at 5.

261. Id at 4.
the price of a product increases, then, all things being equal, the demand for that product will decline. The second principle is the notion of "cost." "Cost to the economist," Posner says, "is 'opportunity cost' - the benefit forgone by employing the resources in a way that denies its use to someone else." "Cost" is the consumption of resources incurred in the making of a product. The final economic concept is efficiency. Posner advocates that "'[e]fficiency' means exploiting resources in such a way that 'value' - human satisfaction as measured by aggregate consumer willingness to pay for goods and services - is maximized." Furthermore, voluntary transactions, Posner claims, are the only way to obtain the most efficient use of resources. The rational for this latter proposition is that if efficiency is measured by willingness to pay, and the only way to ascertain "willingness to pay" is to observe voluntary transactions, then voluntary transactions are necessary for determining whether the transaction is efficient or not. Posner believes that the common law is economic in character. He posits that "[t]he common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize joint value, or what amounts to the same thing,

262. Id at 5. Posner assumes the only change occurring in the system is the change in relative price and quantity. He assumes away the possible impact of changing incomes.
263. Id. For example, if Peter enjoys eating red apples and the price of these apples increases from $0.89 per pound to $1.89 per pound, then, assuming Peter is on a fixed income and the price of other food remains relatively stable, Peter will likely purchase fewer red apples.
264. Posner, Economic at 6 (cited in note 256). Cost is incurred only when someone is denied use of a resource. This is because if resources were unlimited they would be costless, that is free (for example air).
265. Id at 7. "Resource" does not merely refer to money, but it refers to all that money represents.
266. Id at 6. Thus, in an ideal mercantile system, the cost of a product would be the minimum price at which a merchant would accept the sale of the product. Otherwise, a merchant who sold the product for less than cost would lose money.
267. Posner, Economic § 1.2 at 10 (cited in note 256). Thus, a sales transaction would constitute maximum efficiency if the seller was able to obtain the highest price, that is value, as consideration for the goods.
268. Id at 11. Richard A. Posner & Andrew M. Rosenfield, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J Leg Stud 83, 88 (1977): "The process by which goods and services are shifted into their most valuable uses is one of voluntary exchange."
269. Posner, Economics § 8.1 at 179 (cited in note 256). Posner argues that it is futile for contract law to ignore "the economics of the case. The ruling will not effect future conduct; it will be reversed by the parties in their subsequent dealings. But it will impose additional . . . transaction costs." Id § 4.1 at 69.
minimize the joint cost of the activities."270 In summary, Posner believes that the common law may be explained by an appeal to these three principles - especially the economist's efficiency concept.

Economic Analysis Applied to the Impracticability Statute

This essay posits that the application of the new impracticability statute yields efficient results. The statute is efficient because current commercial practices are efficient. That is, since current commercial mores are efficient, a statute which makes these norms determinative in its application will result in states of affairs that are efficient. This hypothesis raises two related issues: (1) Are current commercial practices efficient, and, if that question is answered in the affirmative, (2) does the efficiency of these norms make results obtained by application of the new statute efficient?

In determining whether current commercial norms are efficient, it may be helpful to investigate the reasons behind, or the results of, these practices, and the means by which these mores came into existence. At its most basic level, the reason behind current commercial practices, or the result obtained by the following these norms, is that by acting in a commercially acceptable manner, a commercial agent acts in the most efficient manner.271 A paramount reason why a business may follow current commercial practices is concern over the commercial reputation of the business.272 This concern may take two forms. "One is concerned with both the reaction of the other party in a particular exchange and with his own general business reputation."273

Concern with a co-contractors reaction to one's business practices is based on efficiency. If a co-contractor is unhappy with the way one conducts his business, then the co-contractor can implement practices, a type of non-legal sanction, which make the transaction less efficient. For example, a buyer may withhold part, or all, of the payment until the seller performs to the buyer's satisfaction.274 By withholding the payment, the transaction becomes less efficient from the seller's perspective since the seller, at a minimum, looses the earning power of a prompt payment. That is, if

270. Id.
271. Of course, efficiency in this sense refers to the long-term efficiency of a business.
273. Id at 63.
274. Id.
The Impracticability Doctrine

The Impracticability Doctrine

The Impracticability Doctrine

the sanction is imposed by the buyer, the transaction will be more costly to the seller. Similarly, the seller has counterbalancing non-legal sanctions against the buyer. If the seller implements these non-legal sanctions, it will make the transaction more inefficient, that is, more costly, from the buyer’s perspective.

Yet, the implementation of non-legal sanctions may largely be avoided, and thereby increase the efficiency of the transaction, if both parties conform their conduct to current commercial practices within the trade. This is because, in the vast majority of cases, a contracting party’s expectation will be that his co-contractor performs his obligations in accordance with the current commercial practices and norms. If this expectation is satisfied, then it is very unlikely that this party will implement these non-legal sanctions. In this way, the transaction is more efficient relative to an exchange in which the parties did not adhere to current commercial practices, and in which non-legal sanctions were implemented.

A business will strive to act in accordance with current commercial practices because of concern with its general reputation in the business community. By acting in such a way, a business acts efficiently. A business technique of risk avoidance is to deal with firms that have good reputations. Consequently, if a firm has a good business reputation, then, all things being equal, this firm will attract more business than a firm with a less worthy reputation. Further, a firm with more business is more efficient than a firm with less business. The firm with more business is more efficient because it has more sales than the other firm. “More sales” indicates a greater willingness on the part of customers to pay for the firm’s goods and services. Thus, a firm in this situation is exploiting its resources in a way that maximizes value more than a firm that has less sales. In addition, an individual transaction of a firm with less sales will likely be relatively more costly, as compared

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275. Id. “The seller may have obtained a large downpayment from the buyer which he will want to protect. The seller may have an exclusive process which the buyer needs.” Id.

276. This proposition is derived from the very definition of current commercial practices. People expect to occur that which occurs normally in past, similar situations. For example, in Ohio people expect the sun to rise every morning since it has risen every other morning in the past. This is simply inductive reasoning. Now, current commercial practices are those activities which normally occur in a given state of affairs. Since these practices are the normal occurrence, people come to expect that they will occur given that state of affairs.


278. This discussion assumes two businesses exactly alike save for their reputations and whatever else this entails. Thus, the business are the same size, have the same machines and so on.
with the same transaction in a firm with more sales. A firm with less sales may have to offer price discounts or added services to induce sales.279 Or, because a firm needs sales, it may have to deal with difficult buyers that demand more than the average buyer. These obstacles, in turn, raise the cost of each individual transaction for the firm with less sales. Patently, a certain transaction is more inefficient than the same transaction (which costs less) engaged in by a different firm. In any event, a firm with a good business reputation is more efficient than a firm with a less worthy business reputation. The point is that a firm's adherence to current commercial practices may help a firm obtain a good business reputation.

Evidence exists which indicates that acting in a way inconsistent with current commercial practices will detract from a firm's business reputation. As one author put it, "the way one behaves in a particular transaction, or a series of transactions, will color his general business reputation."280 Thus, for example, a buyer who fails to pay his bills acts in a way contrary to current commercial mores.281 This buyer runs the risk of "a bad report in credit services such as Dun and Bradstreet."282 If this occurs, then the buyer will obtain a poor business reputation. "Obviously, a poor reputation does not help a firm make sales and may force it to offer great price discounts and added services to remain in business."283 If, however, the buyer paid his bills, and thus acted in accordance with current commercial practices, then these bad results would not occur. This latter buyer would have a relatively better business reputation than one who did not act in accord with current commercial practices.284 Consequently, it may reasonably be assumed that when one acts in accordance with current commercial practices, one, at the very minimum, does not harm his business reputation and may even enhance this reputation. This is a good reason for business people to act in accordance with these practices.

There is no evidence to indicate that by acting in conformity with current business practices a firm's general reputation will not

280. Id.
281. Id at 63. In business, "[t]wo norms are widely accepted. (1) Commitments are to be honored in almost all situations ..." Id. A buyer who does not pay his bills without a good excuse is not honoring a primary commitment of the transaction.
283. Id.
284. This essay assumes that one who does not act in accord with the current commercial practices does less then is minimally required by these practices.
be enhanced. One would think that if a firm followed these practices it would obtain a good business reputation. This is because the firm would gain a reputation of effectuating the expectations of its co-contractors and always fulfilling its contractual obligations. If potential co-contractors are the least bit risk-adverse, they will gladly deal with this type of firm.

At this point, an investigation of the means by which current commercial practices have evolved is important. This essay proposes that these norms evolved through repetitive and voluntary actions. What is important in this proposition is the inference that commercial actors were not forced to accept these practices; rather, they adopted them voluntarily. Surely, in a free market system a commercial norm would not continue to exist if it were not voluntarily accepted. The point is that since "man is a rational maximizer of his ends in life" he will only voluntarily accept those practices that achieve this function. Inefficient practices do not tend to maximize people's ends in life. Thus, inefficient practices would only be adopted involuntarily. The negative implication of this is that those practices which are voluntarily accepted tend to be efficient ones. In other words, if current commercial practices are accepted voluntarily, then this is indicative of their efficiency. There is no reason to believe that current commercial practices are not accepted voluntarily.

The next issue to be explored is the causal connection between the efficiency of current commercial practices and the efficiency of the new statute. That is, if it is true that acting in accordance with these commercial practices is efficient and that a statute implements these norms, then does that suggest that the results obtained pursuant to the application of the statute are efficient? Arguably, the results obtained under the new impracticability statute are efficient, because the new statute makes current business practices determinative. It is these mores, and only these mores, which determine whether relief will be granted. In effect, the results obtained under the statute create the same state of affairs which would have existed had the parties initially followed current commercial practices without resorting to litigation. If the latter situation is efficient, then, arguably, the former situation is efficient. It has been demonstrated that acting in accordance with current commercial practices is highly efficient. Since the application of

286. See notes 271 to 285 and accompanying text.
the new statute creates the same state of affairs as if the parties had followed commercial mores, it is, arguably, efficient.\textsuperscript{287}

More generally, the new statute is efficient because it reinforces the supremacy of current commercial mores. It achieves this end by making current commercial practice determinative as to whether relief will be granted. This creates an incentive for members of the business community to follow these norms.\textsuperscript{288} If merchants follow these norms, they will act efficiently.\textsuperscript{289} In this way, the statute is efficient.

**CONCLUSION**

The current impracticability doctrine is in a state of disarray. Its application does not mirror commercial reality and it does not comport with the intent of those who drafted it. As such, this paper has proposed a new impracticability statute which would remedy these shortcomings. In justification of this new statute, this article has shown that the proposed revisions reflect the commercial philosophy of Karl Llewellyn—the principle drafter of the current impracticability statute. Moreover, this article has suggested that most agreements coming within the impracticability rubric are "relational" in nature and that this new statute promotes the norms of relational agreements. This paper has demonstrated that the new statute is fair, in that it is both impartial and based on objective commercial facts. Further, the new statute lends itself to certainty with respect to commercial planning. Finally, the proposed statute should create efficient states of affairs.

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287. Of course, this analysis assumes that an individual does not tarnish his reputation by initiating litigation. This may be true in many cases, as when, for example, there is a good faith dispute as to which of several commercial norms apply to a conflict. Or, in the situation when there is no commercial norm on point, and the case must be settled by analogy to other business practices.

If, however, filing suit does tarnish the plaintiff's business reputation, then it could be argued that the statute does not create an efficient state of affairs. But even in this case, it is the plaintiff who tarnishes his reputation by filing suit and it is this consequence which creates the inefficiency. The operation of the statute has nothing to do with the plaintiff loosing esteem in the business community. So, maybe the statute is neutral on the efficiency question?

288. See note 243 and accompanying text.

289. See notes 271 to 285 and accompanying text.