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Relief from Burdensome Longterm Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment

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COMMENT

RELIEF FROM BURDENSOME LONG-TERM CONTRACTS: COMMERCIAL IMPRACTICABILITY, FRUSTRATION OF PURPOSE, MUTUAL MISTAKE OF FACT, AND EQUITABLE ADJUSTMENT

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I. INTRODUCTION

Since the middle 1960s, promisors increasingly have sought judicial relief from burdensome contracts.¹ Rising rates of inflation and OPEC price hikes have contributed significantly to this trend. The cases sometimes have involved long-term contracts with either fixed price terms² or escalating price

1. See, e.g., *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966); *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974); *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966); *Maple Farms, Inc. v. City School Dist.*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974); cases cited notes 2 & 3 *infra*.

2. See, e.g., *Portland Section of the Council of Jewish Women v. Sisters of Charity*, 266 Or. 448, 451, 513 P.2d 1183, 1185 (1973).

terms that failed to reflect increases in the promisor's costs accurately.³ Although several doctrines are potentially applicable, the courts generally have analyzed these cases on the basis of commercial impracticability,⁴ and almost without exception, they have refused to grant any relief when the promisor's sole complaint has been increased cost of performance.⁵

Traditional contract doctrine holds promisors strictly liable for breach of their contractual duties.⁶ The courts, however, have developed several doctrines that allow a promisor to escape that liability when his contract becomes burdensome. Among those doctrines are commercial impracticability, frustration of purpose, and mutual mistake of fact. The courts, for many reasons, historically have limited the availability of these doctrines to very narrow circumstances. In the past few decades, there has been some movement toward expanding the availability of these doctrines, but that movement has been slow, and the courts have been very reluctant to grant promisors relief. One reason for this reluctance is the difficulty of framing a satisfactory remedy. The normal remedy for commercial impracticability, frustration of purpose, and mutual mistake of fact is to excuse or release the promisor from further performance.⁷ Sometimes, however, this result would place a heavy burden on the promisee. In those instances, the courts are naturally reluctant to disturb the general rule of strict liability.⁸

In 1980, the United States District Court for the Western District of Pennsylvania, in *Aluminum Company of America v. Essex Group, Inc.*,⁹ expansively used all three doctrines to grant a promisor relief from a burdensome

3. See, e.g., *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 137 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1031 (8th Cir. 1979); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 432-33 (S.D. Fla. 1975); *Publicker Indus., Inc. v. Union Carbide Corp.*, 17 U.C.C. REP. 989, 990 (E.D. Pa. Jan. 17, 1975); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 723 (Mo. App., W.D.), *cert. denied*, 444 U.S. 865 (1979).

4. See, e.g., cases cited notes 1-3 *supra*.

5. See cases cited notes 1-3 *supra*. A few courts have excused the promisor on the basis of increased costs under the doctrine of commercial impracticability, but those cases also have involved a change in the contemplated mode of performance. *Northern Corp. v. Chugach Elec. Ass'n*, 513 P.2d 76, 80-82 (Alaska 1974); *City of Vernon v. City of Los Angeles*, 42 Cal. 2d 710, 717-21, 290 P.2d 841, 845-48 (1955); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 292-93, 156 P. 458, 459-60 (1916). See notes 74-83 and accompanying text *infra*.

6. RESTATEMENT (SECOND) OF CONTRACTS, Chapter 11, Introductory Note, at 309 (1981).

7. See notes 141-50 and accompanying text *infra*.

8. See, e.g., *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 79 (W.D. Pa. 1980); Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U. C. C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 NOTRE DAME LAW. 203, 228-29 (1979); notes 169-72 and accompanying text *infra*.

9. 499 F. Supp. 53 (W.D. Pa. 1980).

long-term contract. In so doing, it rejected several traditional barriers to relief that the courts have used to prevent promisors from satisfying the requirements of the doctrines of commercial impracticability, frustration of purpose, and mutual mistake of fact. The court also granted a new remedy—price adjustment—instead of confining itself to the normal “complete excuse or complete enforcement” choice.

This Comment discusses the doctrines of commercial impracticability, frustration of purpose, and mutual mistake of fact, and their application to disputes involving long-term contracts that have become burdensome because of increased cost of performance. It examines the differences among the three doctrines and points out some of the advantages and disadvantages of each. It closely examines the *Aluminum Company of America (Alcoa)* case and explains the court’s uniquely flexible use of these doctrines. The *Alcoa* court is the first to apply all three theories to a dispute involving a burdensome long-term contract, and in several instances, it has extended these doctrines beyond precedent. Finally, this Comment discusses the *Alcoa* court’s use of the price adjustment remedy as a method to arrive at a solution that is “fair” to both the promisor and promisee.

II. *ALUMINUM COMPANY OF AMERICA V. ESSEX GROUP, INC.*

A. *A Typical Dispute*

The facts of *Alcoa* present a textbook example of a dispute involving a long-term contract that has become burdensome because of increased cost of performance. In 1966, Essex Group, Inc. (Essex) decided to manufacture a new line of aluminum wire products. In late 1967, the firm entered into a contract with the Aluminum Company of America (Alcoa) to secure a long-term source of aluminum to meet its expanding needs. The contract’s terms required Essex to deliver specified amounts of alumina¹⁰ (raw material) to Alcoa for conversion into aluminum. After Alcoa had completed the conversion process, Essex was required to pick up the aluminum. The agreement was to last until 1983, but Essex had the option to extend it until 1988. The price term was subject to an escalation formula, but the maximum cost to Essex was set at 65% of the market price of aluminum as published in a trade journal.¹¹

For several years, Alcoa and Essex performed without incident under the contract. Thereafter, the price formula failed to work as the parties expected, and Alcoa began to sustain heavy losses. The formula, in part, called for price adjustments as Alcoa’s nonlabor production cost changed. The price

10. The contract was held not to be for the sale of goods. *Id.* at 84. Thus, the Uniform Commercial Code did not apply to this case. It was, however, used for guidance by the court. *Id.* at 73-74.

11. The particulars of the formula are set out in the opinion. *Id.* at 58. Essex had bargained expressly for the maximum price term. *Id.* at 68.

was to reflect such changes "in direct proportion to periodic changes in the Wholesale Price Index—Industrial Commodities (WPI-IC)."¹² The price formula, however, was rendered inaccurate, *i.e.*, a greater disparity developed between Alcoa's actual cost and the price as set by the formula than the parties expected, when the price of electricity, one of Alcoa's principal production costs, rose much faster than did the WPI-IC. During 1977 and 1978, Alcoa lost a total of \$12,000,000 on the contract; in 1979, Alcoa predicted additional out-of-pocket losses of more than \$75,000,000 if it performed for the remainder of the contract.

In 1979, Alcoa sued Essex in the United States District Court for the Western District of Pennsylvania requesting, on a number of theories,¹³ the court to "reform or equitably adjust"¹⁴ the contract by changing the price formula so that it would reflect Alcoa's actual nonlabor production cost. Essex counterclaimed for damages and asked the court to specifically enforce the contract for its remaining term.

B. *An Atypical Analysis—The Court's Application of the Commercial Impracticability, Frustration of Purpose, and Mutual Mistake of Fact Doctrines to One Dispute*

The *Alcoa* court, construing Indiana law, held for Alcoa and modified the price term of the contract.¹⁵ The court first analyzed the dispute in terms of the mutual mistake of fact doctrine.¹⁶ It characterized the use of an inaccurate price formula as a mutual mistake of fact justifying relief. Speculating that the chance for review was high, however, the court thought it appropriate to rule on the commercial impracticability and frustration of purpose doctrines as well. It held that those doctrines also justified relief for Alcoa.¹⁷

While, as the court noted,¹⁸ all three theories are similar, there are important differences among them. Commercial impracticability generally deals

12. *Id.* at 58.

13. Alcoa sought this remedy on five grounds: (1) mutual mistake of fact, (2) unilateral mistake of fact, (3) unconscionability, (4) frustration of purpose, and (5) commercial impracticability. In a second count, Alcoa alleged that the contract had been modified by oral agreement and that Essex had breached the new agreement. In a third count, Alcoa alleged that it should be excused from performance according to the terms of a side letter agreement. Alcoa lost on both of these issues. *Id.* at 80-85.

14. *Id.* at 55.

15. *Id.* at 57. Alcoa did not receive the full relief it requested. The price was not modified to reflect its full actual production cost. *See* notes 157-59 and accompanying text *infra*.

16. 499 F. Supp. at 61-70.

17. *Id.* at 70.

18. The court stated:

In broad outline the doctrines of impracticability and of frustration of purpose resemble the doctrine of mistake. All three doctrines discharge

with supervening events that impede performance;¹⁹ frustration of purpose generally deals with supervening events that make the exchange worthless to one of the parties;²⁰ mutual mistake of fact deals with beliefs that are not in accord with the facts at the time the contract was made.²¹ Commercial impracticability and frustration of purpose decisions often turn on questions concerning the risk of supervening events;²² mutual mistake of fact decisions look to the risk of beliefs not in accord with the facts.²³ Commercial impracticability and frustration of purpose focus on severe hardship as the basis for relief, while mutual mistake of fact focuses on an upset in the equivalence of the bargain.²⁴ Finally, while a finding of commercial impracticability or frustration of purpose justifies excuse from the duty to perform,²⁵ a finding of mistake of fact merely renders the contract voidable.²⁶

III. DISCUSSION OF THE DOCTRINES

A. *Commercial Impracticability*

The doctrine of commercial impracticability is an exception to the traditional contract notion that promisors are strictly liable for breach of their contractual duties.²⁷ In the 1600s, the English courts said that the promisor never was excused from his duty to perform.²⁸ By the mid-1800s, English

an obligor from his duty to perform a contract where a failure of a basic assumption of the parties produces a grave failure of the equivalent of value of the exchange to the parties. And all three are qualified by the same notions of risk assumption and allocation.

Id.

19. See U.C.C. § 2-615; RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). The new Restatement also has a section dealing with existing impracticability. *Id.* § 266(1). This section offers the possibility of substantial overlap with the doctrine of mutual mistake. See notes 105 & 112-14 and accompanying text *infra*.

20. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981). *Id.* § 266(2) provides relief for existing frustration. See note 105 *infra*.

21. See notes 108-14 and accompanying text *infra*.

22. See notes 58-73 & 93-95 and accompanying text *infra*.

23. See notes 120-33 and accompanying text *infra*.

24. See RESTATEMENT (SECOND) OF CONTRACTS, Chapter 6, Introductory Note (1981); notes 74-83, 96 & 134-40 and accompanying text *infra*.

25. U.C.C. § 2-615; RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

26. Contracts entered into under a mutual mistake of fact are considered voidable at the option of the adversely affected party. RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981); RESTATEMENT OF CONTRACTS § 502 (1932). Mistakes that prevent the formation of a contract sometimes render the apparent contract void. *Id.* § 501. See also *Fulton v. Bailey*, 413 S.W.2d 514, 518 (Mo. 1967).

27. See note 6 and accompanying text *supra*.

28. See, e.g., *Paradine v. Jane*, 82 Eng. Rep. 897 (1647); Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under U.C.C. Section 2-615*, 54 N.C. L. REV. 545, 549-50 (1976); Wallach, *supra* note 8, at 204.

and American courts would excuse the promisor from liability if he could establish that performance had become literally impossible.²⁹ In 1916, the California Supreme Court extended the doctrine³⁰ by holding that performance did not have to be impossible, but merely impracticable, *i.e.*, it could "only be done at an excessive and unreasonable cost."³¹ Today, American courts recognize that literal impossibility is not a condition to excuse from performance,³² but traditions of strict liability in contract have fostered a reluctance to excuse performance merely because it has become impracticable.³³ The Uniform Commercial Code drafters sought to reduce this judicial caution when they drafted Uniform Commercial Code section 2-615.³⁴ The Restatement (Second) of Contracts, in section 261, has followed their lead.³⁵ Both attempts have had little substantive impact on the impracticability doctrine. The *Alcoa* court, however, embraced the goals of the Code

29. See, e.g., *Taylor v. Caldwell*, 122 Eng. Rep. 309, 313-15 (1863); Hurst, *supra* note 28, at 549-51; Wallach, *supra* note 8, at 204-05.

30. See *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916).

31. *Id.* at 293, 156 P. at 460.

32. See, e.g., *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974); *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 725-28 (Mo. App., W.D.), *cert. denied*, 444 U.S. 865 (1979). See U.C.C. § 2-615; RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

33. See Hurst, *supra* note 28, at 574; Wallach, *supra* note 8, at 206-07, 218-21; Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 NW. L. REV. 1032, 1044-45 (1978).

34. See Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75, 77 (1974); Hurst, *supra* note 28, at 554; Wallach, *supra* note 8, at 203; Comment, *supra* note 33, at 1035.

U.C.C. § 2-615 provides:

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

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made

35. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981) provides:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

The language is very similar to that in U.C.C. § 2-615. See note 34 *supra*. The comments to § 261 frequently state that § 2-615 was used for guidance in drafting § 261. RESTATEMENT (SECOND) OF CONTRACTS § 261, Comments a, b, d (1981).

and Second Restatement drafters, and its views provide an alternative to the prevailing strict approach to impracticability problems.

If the parties to a contract have allocated the risk of impracticability of performance, the express terms of the contract control.³⁶ In the typical situation, however, the parties have not formally allocated this risk.³⁷ Even if the risk has not been allocated expressly by the parties, the promisor will still be held liable for nonperformance unless his performance is excused under the doctrine of commercial impracticability.³⁸ To invoke this doctrine, a promisor must prove that there has been an unexpected event or contingency, usually a supervening event, the nonoccurrence of which was a basic assumption on which the contract was made.³⁹ He also must prove that the event made performance impracticable⁴⁰ and that the impracticability is not his fault.⁴¹

In order for the commercial impracticability doctrine to apply, a supervening event or contingency must render performance under the con-

36. *Gulf Oil Corp. v. Federal Power Comm'n*, 563 F.2d 588, 599-600 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); U.C.C. § 2-615, Comment 8; RESTATEMENT (SECOND) OF CONTRACTS § 261, Comment c (1981).

37. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 3-9, at 129-30 (2d ed. 1980). This discussion does not observe the subtle distinction between the concepts of assumption of risk and allocation of risk. See notes 68 & 120-22 and accompanying text *infra*.

38. RESTATEMENT (SECOND) OF CONTRACTS, Chapter 11, Introductory Note (1981); *id.* § 261, Comment a.

39. This general scheme of analysis tracks the U.C.C. and the new Restatement. See notes 34 & 35 *supra*. The courts analyze the impracticability question in the same or similar manner. See, e.g., *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974); *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 725-26 (Mo. App., W.D.), *cert. denied*, 444 U.S. 865 (1979). See also Comment, *supra* note 33, at 1042-44.

40. See note 39 *supra*.

41. Although not stated expressly in U.C.C. § 2-615, if the impracticability is the fault of the promisee, he will not be excused. The landmark case on fault is *Canadian Indus. Alcohol Co. v. Dunbar Molasses Co.*, 258 N.Y. 194, 199, 179 N.E. 383, 384 (1932). See *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 73 n.15 (W.D. Pa. 1980) (burden on promisee to prove promisor was at fault); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 132-33 & n.6 (N.D. Iowa 1978) (court discusses burden of proof and fault), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 440-41 (S.D. Fla. 1975) (costs increased by intra-company profits); RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981); 6 A. CORBIN, CONTRACTS § 1329 (1962). One commentator has stated that the "cases show that the faultlessness requirement can be a significant barrier to the successful assertion of the excuse defense." Wallach, *supra* note 8, at 212. This is especially true since "every case will involve some type of fault." *Id.* at 219.

tract impracticable. Many times, this element of commercial impracticability is obvious and presents no problem. Sometimes, a global event, such as the Arab oil embargo, can be blamed for the promisor's troubles. There are times, however, when no specific event can be identified.⁴² In those instances, a characterization is required.⁴³ For example, the *Alcoa* court found that "the non-occurrence of an extreme deviation of the WPI-IC and Alcoa's non-labor production costs was a basic assumption on which the contract was made."⁴⁴ In other words, the inaccuracy of the price formula index itself was characterized as the supervening event or contingency that caused Alcoa's losses.⁴⁵ This initial characterization is important not only because

42. For example, in some cases several events or contingencies will combine to increase costs. In others, such as *Alcoa*, a party can pick one of several aspects of one overall event. For example, Alcoa argued that the inaccurate formula was the event creating its losses. It could have characterized rising electricity costs as the triggering event, or it could have gone one step further and characterized the Arab oil embargo as the triggering event. See *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 58-59 (W.D. Pa. 1980); note 45 *infra*.

In cases where one of several events or contingencies can be characterized as the triggering event, the promisor's advocate should pick the event that seems most unforeseeable and most outside the scope of risks assumed or allocable to the promisor. See notes 47-73 and accompanying text *infra*. See also note 45 *infra*.

43. See note 42 *supra*.

44. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 72 (W.D. Pa. 1980).

45. In its mistake analysis, the *Alcoa* court characterized the use of the inaccurate price formula as a mistake relating to an existing fact, *i.e.*, a present actuarial error. *Id.* at 61-63. Under present mistake doctrine, that characterization was necessary because relief can be granted for mistake only if the mistake relates to a fact existing when the contract was made. See notes 108-14 and accompanying text *infra*. In its impracticability analysis, the court could have characterized Alcoa's losses as being caused by an existing impracticability rather than a supervening impracticability. The former justifies relief under RESTATEMENT (SECOND) OF CONTRACTS § 266(1) (1981) or RESTATEMENT OF CONTRACTS § 456 (1932). See note 105 *infra*. Such a characterization would have been consistent with the court's mistake analysis. The court, however, characterized the deviation as the contingency that rendered performance impracticable. This deviation did not exist when the contract was made, and thus the court's characterizations are inconsistent. The court, however, implied that the distinction between existing fact and future event was not the main issue in the case and that the doctrines were better understood to rest on risk allocation principles. See 499 F. Supp. at 70-72. In fact, the court expressly rejected the existing fact requirement in the mistake doctrine. *Id.* at 71. The court, perhaps realizing that the *Alcoa* situation could be characterized in a number of ways, stated, "Thus there is a substantial area of similarity between the three doctrines. Within that area, the findings and holdings with respect to the claim of mistake also apply to the claims of impracticability and frustration." *Id.* at 72.

Another interesting feature of the *Alcoa* case is the court's characterization of

it triggers the application of the impracticability doctrine, but also because the bulk of the impracticability analysis turns on the event that caused the promisor's loss.⁴⁶

Once the triggering event is identified, the promisor must establish that its nonoccurrence was a basic assumption⁴⁷ on which the contract was made. This element of the impracticability doctrine is complex. A finding that the nonoccurrence of a particular event was a basic assumption on which the contract was made does not depend on whether the parties consciously thought about the event at the time the contract was made.⁴⁸ The courts, although their exact method of analysis is unclear, consider factors such as foreseeability of the event or contingency, assumption of risk, and allocation of risk as important in determining the basic assumptions of the parties.⁴⁹

the contingency involved as being the deviation between the WPI-IC and Alcoa's actual costs. Other courts, faced with similar questions involving price formulas, have focused either on the actual events causing the cost increases involved or on the cost increases themselves. *See, e.g., Eastern Air Lines, Inc. v. Gulf Oil Co.*, 415 F. Supp. 429, 441 (S.D. Fla. 1975) (energy crisis foreseeable); *Publicker Indus. Inc. v. Union Carbide Corp.*, 17 U.C.C. REP. 989, 992 (E.D. Pa. Jan. 17, 1975) (cost increases foreseeable). The *Alcoa* court's characterization makes possible an argument that the foreseeability of the cost increases is irrelevant and that the courts should look at the foreseeability of the deviation instead. *See Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 728 (Mo. App., W.D.), *cert. denied*, 444 U.S. 865 (1979); notes 50-57 and accompanying text *infra*. It is not clear, however, that the *Alcoa* court noticed this possible argument. *See* 499 F. Supp. at 58, 74-76.

46. *See* notes 42 & 45 *supra*.

47. For a discussion of the meaning of the "basic assumption" term, see note 115 *infra*. The term probably originated when courts granted excuse for impracticability on the ground that there was an implied term in the contract authorizing excuse. Thus, the courts talked about the parties' basic assumptions and thoughts at the time they entered into the contract. *See Mineral Park Land Co. v. Howard*, 172 Cal. 289, 292-93, 156 P. 458, 459-60 (1916). The implied condition theory has been rejected, but the "basic assumption" term remains. *See United States v. Wegematic Corp.*, 360 F.2d 674, 677 (2d Cir. 1966) ("basic assumption" term is "a somewhat complicated way of putting Professor Corbin's question of how much risk the promisor assumed"); RESTATEMENT (SECOND) OF CONTRACTS, Chapter 11, Introductory Note (1981); *id.* § 261, Comment b; 6 A. CORBIN, *supra* note 41, § 1331.

48. RESTATEMENT (SECOND) OF CONTRACTS, Chapter 11, Introductory Note (1981).

49. The courts do not always express these three concepts as simply factors used to decide what the basic assumptions of the parties were. The new Restatement, however, states that they are important factors in deciding the basic assumption element. *Id.*; *id.* § 261, Comment b. On the other hand, both U.C.C. § 2-615 and RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981), Comment c suggest that the assumption/allocation of risk questions should receive separate treatment. Where

Foreseeability can be a troublesome barrier to relief.⁵⁰ Despite authority to the contrary,⁵¹ most courts hold the promisor to the contract if they find that the contingency was reasonably foreseeable when the contract was made.⁵² It is often said that foreseeable risks are assumed by the promisor unless he shifts those risks to the promisee via the contract,⁵³ and the courts often have strained to find foreseeability.⁵⁴ The *Alcoa* court held that the deviation between Alcoa's nonlabor costs and the WPI-IC was unforeseeable.⁵⁵ It found that while there was some range of foreseeable deviation, "the risk of a wide variation between these values was unforeseeable in the commercial sense."⁵⁶ The court also rejected the strict approach on the foreseeability factor and adopted the view that foreseeability alone does not preclude relief.⁵⁷

Intertwined with the foreseeability factor is the concept of assumption of risk.⁵⁸ If it is found that a promisor assumed the risk of the occurrence

these concepts are pigeonholed in the analytical scheme of impracticability is difficult to ascertain, but it seems best to speak of them as factors relating to the "basic assumption" term.

50. See, e.g., *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 75-76 (W.D. Pa. 1980); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 438, 441-42 (S.D. Fla. 1975); Hurst, *supra* note 28, at 567-70; Duesenberg, *Exiting From Bad Bargains Via U.C.C. Section 2-615: An Impractical Dream*, 13 U.C.C. L.J. 32, 36-38 (1980); Wallach, *supra* note 8, at 214-15, 218-20.

51. See notes 52 & 57 *infra*.

52. The courts often state that foreseeability of the supervening event causing impracticability is not an absolute bar to relief. A finding that the event was reasonably foreseeable, however, usually results in a holding that the promisor assumed the risk of the event because he did not protect himself in the contract. See, e.g., *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 134-35 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441-42 (S.D. Fla. 1975); *Lloyd v. Murphy*, 25 Cal. 2d 48, 54-56, 153 P.2d 47, 50-51 (1944); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 725-28 (Mo. App., W.D.), *cert. denied*, 444 U.S. 865 (1979); Hurst, *supra* note 28, at 567-70; Wallach, *supra* note 8, at 214-15, 218-21; Comment, *supra* note 33, at 1037-42.

53. See note 52 *supra*.

54. See Wallach, *supra* note 8, at 215.

55. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 58 (W.D. Pa. 1980).

56. *Id.* at 76.

57. *Id.* The court rejected the rule that all foreseeable risks should be allocated to the promisor. The new Restatement says that foreseeability is merely a factor in determining whether the risk should be allocated to the promisor. RESTATEMENT (SECOND) OF CONTRACTS § 261, Comments b, c (1981). U.C.C. § 2-615 makes no mention of foreseeability, but Comment 1 to that section mentions "unforeseen supervening circumstances." See *Transatlantic Financing Co. v. United States*, 363 F.2d 312, 318 (D.C. Cir. 1966) (foreseeability not dispositive); Hurst, *supra* note 28, at 567-70.

58. See notes 52 & 57 *supra*.

that caused the hardship, relief will be denied.⁵⁹ Such a finding may be based on the promisor's express assumption of the risk,⁶⁰ on circumstances surrounding the making of the contract,⁶¹ or on the presumption that certain risks normally are assumed by the promisor, unless shifted by the contract.⁶² Past impracticability decisions have taken the position that the promisor normally assumes the risk of an inaccurate price formula.⁶³ The *Alcoa* court rejected this view⁶⁴ and distinguished decisions to the contrary on the ground

59. U.C.C. § 2-615; RESTATEMENT (SECOND) OF CONTRACTS § 261, Comments b, c (1981). See *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 74-76 (W.D. Pa. 1980); cases cited notes 1-3 *supra*; 6 A. CORBIN, *supra* note 41, § 1328.

60. See note 48 and accompanying text *supra*.

61. *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 318-19 (D.C. Cir. 1966) (foreseeability indicates willingness to assume some abnormal risk); *Heat Exchangers v. Map Constr. Corp.*, 34 Md. App. 679, ____, 368 A.2d 1088, 1094-95 (1977) (failure to shift foreseeable risk in contract permits conclusion that risk assumed by promisor); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 726 (Mo. App., W.D.) (court lists a number of relevant factors), *cert. denied*, 444 U.S. 865 (1979); U.C.C. § 2-615, Comment 8; RESTATEMENT (SECOND) OF CONTRACTS § 261, Comment c (1981); 6 A. CORBIN, *supra* note 41, § 1328; Hurst, *supra* note 28, at 570-73; Wallach, *supra* note 8, at 214-15. See generally cases cited notes 1-3 *supra*.

62. See, e.g., U.C.C. § 2-615, Comment 8; RESTATEMENT (SECOND) OF CONTRACTS § 261, Comments b, c (1981).

63. See *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 134-37 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 437-42 (S.D. Fla. 1975); *Publicker Indus., Inc. v. Union Carbide Corp.*, 17 U.C.C. REP. 989, 990-93 (E.D. Pa. Jan. 17, 1975); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 728 (Mo. App., W.D.), *cert. denied*, 444 U.S. 865 (1979). See also *McLouth Steel Corp. v. Jewell Coal & Coke Co.*, 570 F.2d 594, 609 (6th Cir.), *cert. denied*, 439 U.S. 801 (1978). The use of a ceiling or maximum price term along with a formula is especially damaging to the promisor. See *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 79-80 (W.D. Pa. 1980); *Publicker Indus. Inc. v. Union Carbide Corp.*, 17 U.C.C. REP. at 992; Duesenberg, *supra* note 50, at 41; notes 126-28 and accompanying text *infra*.

A special problem arises when the parties agree on a nonexistent index or an index whose character changes after the contract is formed. See *North Cent. Airlines v. Continental Oil Co.*, 574 F.2d 582, 587-93 (D.C. Cir. 1978) (court remanded and ordered insertion of reasonable price term); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. at 437-42 (change in character of formula index not ground for excuse); *Seattle-First Nat'l Bank v. Earl*, 17 Wash. App. 830, 835-39, 565 P.2d 1215, 1218-20 (1977) (court refused to grant relief on mistake theory).

64. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 74 (W.D. Pa. 1980). *Alcoa* was held to have assumed the risk of some of the cost increases because the contract had a maximum price term. See notes 157-59 and accompanying text *infra*; note 63 *supra*.

that they involved different degrees of foreseeability and loss.⁶⁵

When the risk of impracticability is not allocated in the contract or otherwise assumed by one of the parties, the court must determine who should bear the risk.⁶⁶ Commercial custom and policy dictate the result.⁶⁷ Although the distinction is not always clear, this court-imposed allocation of risk differs from the concept of assumption of risk in that it requires a more objective inquiry.⁶⁸ The present view is that the promisor should be allocated most of the risks associated with his performance.⁶⁹ This general rule is said to promote certainty and stability in commercial transactions.⁷⁰ In all the commercial impracticability decisions involving inaccurate price formulas, the risk of burdensome performance was allocated to the promisor.⁷¹ While the *Alcoa* court did not discuss many of the factors that other courts have stressed, it did not allocate this risk to the promisor.⁷² The parties' efforts to limit their risks were the central reason for this finding.⁷³

Once the promisor has established that an event has occurred, the nonoccurrence of which was a basic assumption on which the contract was made,

65. 499 F. Supp. at 74, 76.

66. See U.C.C. § 2-615, Comment 8; RESTATEMENT (SECOND) OF CONTRACTS § 261, Comments b, c (1981); 6 A. CORBIN, *supra* note 41, at §§ 1321, 1328.

67. See Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 76 (W.D. Pa. 1980); authorities cited note 66 *supra*. In Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966), the court stated, "The doctrine [of impracticability] ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance." (Footnote omitted). For an extensive work on risk allocation principles, see generally Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977). See notes 183 & 184 and accompanying text *infra*.

68. See notes 121 & 122 and accompanying text *infra*.

69. See RESTATEMENT (SECOND) OF CONTRACTS, Chapter 11, Introductory Note (1981); *id.* at Chapter 6, Introductory Note, at 380, which states, "Indeed, in the absence of provision to the contrary and aside from the exceptional cases of supervening impracticability (§ 261) and frustration (§ 265), a party generally bears the entire risk of subsequent changes that affect the agreed exchange." See Hurst, *supra* note 28, at 574-75.

70. "It makes little difference to the community which party must bear the risk, but it makes much difference that we may know in advance which one must bear it." 6 A. CORBIN, *supra* note 41, § 1328. See Hurst, *supra* note 28, at 574-75 (also noting importance of freedom of contract notions); Wallach, *supra* note 8, at 218 (other policies noted).

71. See cases cited note 63 *supra*.

72. Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 73-76 (W.D. Pa. 1980).

73. *Id.* See also notes 123-29 and accompanying text *infra*.

he must show that the event has rendered performance impracticable.⁷⁴ When increased cost of performance constitutes the promisor's sole ground for claiming impracticability, the courts require a strong showing of severe hardship.⁷⁵ While no exact standard exists, relief has been denied when a 100% cost increase was involved.⁷⁶ A 1000% cost increase, however, has been held sufficient to support a finding of impracticability.⁷⁷ The promisor cannot rely solely on evidence indicating large increases in cost because some courts strictly have considered only those increases attributable to certain causes.⁷⁸ Those courts have required the promisor to prove that the cost in-

74. U.C.C. § 2-615; RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). See notes 27-33 and accompanying text *supra*.

75. See notes 1-5 and accompanying text *supra*. U.C.C. § 2-615, Comment 4, provides:

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

RESTATEMENT (SECOND) OF CONTRACTS § 261, Comment d (1981), states, "A mere change in the degree of difficulty or expense due to such causes as increased wages, price of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability . . ." See Hurst, *supra* note 28, at 562; Wallach, *supra* note 8, at 215-18.

76. See *Publicker Indus., Inc. v. Union Carbide Corp.*, 17 U.C.C. REP. 989, 992 (E.D. Pa. Jan. 17, 1975); Wallach, *supra* note 8, at 215-18.

77. See *City of Vernon v. City of Los Angeles*, 42 Cal. 2d 710, 717-21, 290 P.2d 841, 845-48 (1955); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 291-93, 156 P. 459, 459-60 (1916); RESTATEMENT (SECOND) OF CONTRACTS, Chapter 11, Introductory Note (1981); RESTATEMENT OF CONTRACTS § 460, Comment a, Illustration 2 (1932); Wallach, *supra* note 8, at 215-18.

78. See *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), where the court stated:

Where the occurrences complained of are in some degree foreseeable and capable of being protected against contractually, where the burdensome production cost increase complained of is to some extent a function of internal corporate decisions, and where it is impossible to determine what share of the increase is attributable to unforeseen conditions not assignable to the party seeking adjustment, it becomes unnecessary to reach the question of how much increase constitutes impracticability. In fact failure of proof stymies any attempt this court could make toward adjustment under § 2-615.

creases did not result from promisor fault, market fluctuations, management decisions, foreseeable events, or other risks assumed by or allocable to the promisor.⁷⁹

The *Alcoa* court found that Alcoa would lose over \$60,000,000 out of pocket over the life of the contract if it were fully enforced⁸⁰ and considered that degree of loss sufficient to justify a finding of impracticability.⁸¹ It is unclear whether the court looked beyond the \$60,000,000 figure and considered the actual percentage of cost increase involved.⁸² If the actual figure approached a mere 100% increase, *Alcoa* represents major departure from prior decisions.⁸³

B. Frustration of Purpose

The frustration of purpose doctrine also represents an exception to the general rule that a promisor is strictly liable for breach of his contractual duties.⁸⁴ The doctrine originated in England and has gained limited acceptance in America.⁸⁵ The modern requirements of the doctrine are expressed in Restatement (Second) of Contracts section 265, which provides:

467 F. Supp. at 135. See *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 440-41 (S.D. Fla. 1975). A good scholarly discussion explaining the isolation of cause concept is in Wallach, *supra* note 8, at 218-21.

79. See note 78 *supra*.

80. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 73 (W.D. Pa. 1980). The court considered only the increases due to the deviation. It noted the isolation of causes concept, but did not give it extensive attention. *Id.* at 73 n.15. The court did not require Alcoa to use expert testimony in order to prove its future losses. See also notes 134-40 and accompanying text *infra*.

81. 499 F. Supp. at 73.

82. Although the court mentioned other cases that denied excuse because the percentage of cost increase was too low, the court never indicated what percentage of cost increase in *Alcoa* was not reflected by the price formula. Information provided in the opinion does not provide a basis on which a percentage figure can be computed.

83. See Wallach, *supra* note 8, at 215-18. The mistake doctrine does not require the proponent to prove severe hardship. Its less restrictive requirement provides an incentive for the promisor to characterize his situation as being within the scope of the mistake doctrine rather than the commercial impracticability doctrine. See notes 134-40 and accompanying text *infra*.

84. See note 6 and accompanying text *supra*.

85. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981) (supervening frustration); *id.* § 266(a) (existing frustration). U.C.C. § 2-615 apparently also was drafted broadly enough to encompass the doctrine of frustration. See *id.*, Comment 3; Hawkland, *supra* note 34, at 76-80. While American courts recognize the doctrine, it has seen limited success. See Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DEPAUL L. REV. 1, 1-4 (1953); Hawkland, *supra* note 34, at 76-80; Comment, *Contracts—Frustration of Purpose*, 59 MICH. L. REV. 98, 98-100 (1960).

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his remaining duties to render performances are discharged, unless the language or the circumstances indicate the contrary.⁸⁶

The frustration of purpose doctrine is closely akin to the doctrine of commercial impracticability.⁸⁷ There is, however, an important distinction with regard to the event that triggers its application. Instead of focusing on supervening events that impede performance, the frustration doctrine focuses on supervening events that make the exchange worthless to one of the parties.⁸⁸ The 1903 English case of *Krell v. Henry*⁸⁹ illustrates this distinction. In *Krell*, the promisor rented, for a premium, a room along the route of the King's coronation parade. His ultimate purpose⁹⁰ for entering the contract was to watch the parade. The King fell ill, however, and the parade was cancelled. Although the promisor's performance was still possible, *i.e.*, he still could have paid the rent, he was excused from performing the con-

86. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

87. Both doctrines use extreme hardship as a basis for relief and both require the same "basic assumption" analysis. *Id.*, Comment a. See notes 47-73 and accompanying text *supra*.

88. *Howard v. Nicholson*, 556 S.W.2d 477, 482 (Mo. App., St. L. 1977); RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981); 6 A. CORBIN, *supra* note 41, §§ 1353, 1355.

89. [1903] 2 K.B. 740.

90. One of the difficulties with the frustration of purpose doctrine is determining what kinds of frustrated purposes justify relief. Until *Alcoa*, the courts had refused to apply the doctrine when the promisor's purpose to earn money or avoid loss was frustrated. See notes 98-102 and accompanying text *infra*. Generally, the doctrine has been applied when the promisor's reason (aside from profit) for entering the contract has ceased to exist. For example, in *Krell*, the promisor's reason for entering the contract, *i.e.*, to watch the parade, had ceased to exist; thus, the exchange was worthless to him. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981) uses the term "principal purpose" in describing the type of purposes that fall within the doctrine. Professor Corbin used the term "ultimate object of desire." 6 A. CORBIN, *supra* note 41, § 1353. Corbin stated:

It may be asked how can a contractor's purpose be frustrated by collateral events, when the agreed equivalent promised him in return for his own has been performed or is going to be. In such a case he gets that for which he bargained—his immediate object of desire. The answer to this is that a contractor has indirect and ultimate objects of desire; he bargains for the immediate object in order to attain more remote ends and in the confident belief that the attainment of the first will bring home the second also.

Id. See *Chicago, M., St. P. & P. R.R. v. Chicago & N.W. Transp. Co.*, 82 Wis. 2d 514, 521-23, 263 N.W.2d 189, 192-94 (1978).

tract because his purpose for entering the contract had been frustrated.⁹¹

Aside from this distinction, the frustration and impracticability doctrines are very much alike. Frustration, like commercial impracticability, applies the concepts of foreseeability,⁹² assumption of risk,⁹³ and allocation of risk⁹⁴ to determine whether the nonoccurrence of the triggering event was a basic assumption⁹⁵ on which the contract was made. Both doctrines also require a showing of severe hardship⁹⁶ before the promisor will be excused from performance and a lack of promisor fault.⁹⁷

Restatement (Second) of Contracts section 265⁹⁸ requires that the promisor's *principal purpose* for making the contract be frustrated before relief can be granted. Furthermore, courts have been restrictive in the types of purposes they will consider.⁹⁹ Promisors have not been excused under the frustration doctrine when their purpose to earn money or avoid loss is frustrated.¹⁰⁰ This restriction has rendered the frustration doctrine inap-

91. 2 K.B. at 754.

92. *E.g.*, West Los Angeles Inst. for Cancer v. Mayer, 366 F.2d 220, 225-26 (9th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967); Lloyd v. Murphy, 25 Cal. 2d 48, 54-56, 153 P.2d 47, 50-51 (1944); Howard v. Nicholson, 556 S.W.2d 474, 482-83 (Mo. App., St. L. 1977); Chicago, M., St. P. & P. R.R. v. Chicago & N. W. Transp. Co., 82 Wis. 2d 514, 526-29, 263 N.W.2d 189, 194-96 (1978); RESTATEMENT (SECOND) OF CONTRACTS § 265, Comment a (1981).

93. *E.g.*, West Los Angeles Inst. for Cancer v. Mayer, 366 F.2d 220, 225-26 (9th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967); Haas v. Pittsburg Nat'l Bank, 495 F. Supp. 815, 819 (W.D. Pa. 1980); Glenn R. Sewell Sheet Metal, Inc. v. Loverde, 70 Cal. 2d 666, 675-78, 451 P.2d 721, 727-28, 75 Cal. Rptr. 889, 895-96 & n.13 (1969); Howard v. Nicholson, 556 S.W.2d 477, 482-84 (Mo. App., St. L. 1977); Brenner v. Little Red School House, ___ N.C. ___, ___, 274 S.E.2d 206, 209-10 (1981); RESTATEMENT (SECOND) OF CONTRACTS § 265, Comment a (1981).

94. *E.g.*, Howard v. Nicholson, 556 S.W.2d 477, 482 (Mo. App., St. L. 1977) (dictum); Castagno v. Church, 552 P.2d 1282, 1283-84 (Utah 1976); 6 A. CORBIN, *supra* note 41, § 1354.

95. *E.g.*, Ma v. Community Bank, 494 F. Supp. 252, 257-58 (E.D. Wis. 1980); Chicago, M., St. P. & P. R.R. v. Chicago & N.W. Transp. Co., 82 Wis. 2d 514, 526-29, 263 N.W.2d 189, 195-96 (1978); RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

96. *E.g.*, Haas v. Pittsburg Nat'l Bank, 495 F. Supp. 815, 819 (W.D. Pa. 1980); Howard v. Nicholson, 556 S.W.2d 477, 483-84 (Mo. App., St. L. 1977); RESTATEMENT (SECOND) OF CONTRACTS § 265, Comment a (1981).

97. *E.g.*, 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 282, 244 N.E.2d 37, 42, 296 N.Y.S.2d 338, 344-45 (1968); Chicago, M., St. P. & P. R.R. v. Chicago & N.W. Transp. Co., 82 Wis.2d 514, 524-29, 263 N.W.2d 189, 194-96 (1968); RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

98. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

99. *See* note 90 *supra*.

100. *See, e.g.*, Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 76-78 (W.D. Pa. 1980). When a promisor's purpose to earn money or avoid

plicable to most disputes involving long-term contracts that have become burdensome due to increased cost of performance.¹⁰¹ The *Alcoa* court, however, rejected that restriction and decided that Alcoa's purpose to earn a profit or avoid a loss could be characterized as a principal purpose within the meaning of section 265.¹⁰²

The promisor may have little advantage to gain by applying the frustration doctrine to disputes involving burdensome long-term contracts. Characterizing such a dispute as a frustration problem does not appear to affect the standards for relief since the same basic assumption and severe hardship requirements must still be satisfied.¹⁰³ In fact, the *Alcoa* court applied its commercial impracticability analysis on the basic assumption and hardship questions to its frustration analysis without further discussion.¹⁰⁴

loss is frustrated, it is usually because it has become more expensive to render performance. In those cases, he should assert the theory of commercial impracticability as a basis for excuse. See notes 30-35 and accompanying text *supra*. See generally 499 F. Supp. at 72-73; *Pete Smith Co. v. City of El Dorado*, 258 Ark. 862, 863-64, 529 S.W.2d 147, 148-49 (1976); *Cutter Laboratories, Inc. v. Twining*, 221 Cal. App. 2d 302, 314-16, 34 Cal. Rptr. 317, 324-25 (1963); note 90 *supra*. Perhaps for this reason, the courts and promisors have not discussed the purpose to earn money or avoid a loss. The *Alcoa* court held that such purposes do fall within the scope of the frustration doctrine, but cited no cases discussing the issue. See note 102 *infra*.

101. See note 100 *supra*.

102. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 78 (W.D. Pa. 1980). The court suggested that unfairness would result if relief were not granted when extreme inflation would otherwise render enforcement of a contract harsh. It noted Professor Corbin's opinion that frustration should apply to situations in which gross inflation has rendered the performance of a contract meaningless to one of the parties. *Id.* at 77-78. A fair reading of Corbin's work, however, indicates that he was speaking of situations far different from the one involved in *Alcoa*. See 6 A. CORBIN, *supra* note 41, § 1360. While the court did not cite any cases directly supporting its holding, it did note that past American and foreign decisions have granted relief in times of serious inflation. The court said:

The exact character of the relief granted is not important here. Neither is the exact explanation of the decisions found in the cases, because even the Civil War cases antedate the evolution of the distinct doctrine of frustration. What is important is this: first, the results of those decisions would be readily explained today in terms of frustration of purpose. Corbin discusses them in his chapter on Frustration of Purpose. And second, the frustration which they involved was a frustration of the purpose to earn money or to avoid losses. Thus it appears that there is no legitimate doctrinal problem which prevents relief for frustration of this sort. There remain the customary strictures concerning risk allocation and gravity of injury. Those have been addressed above [in the court's impracticability analysis] and need not be considered again here.

499 F. Supp. at 78.

103. See notes 92-97 and accompanying text *supra*.

104. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 76-78 (W.D. Pa. 1980).

C. *Mutual Mistake of Fact*

The mutual mistake doctrine rarely has been applied to disputes involving long-term contracts that have become burdensome due to increased cost of performance.¹⁰⁵ The *Alcoa* court, however, held that Alcoa was entitled to "some form of relief"¹⁰⁶ because of a mutual mistake of fact. Its analysis

105. The overwhelming majority of commercial impracticability and frustration of purpose cases have involved supervening events. The RESTATEMENT (SECOND) OF CONTRACTS § 266 (1981) also recognizes the doctrines when conditions existing at the time the contract was made render the contract impracticable or frustrate the purpose of one of the parties. That section provides:

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

(2) Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.

The Second Restatement comments indicate that many of the same standards apply to both existing and supervening commercial impracticability and frustration of purpose. Two differences, however, are specifically noted. First, the party must have no reason to know of the existing facts. Second, if the doctrine applies, the promisor is considered never to have had a duty to perform instead of being excused from performance. *Id.*, Comment a. The drafters also suggest that a party is more likely to assume the risk of an existing fact than that of a supervening event.

Most of the burdensome long-term contract cases have been decided on the basis of commercial impracticability, but, since both mistake and existing impracticability relate to existing facts that affect the value of a party's contract, the mistake doctrine probably is applicable to some disputes involving burdensome contracts. Indeed, the Second Restatement notes that in some situations, both mistake and existing impracticability or frustration of purpose may apply. *Id.*, Comment c.

The mistake doctrine does not require extreme hardship as does existing or supervening impracticability or frustration. See notes 134-40 and accompanying text *infra*. The Second Restatement, however, implies that courts should be more willing to allocate risks to the promisor when he asserts the mistake doctrine than when he asserts the latter doctrines. See RESTATEMENT (SECOND) OF CONTRACTS, Chapter 6, Introductory Note (1981). In view of the courts' past willingness to allocate risks to the promisor in impracticability and frustration cases, it may not be valid to distinguish the doctrines on the allocation of risk issue. See notes 49-73 and accompanying text *supra*.

For an application of mistake doctrine where commercial impracticability also could have been applied, see *National Presto Indus., Inc. v. United States*, 338 F.2d 99, 106-12 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965).

106. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 70 (W.D. Pa. 1980).

provides an excellent illustration of the doctrine's potential use.

The court applied Restatement (Second) of Contracts section 152(1), which states:

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.¹⁰⁷

In order for this section to apply, the court had to decide whether the use of the inaccurate price formula was a mistake or simply a misjudgment of future events. Mistakes of existing facts may justify relief, but erroneous predictions do not.¹⁰⁸ While noting that the use of the price formula was not "wholly isolated from predictions of the future,"¹⁰⁹ the court characterized its use as "essentially a present actuarial error."¹¹⁰ It further said that the formula's "capacity to work as the parties expected it to work was a matter of fact, existing at the time they made the contract."¹¹¹ This characteriza-

107. RESTATEMENT (SECOND) OF CONTRACTS § 152(1) (1981). The final draft of the new Restatement had not been published at the time *Alcoa* was decided. The court, however, applied RESTATEMENT (SECOND) OF CONTRACTS § 294 (Tent. Draft No. 10, 1975), 499 F. Supp. at 62. That section contained the same language as the new § 152. See also RESTATEMENT OF CONTRACTS § 502 (1932).

108. RESTATEMENT (SECOND) OF CONTRACTS § 151 (1981) defines a mistake as "a belief not in accord with the facts." At the time *Alcoa* was tried, the new Restatement had not been published. The court, therefore, applied RESTATEMENT (SECOND) OF CONTRACTS § 293 (Tent. Draft No. 10, 1975). That section defined a mistake as "a belief that is not in accord with *existing* facts." (Emphasis added.) The court, however, was presented a master draft of the new Restatement § 151 by Professor E. Allan Farnsworth. Professor Farnsworth testified that as the reporter, he had deleted the word "existing" from the tentative draft in response to a "small but unanimous body of opinion that didn't like the word 'existing.'" 499 F. Supp. at 62. Professor Farnsworth further testified:

I think there is in the comment still a statement with respect to "existing" but the deletion from the black letter is at least a change that permits more flexibility with respect to the line between what is an existing fact or what is a fact and what is a pure presumption which is an extremely difficult line to draw in both cases.

Testimony of E. Allan Farnsworth, *quoted in* 499 F. Supp. at 62-63. RESTATEMENT (SECOND) OF CONTRACTS § 151, Comment a, at 9 (1981) provides:

Furthermore, the erroneous belief must relate to the facts as they exist at the time of the making of the contract. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a "mistake" as that word is defined here.

See notes 42-46 and accompanying text *supra*; notes 109-14 and accompanying text *infra*.

109. 499 F. Supp. at 63.

110. *Id.*

111. *Id.* at 64.

tion, seemingly at odds with the court's impracticability analysis,¹¹² was essential to the court's mistake analysis.¹¹³ Most courts in similar situations have indicated that the unsuitable formulas were accurate at the inception of the contract, but rendered inaccurate by supervening events.¹¹⁴

The court also found that Alcoa had satisfied the rather loosely defined element of mistake that requires that the mistake relate to a basic assumption¹¹⁵ of the parties. To establish this element, the proponent is not

112. See notes 45 & 105 and accompanying text *supra*.

113. The requirement that the mistake must relate to "existing facts" remains strong in the law of mistake. See, e.g., *Haas v. Pittsburg Nat'l Bank*, 495 F. Supp. 815, 817-18 (W.D. Pa. 1980); *Tony Downs Foods Co. v. United States*, 530 F.2d 367, 372-74 (Ct. Cl. 1976); *J.A. Maurer, Inc. v. United States*, 485 F.2d 588, 596 (Ct. Cl. 1973); *Bernstein v. Kapneck*, 46 Md. App. 231, —, 417 A.2d 456, 461 (1980); *Czarnecki v. Phillips Pipe Line Co.*, 524 S.W.2d 153, 156-57 (Mo. App., St. L. 1975); *Rabin, A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions*, 45 TEX. L. REV. 1273, 1285-86 (1967).

The line between an existing fact and a prediction into the future can sometimes be difficult to draw. See, e.g., *Haas v. Pittsburg Nat'l Bank*, 495 F. Supp. at 817-18; *Denton v. Utley*, 350 Mich. 332, 339, 86 N.W.2d 537, 540 (1957); notes 42-46 and accompanying text *supra*.

114. See cases cited note 3 *supra*; notes 45 & 105 *supra*. One court has analyzed a price formula case under the mutual mistake doctrine. In *City of Austin v. Cotten*, 509 S.W.2d 554, 557 (Tex. 1974), the court held that the adversely affected party had assumed the risk of the mistake because the parties had bargained on the assumption that the future was uncertain. The court refused to hold "that a mistaken expectation concerning a future state of facts . . . [would] never justify relief." *Id.*

115. The term "basic assumption" is difficult to define. If the parties consciously assumed that a certain fact was true, it may be a basic assumption. See RESTATEMENT (SECOND) OF CONTRACTS § 152, Comment b, Illustrations 1-6 (1981). A conscious assumption, however, is not required. *Id.* Comment b. In Comment b, the drafters state that the term means the same as it does in the frustration of purpose and commercial impracticability doctrines. See *id.* §§ 261, 265. As used there, whether something was a basic assumption of the parties often turns on questions of risk allocation, foreseeability, and assumption of the risk. See notes 47-83 and accompanying text *supra*. In the new Restatement's mistake section, however, those concepts are given treatment separate from the basic assumption question. RESTATEMENT (SECOND) OF CONTRACTS §§ 152, 154 (1981). See also note 49 *supra*.

Professor Corbin criticized the use of the basic assumption language because he felt that the main problem is really one of allocating risks "in accordance with the requirements of 'justice.'" 6 A. CORBIN, *supra* note 41, § 1331, at 358. In view of the new Restatement's separation of the risk allocation concepts from the basic assumption element in § 152, it is unclear what the term implies beyond what the parties actually assumed or what the court thinks they normally would have assumed. See notes 117-33 and accompanying text *infra*. For differing views on what assumptions are required for mistake, see *Tombigbee Constructors v. United States*,

required to prove that the parties consciously bargained on the existence of the mistaken fact.¹¹⁶ Often, the parties may not have considered the fact in question, but the court still can decide the question on the basis of commercial practice and usage.¹¹⁷ Mistakes about value ordinarily do not justify relief because the “parties are conscious of the uncertainty of value.”¹¹⁸ The *Alcoa* court, however, stated:

The assumed capacity of the price formula in a long term service contract to protect against vast windfall profits to one party and vast windfall losses to the other is so clearly basic to the agreement as to repel dispute. While the cases often assert that a mistake as to price or as to market conditions will not justify relief, this is not because price assumptions are not basic to the contracts. Instead, relief is denied because the parties allocated the risk of present price uncertainties or of uncertain future market value by their contract.¹¹⁹

Although the Second Restatement and the *Alcoa* court apparently analyze the assumption/allocation of risk questions as a separate element of mistake, those questions also relate to the mistake doctrine’s basic assumption analysis.¹²⁰ The distinction between assumption of risk and allocation of risk

420 F.2d 1037, 1041 (Ct. Cl. 1970); *Guthrie v. Times-Mirror Co.*, 51 Cal. App. 3d 879, 887-88, 127 Cal. Rptr. 577, 582-83 (1975); *Denton v. Utley*, 350 Mich. 332, 345-46, 86 N.W.2d 537, 543 (1957); *Nordyke & Marmon Co. v. Kehlror*, 155 Mo. 643, 653-57, 56 S.W. 287, 289-91 (1900); *Hinson v. Jefferson*, 287 N.C. 422, 430, 215 S.E.2d 101, 107 (1975); 13 S. WILLISTON, *CONTRACTS* § 1544 (3d ed. 1970); *Rabin*, *supra* note 113, at 1286-88.

116. See note 115 *supra*.

117. See note 115 *supra*; notes 121-25 and accompanying text *infra*.

118. 3 A. CORBIN, *supra* note 41, § 605, at 638-39 (1960).

119. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 65 (W.D. Pa. 1980).

120. *Id.* The *Alcoa* court followed the new Restatement’s lead and treated the “basic assumption” element and the risk allocation question as separate inquiries. That separation, however, may not be justified historically. See 3 A. CORBIN, *supra* note 41, § 598 (1960); J. MURRAY, *CONTRACTS* § 128 (2d rev. ed. 1974); notes 47 & 115 *supra*.

RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981) bars relief if the adversely affected party to the contract bears the risk of the mistake under § 154. *Id.* § 154 provides:

A party bears the risk of a mistake when

- (a) the risk is allocated to him by agreement of the parties, or
- (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

See 3 A. CORBIN, *supra*, § 598; J. MURRAY, *supra*, § 128; notes 121-23 and accompanying text *infra*.

is, again, subtle, but generally the latter relates to court-imposed risk allocation on the basis of commercial practice and policy,¹²¹ whereas the former generally is based on the circumstances surrounding the contract.¹²² The *Alcoa* court found that Alcoa did not bear the risk of the inaccurate price formula.¹²³ Essex argued that Alcoa had expressly or impliedly assumed the risk of the mistake because it failed to protect itself with a contract term¹²⁴ and also because "the parties made a calculated gamble with full awareness that the future was uncertain."¹²⁵ The court rejected both arguments.

Essex's first argument was grounded on its contention that it had insisted on a ceiling price in order to protect itself from the risk of uncertainty and that Alcoa "could have sought a corresponding 'floor' provision to limit its risks."¹²⁶ Despite this classic assumption of the risk argument,¹²⁷ the court stated that the circumstances indicated that Alcoa had "plainly" sought to limit its risk.¹²⁸ The court rejected Essex's "calculated gamble"

121. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 67-68 (W.D. Pa. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 154(c) (1981); *id.*, Comment d; 3 A. CORBIN, *supra* note 41, § 598 (1960); Rabin, *supra* note 113, at 1295-97. *See* *Beachcomber Coins, Inc. v. Boskett*, 166 N.J. Super. 442, 446-47, 400 A.2d 78, 80 (Super. Ct. 1979).

122. The courts sometimes use these terms interchangeably. Assumption of the risk is usually used, however, to express the judicial process whereby a party is held to bear the risk because of language in the contract, the circumstances surrounding the particular contract, or certain actions or inactions of the party. *See* *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 67-68 (W.D. Pa. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1981); *id.*, Comment c; 3 A. CORBIN, *supra* note 41, § 598 (1960); Rabin, *supra* note 113, at 1292-95; notes 124-29 and accompanying text *infra*. *See also* 6 A. CORBIN, *supra*, § 1328 (1962).

123. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 66-70 (W.D. Pa. 1980).

124. *Id.* at 68.

125. *Id.*

126. *Id.*

127. For cases that have considered this or similar arguments concerning assumption of the risk by failure to protect oneself by contractual provision, see *Tony Downs Foods Co. v. United States*, 530 F.2d 367, 374 (Ct. Cl. 1976); *National Presto Indus., Inc. v. United States*, 338 F.2d 99, 109 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965). In such cases, the courts often state that the party expressly or impliedly assumed the risk in the contract, or, alternatively, they will state that the risk was allocated by the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 154, Comment b (1981).

The easiest cases for the courts are those in which they can find a basis for holding that the adversely affected party expressly assumed the risk of mistake. *See* *Gulf Oil Corp. v. Federal Power Comm'n*, 563 F.2d 588, 600-01 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); *Flippin Materials Co. v. United States*, 312 F.2d 408, 415-16 (Ct. Cl. 1963); *City of Austin v. Cotten*, 509 S.W.2d 554, 557-58 (Tex. 1974).

128. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 68-69 (W.D. Pa. 1980). The court considered Alcoa's aggressive efforts to limit its risks

argument on the same ground.¹²⁹

Courts that have decided price formula cases on the basis of commercial impracticability have placed the risk of an inaccurate formula on the party seeking relief.¹³⁰ The allocation/assumption of risk questions in commercial impracticability cases, however, focus on the risk of supervening occurrences that impede performance,¹³¹ while the mistake doctrine emphasizes the risk of a "belief not in accord with the facts."¹³² It is unclear whether the application of the mistake doctrine provides more lenient standards on the allocation/assumption of risk questions than does the doctrine of commercial impracticability.¹³³

Alcoa also established the last requirement for relief under the mistake doctrine, that the mistake had a "material effect on the agreed exchange of performances."¹³⁴ This element generally is established by a showing that the mistake upset the equivalence of the bargain.¹³⁵ Alcoa was able to show

to be inconsistent with Essex's argument. The court stated that the risk was so improbable that "the absence of an express floor limitation can only be understood to imply that the parties deemed the risk too remote and their meaning too clear to trifle with additional negotiation and drafting." *Id.* at 69.

129. *Id.* at 70. Essex's argument was essentially that the parties had entered into the agreement in "conscious ignorance" of the facts, *i. e.*, whether the price formula would work as they had hoped. *Id.* at 69. The cases and the new Restatement are in agreement that a finding of conscious ignorance will result in the adversely affected party being held to have assumed the risk of mistake. *See, e.g.*, Southern Nat'l Bank v. Crateo, Inc., 458 F.2d 688, 693 (5th Cir. 1972); United States v. Idlewild Pharmacy, Inc., 308 F. Supp. 19, 25 (E.D. Va. 1969); Guthrie v. Times-Mirror Co., 51 Cal. App. 3d 879, 885, 124 Cal. Rptr. 577, 581 (1971); Gardner v. Meiling, 280 Or. 665, 674-76, 572 P.2d 1012, 1017-18 (1977); Harvey v. Robey, 211 Va. 234, 238-39, 176 S.E.2d 673, 675-76 (1970); RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1981).

130. *See* note 63 and accompanying text *supra*.

131. *See* note 63 and accompanying text *supra*.

132. RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981).

133. *See* note 105 *supra*. The *Alcoa* court treated the two concepts in the same fashion. Alcoa's attempt to limit its risk was the most important factor leading the court to decide that Alcoa had not assumed and could not be allocated the relevant risks. *See* Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 67-71, 74-76 (W.D. Pa. 1980). Under the new Restatement, risk allocation is much "broader" and "plays a much more significant role in connection with the law of mistake than it does in connection with the law of impracticability and frustration." RESTATEMENT (SECOND) OF CONTRACTS, Chapter 6, Introductory Note, at 380 (1981). *See generally* 3 A. CORBIN, *supra* note 41, § 598 (1960); 6 A. CORBIN, *supra*, § 1328 (1962); J. MURRAY, *supra* note 120, §§ 128, 197.

134. RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981).

135. The drafters state:

Ordinarily he will be able to do this [show the material effect] by showing that the exchange is not only less desirable to him but is also more advantageous to the other party. . . . In such cases the materiality of the effect

that its losses were matched by comparable gains for Essex, and Essex apparently conceded that Alcoa had met this general test for materiality.¹³⁶ Essex argued that Alcoa had failed to establish that enforcement of the contract would be unconscionable. That requirement, however, exists only when a unilateral mistake is involved.¹³⁷ A showing of severe hardship is not required to obtain relief for mutual mistake.¹³⁸ Commercial impracticability, as previously noted, requires a showing of severe hardship, and proving losses sufficient to justify relief has been a difficult task.¹³⁹ These differing standards offer the party seeking relief a strong incentive to bring himself within the scope of the mutual mistake doctrine.¹⁴⁰

IV. EQUITABLE ADJUSTMENT

The usual remedy for mutual mistakes of fact is avoidance or

on the agreed exchange will be determined by the overall impact on both parties. In exceptional cases the adversely affected party may be able to show that the effect on the agreed exchange has been material simply on the ground that the exchange has become less desirable for him, even though there has been no effect on the other party. Cases of hardship that result in no advantage to the other party are, however, ordinarily appropriately left to the rules on impracticability and frustration.

Id., Comment c. The *Alcoa* court found an imbalance in the bargain that justified relief. Essex argued that a showing of unconscionability was required and that Alcoa should not be granted relief because it had made a \$9,000,000 profit on the contract at the time of suit and it had not used expert testimony to prove its future losses. The court held that Alcoa's losses were proven sufficiently and that those losses were offset by comparable gains to Essex. The court also said that even if the future losses had not been proved, it would have found the mutual mistake material because Alcoa has received less profit up to the time of suit than it had expected. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 65-66 (W.D. Pa. 1980). See note 137 and accompanying text *infra*. See generally *Flippin Materials Co. v. United States*, 312 F.2d 408, 416 (Ct. Cl. 1963); *Guthrie v. Times-Mirror Co.*, 51 Cal. App. 3d 879, 886-87, 124 Cal. Rptr. 577, 582 (1975); Rabin, *supra* note 113, at 1288-91.

136. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 65 (W.D. Pa. 1980). See note 135 *supra*.

137. The courts apply more stringent requirements when the mistake is unilateral. See, e.g., *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 64 (W.D. Pa. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981). The *Alcoa* court, however, rejected Essex's argument that the mistake was unilateral. 499 F. Supp. at 64-65. The court also said that, if necessary, it would have held that enforcement of the contract would have been unconscionable. *Id.* at 66. See note 135 *supra*.

138. See note 135 *supra*.

139. See notes 74-83 and accompanying text *supra*.

140. See notes 74-83 and accompanying text *supra*.

rescission.¹⁴¹ If the contract is fully or partially performed, the court may attempt to return the parties to their original positions by granting restitution or reliance damages.¹⁴² The usual remedy for both commercial impracticability and frustration of purpose is excuse from further performance.¹⁴³ As in mistake, restitution or reliance damages may be granted in proper circumstances.¹⁴⁴ Under all three theories, significant problems can arise when restitution or reliance damages will not suffice to return the parties to their original positions.¹⁴⁵ For example, when a party builds a manufacturing plant that depends on a cheap source of aluminum in order to be profitable, the manufacturer may end up bearing a heavy loss, notwithstanding the availability of these remedies.¹⁴⁶ A few courts have split the losses between the parties after the contract was fully performed,¹⁴⁷ but these decisions have not gained much support.¹⁴⁸ Until *Alcoa*, however, no court, under

141. RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981); *id.*, Introductory Note; RESTATEMENT OF CONTRACTS § 510 (1932). See note 26 and accompanying text *supra*.

142. RESTATEMENT (SECOND) OF CONTRACTS §§ 152(2), 158 & Comment a, 294(2), 300(1) (1981). See generally RESTATEMENT OF RESTITUTION §§ 15-43 (1937).

143. See notes 34 & 35 *supra*; note 87 and accompanying text *supra*.

144. RESTATEMENT (SECOND) OF CONTRACTS § 272(1) (1981); *id.* § 292(1), Comment b; RESTATEMENT OF CONTRACTS § 468 (1932). The U.C.C. does not expressly provide for restitution. The remedy, however, probably is available. See U.C.C. § 2-615, Comment 6; *id.* § 1-103. For a discussion of restitution as a remedy for commercial impracticability, see *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 320 (D.C. Cir. 1966); J. CALAMARI & J. PERILLO, CONTRACTS § 13-17 (2d Ed. 1977); Comment, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution*, 69 YALE L. J. 1054, 1060-69 (1960). Reliance damages also are allowed in some cases. *Id.* See also Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208 (1973).

145. If the contract is avoided or performance is excused after one of the parties has spent considerable amounts of money in an attempt to perform, he will suffer a loss unless he has received a benefit equal to his costs from the other party. See Comment, *supra* note 144, at 1061-69. Restitution or reliance damages probably will be inadequate to protect a party who has spent money for capital improvements in reliance on an assured long-term source of supply if the supply is either unavailable elsewhere or prohibitively expensive at the time performance is excused. See, e.g., *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53, 79 (W.D. Pa. 1980).

146. See note 145 *supra*.

147. See *National Presto Indus., Inc. v. United States*, 338 F.2d 99, 109-12 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965); *Northern Corp. v. Chugach Elec. Ass'n*, 518 P.2d 76, 82-85 (Alaska), *modified on rehearing*, 523 P.2d 1243, 1243-47 (Alaska 1974). See articles cited note 148 *infra*.

148. For articles criticizing this approach, see *Government Contracts: Fixed-Price Agreements and Mutual Mistake of Fact*, 65 COLUM. L. REV. 542, 546-47 (1965); *Contracts—Implied Warranty; Reformation—No Implied Warranty in Absence of Reliance; Government Held Liable for One-Half Loss Incurred by "Fixed-Price" Contractor*, 33 FORDHAM L. REV. 507, 513 (1965).

any of these theories, had ever adjusted the price and anticipated further performance of the contract.¹⁴⁹ The court granted Alcoa its request for equitable adjustment and modified the contract's price term so that the executory portion of the contract could be performed.¹⁵⁰

Although previously untried,¹⁵¹ equitable adjustment is available under the Uniform Commercial Code¹⁵² and the Second Restatement.¹⁵³ Both of

149. See generally Mueller, *Contract Remedies: Business Fact and Legal Fantasy*, 1967 WIS. L. REV. 833, 836-37; Wallach, *supra* note 8, at 228-29. See also notes 151-53 and accompanying text *infra*.

150. Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 78-80 (W.D. Pa. 1980).

151. A few courts have discussed equitable adjustment, but the *Alcoa* court was the first to grant it. See *McLouth Steel Corp. v. Jewell Coal & Coke Co.*, 570 F.2d 594, 610 (6th Cir.), *cert. denied*, 439 U.S. 801 (1978); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 135-36, 138-40 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 432 n.2 (S.D. Fla. 1975); *Publicker Indus. Inc. v. Union Carbide Corp.*, 17 U.C.C. REP. 989, 990 (E.D. Pa. Jan. 17, 1975).

152. Authority for equitable adjustment in commercial impracticability situations is granted in U.C.C. § 2-615, Comment 6, which provides:

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

See 6 A. CORBIN, *supra* note 41, § 1333, at 371-72 & n.84; J. MURRAY, *supra* note 120, § 203; Speidel, *Court Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. L. REV. 369, 404-22 (1981); Wallach, *supra* note 8, at 228-29; Comment, *Commercial Impracticability and Intent in UCC Section 2-615: A Reconciliation*, 9 CONN. L. REV. 266, 273-77 (1977); Comment, *The International Uranium Cartel: International Economic Contingencies and Contractual Excuse Under Section 2-615 of the Uniform Commercial Code*, 14 TEX. INT'L L.J. 277, 287 n.46 (1979); cases cited note 151 *supra*.

Thus far, the courts have held that promisees have no good faith obligation to negotiate privately with promisors whose performance arguably has become impracticable or to accept an upward adjustment of price on request of the promisor. See *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 724-25 (Mo. App., W.D.), *cert. denied*, 444 U.S. 865 (1979); Speidel, *supra*, at 370-81; Note, *U.C.C. § 2-615: Sharp Inflationary Increases in Cost as Excuse From Performance of Contract*, 50 NOTRE DAME LAW. 297, 306-08 (1974).

153. The new Restatement provides that the court can supply a reasonable term to adjust the rights of the parties when the normal remedies for mistake, commercial impracticability, and frustration of purpose will not prevent injustice. RESTATEMENT (SECOND) OF CONTRACTS §§ 158(2), 172, 204 (1981). See Hurst, *supra* note 28, at 555 n.53; Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under*

these sources suggest that the adjustment remedy is available when the normal “ ‘excuse’ or ‘no excuse’ ”¹⁵⁴ outcome is insufficient to avoid injustice.¹⁵⁵ The *Alcoa* court applied the remedy for that very reason and stated, “A remedy modifying the price term of the contract in light of circumstances which upset the price formula will better preserve the purposes and expectations of the parties than any other remedy. Such a remedy is essential to avoid injustice in this case.”¹⁵⁶ The court decided that rescission would be unfair to Essex because it would deprive Essex of both an assured source of supply and certain economic benefits it had gained under the original price term.¹⁵⁷ Although Alcoa was not allocated the entire risk of the disparity between its actual cost and the price as computed under the formula, the court decided that Alcoa had assumed the risk of increased costs in excess of the maximum ceiling price on which the parties originally had agreed.¹⁵⁸ Accordingly, the court modified the price at that general level.¹⁵⁹

Equitable adjustment of contract terms as basic as price raises several questions. The first is whether the courts should ever adjust such basic terms.¹⁶⁰ Judicial imposition of a price term to which the parties did not agree conflicts with the maxim that a court will not make a contract for the parties.¹⁶¹ This maxim has lost most of its force, but it still represents the

Classical, Neoclassical, and Relational Contract Law, 72 NW. L. REV. 854, 873-76 (1978); note 161 *infra*.

154. U.C.C. § 2-615, Comment 6. *See* note 153 *supra*.

155. *See* notes 152 & 153 *supra*.

156. Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 79 (W.D. Pa. 1980).

157. *Id.*

158. *Id.* at 79-80. *See* note 63 *supra*.

159. The maximum price Alcoa will receive under the adjusted contract is the contract ceiling price. If its actual cost does not reach that level, Alcoa is to receive the greater of either the amount it would receive under the original contract or a profit of one cent per pound of aluminum converted. 499 F. Supp. at 80.

160. Equitable adjustment allows the court to split losses caused by unexpected facts or events. Some writers have suggested those losses should be split evenly. *See, e.g.*, Comment, *supra* note 144, at 1060. Many writers have discussed loss splitting in relation to situations in which the contract has been performed fully, but adjustment that splits future loss raises similar questions. *See* Posner & Rosenfield, *supra* note 67, at 113-14; Wallach, *supra* note 8, at 228; Comment, *supra*, at 1060. Several writers have complained that an equal division of losses creates uncertainty and encourages the parties to forego protecting themselves against the risks incident to their bargains. *See* Posner & Rosenfield, *supra*, at 113-14; 65 COLUM. L. REV., *supra* note 148, at 546-47; note 161 and accompanying text *infra*.

161. Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 91 (W.D. Pa. 1980). As the *Alcoa* court noted, the courts can and do make contracts for the parties. *Id.* In an effort to avoid the appearance of making contracts, the courts analyzed impracticability in terms of an implied term in the contract

notion that the courts should not have unlimited power to interfere with the contractual relationships of private parties.¹⁶² The *Alcoa* court rejected the maxim as inappropriate in the price formula situation,¹⁶³ and it noted several policy considerations that lent the remedy support: (1) there is a general trend in the law to be responsive to commercial practices and understandings,¹⁶⁴ (2) there is a need to protect the viability of long-term price contracts,¹⁶⁵ (3) there is a need to protect the purposes of parties who actively seek to limit their risks,¹⁶⁶ and (4) there is a need to develop an "appropriate legal response to problems of inflation."¹⁶⁷ Whether these or other policy considerations justify equitable adjustment of basic contract terms is likely to be the subject of much dispute among the courts and legal scholars.¹⁶⁸

If other courts follow *Alcoa's* lead on the adjustment remedy, a second question will arise: whether the availability of this remedy justifies a relaxation of the standards presently applied to the doctrines of mutual mistake of fact, commercial impracticability, and frustration of purpose. The latter two theories have especially strict standards.¹⁶⁹ One commentator has noted that the adjustment possibility arguably justifies a relaxation of the commercial impracticability standards because it,

that excused performance if it became unduly harsh. See Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860, 862-68 (1968); note 153 *supra*. The new Restatement has repudiated that theory and treats impracticability and frustration of purpose as an omitted case, *i.e.*, the parties failed to agree on a term defining their rights and duties on the happening of the event causing impracticability or frustration. The new Restatement allows the court to adjust the rights of the parties by supplying a reasonable term to cover the omission. RESTATEMENT (SECOND) OF CONTRACTS §§ 178(2), 204, 292(2) (1981). Mistake is treated in a similar manner. *Id.* § 152(2). For an explanation of contract omissions, see generally Farnsworth, *supra*.

Even though the maxim that a court will not make a contract for the parties cannot be taken literally, it still reflects the notion that the courts do not have unlimited power to impose contract terms to which the parties never agreed. The true question raised in *Alcoa* is whether adjustment of basic terms in long-term executory contracts exceeds the level of power that courts should have in resolving contract disputes. The problem of defining the courts' power to adjust terms will become even more acute if court-modified contracts are specifically enforced. See notes 177 & 199 *infra*.

162. See note 161 *supra*.

163. Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 91-92 (W.D. Pa. 1980).

164. *Id.* at 89.

165. *Id.*

166. *Id.* at 90.

167. *Id.* at 92.

168. See note 161 *supra*.

169. See pp. 83-95 *supra*.

by splitting the losses, takes at least some of the sting out of the conclusion that excuse should be recognized. Since the losses will not all fall entirely on one party or the other, the courts should be willing to recognize excuse defenses more often, and then use the adjustment approach to apportion the losses.¹⁷⁰

Undoubtedly, advocates of certainty will object to any expansion of these doctrines.¹⁷¹ There is a good argument, however, that the benefits of certainty are outweighed by the benefits of more flexible doctrines that can be used to protect the “purposes and expectations of the parties.”¹⁷²

A third question raised by the availability of equitable adjustment is what kind of situations justify an adjustment of the price or other basic terms¹⁷³ of a contract. The *Alcoa* court stated:

[F]our factors considered in this decision will likely prove to be of durable importance in deciding whether to modify contracts: (1) the parties' prevision of the problems which eventually upset the balance of the agreements and their allocation of the associated risks; (2) the parties' attempts at risk limitation; (3) the existence of severe out of pocket losses and (4) the customs and expectations of the particular business community.¹⁷⁴

The Uniform Commercial Code and the Second Restatement suggest that equitable adjustment should be used only as a last resort.¹⁷⁵ It stands to reason that the courts will follow this approach. The courts probably will use the remedy only when the normal application of the underlying theories coupled with the normal “excuse or no excuse” solution are found inadequate to provide a fair solution. Practical considerations also will be important in deciding whether to use equitable adjustment. Unless a party seeking adjustment is able to convince the court that a fair adjustment can be deter-

170. Wallach, *supra* note 8, at 229.

171. See notes 66-70 and accompanying text *supra*. See also note 160 *supra*.

172. Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 80 (W.D. Pa. 1980).

173. U.C.C. § 2-615, Comment 6 would seem to allow equitable adjustment of any term in a contract. At least one writer has suggested that price adjustment was what the draftsman of the Code primarily had in mind. See Wallach, *supra* note 8, at 228. No such suggestion appears in the language of the new Restatement. See RESTATEMENT (SECOND) OF CONTRACTS §§ 158, 172 (1981).

174. Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 92 (W.D. Pa. 1980).

175. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 158, Comment c (1981), which states:

Ordinarily the rules stated in this Chapter, coupled with those stated in Chapter 16, will be adequate to allow the court to arrive at a just result If, however, these rules will not suffice to avoid injustice, the court may supply a term just as it may in cases of impracticability of performance and frustration of purpose.

See also notes 152 & 153 *supra*.

mined with reasonable certainty, it is unlikely that the court will consider adjustment a preferable alternative.¹⁷⁶ This would be true especially if specific performance of the executory portion of the contract as modified is being considered.¹⁷⁷

A fourth question raised by the availability of equitable adjustment is what methods will be used to adjust the rights of the parties fairly. In *Alcoa*, the price was set at the point where Alcoa was required to bear only those losses attributable to risks it had assumed.¹⁷⁸ All other future losses (cost increases) were shifted to Essex.¹⁷⁹ This was true, even though the losses probably were not attributable to risks, *e.g.*, an inadequate price formula, assumed or otherwise allocable under normal standards to Essex.¹⁸⁰ Apparently, the court decided that such an adjustment was fair to both parties.¹⁸¹ In most cases it will be unfair to force the promisee to bear all of the loss that is not readily allocable to the promisor under usual standards.¹⁸² Be-

176. See Wallach, *supra* note 8, at 229.

177. Traditionally, the courts have not granted specific performance if the contract terms are not certain enough to permit them to frame a proper remedy. See D. DOBBS, REMEDIES § 2.5 (1973). Proof of consequential damages also requires reasonable certainty. *Id.* § 12.3. The courts probably will require certainty of fairness before they will specifically enforce a contract with a court-imposed price term.

178. See notes 157-59 and accompanying text *supra*.

179. The court shifted some of the losses Alcoa would have suffered in the future but for the adjustment. The adjustment requires Essex to pay Alcoa for cost increases not attributable to risks assumed by Alcoa in the contract. Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 78-80 (W.D. Pa. 1980).

180. The *Alcoa* court never clearly indicated whether it considered these risks allocable to Essex. The court indicated that the adjustment would "preserve the purposes and expectations of the parties." *Id.* at 79. The court also stated that the adjustment would "reduce ALCOA's disappointment to the limit of risk the parties expected in making the contract." *Id.* at 80. These statements could be interpreted to mean that the court thought Essex assumed the risk of these losses. The court, however, also stated that the losses were "not adequately foreseen and provided for." *Id.* at 92. That statement suggests that the court thought the losses were due to risks unallocable to either party. See also *id.* at 66-70.

181. The exact nature of the adjustment may be due to a settlement, but this is unclear. The court did state:

During the trial the parties agreed that a modification of the price term to require Essex to pay ALCOA the ceiling price specified in the contract would be an appropriate remedy if the Court held for ALCOA. The Court understands from the parties that ALCOA will continue to suffer a substantial but smaller out of pocket loss at this price level.

Id. at 79. The meaning of this statement is unclear, but the opinion does indicate that Essex opposed adjustment of the price. See *id.* at 78-80, 89-93.

182. In *Alcoa*, Essex still had a beneficial agreement after the price was adjusted. In other cases, a complete shift of the otherwise unallocable losses might be burdensome to the promisee.

tween the extremes, however, it will be difficult to decide what standards to apply to apportion such losses.

One approach the courts might take is to attempt to isolate the causes of each portion of the loss and then to allocate the risk of each cause to one or the other party. Under this approach, each party would bear the portion of loss attributable to risks allocable to him. Since 100% of the loss will have to be attributed to risks allocable to one or the other party, the courts would be forced to expand the category of factors that can be taken into account in the risk of allocation inquiry.¹⁸³ The present standards are inadequate because the "excuse or no excuse" solution generally has required the courts only to state in a conclusory manner that all of the losses should be allocated to the promisor.¹⁸⁴ This isolation approach might be attractive because it can be used in the original decision of whether to grant relief.¹⁸⁵ If the approach leads to the conclusion that one or the other party should bear most of the losses, price adjustment is unnecessary.¹⁸⁶ If it is determined that 50%

183. Because of the general rule that promisors bear the risk of nonperformance, the courts have not developed a sophisticated set of factors to allocate risks. In many cases, either foreseeability or conscious ignorance of the risk has been treated as an absolute indicator that the complaining party assumed the risk. *See* notes 50-65 & 120-29 and accompanying text *supra*. Many times, the courts have allocated all of the risks to the complaining party with little or no analysis. *See, e.g.,* Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 135 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979); Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721, 728 (Mo. App., W.D.), *cert. denied*, 444 U.S. 865 (1979). For various factors relating to risk allocation, see RESTATEMENT (SECOND) OF CONTRACTS § 158, Comments a-d (1981); *id.* § 262; *id.* § 281, Comments b, c; 6 A. CORBIN, *supra* note 41, §§ 1328, 1354; Patterson, *The Apportionment of Business Risk Through Legal Devices*, 24 COLUM. L. REV. 336 (1924); Posner & Rosenfield, *supra* note 67, at 83.

It generally has been assumed that our present risk allocation standards are inadequate to allocate all risks and that there are situations in which losses cannot be allocated to either party. *See* National Presto Indus., Inc. v. United States, 338 F.2d 99, 111 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965); 3 A. CORBIN, *supra* note 41, § 598 (1960); Posner & Rosenfield, *supra* note 67, at 113-14; Comment, *supra* note 144, at 1058-59. The courts would have to eliminate this sphere of unallocable risks if the 100% allocation approach is used. To do so, the courts might have to examine subtle equities, such as remote fault, remote foreseeability, and financial ability. The problem with using these concepts, however, is that they may always be applied to allocate these risks to the promisor. If so, the outcome would be very much as it is today: the promisor would be denied relief. *See* notes 79-86 & 104-09 and accompanying text *supra*.

184. *See* note 183 *supra*.

185. Some courts already are isolating the causes of loss in the impracticability analysis. *See* Wallach, *supra* note 8, at 218-21; notes 174-79 and accompanying text *supra*.

186. If the court decides that the promisor should bear most of the losses, he

of the losses should be borne by each party, then the losses can be allocated evenly. The problems inherent in attempting to isolate each cause of loss and to allocate each risk related to those causes, however, cuts against the adoption of this approach.¹⁸⁷

A second possible approach is to assume that all risks cannot be allocated specifically and that the loss attributable to unallocable risks can be apportioned according to notions of fairness and equity.¹⁸⁸ Under this approach, the loss attributable to unallocable risks might be apportioned evenly,¹⁸⁹ according to benefits to be conferred,¹⁹⁰ or according to the parties' individual ability to bear them.¹⁹¹ This approach is more flexible than the first one, but it may be an inadequate measuring device when a complex long-term contract is involved.¹⁹²

No method adopted by the courts will eliminate uncertainty.¹⁹³ This uncertainty presents a valid ground for objection to equitable adjustment, and some courts will be reluctant to use the remedy for that reason. In some situations, however, the present "excuse or no excuse" solution is not flexible enough to do justice.¹⁹⁴ In those instances, an imprecise method of adjustment may be better than none at all.

V. CONCLUSION

The promisor seeking relief from a long-term contract that has become burdensome because of increased cost of performance has several avenues to relief. Such disputes ordinarily are decided on the basis of commercial

will lose on the mistake, impracticability, or frustration issues. *See generally* notes 47-73 & 120-33 and accompanying text *supra*. If it is decided that the promisee should bear most of the losses, the court should shift the entire loss to him by granting full excuse. *See* notes 173-77 and accompanying text *supra*.

187. *See* National Presto Indus., Inc. v. United States, 338 F.2d 99, 112 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965).

188. *See* 338 F.2d at 112.

189. *See id.*; Posner & Rosenfield, *supra* note 67, at 113-14; Comment, *supra* note 144, at 1058-59.

190. The problem with setting the price at the level of benefits conferred is that if the benefit is measured by market value, most of the loss will be shifted to the promisee. If the product is unavailable on the market, the promisee will still prefer this result instead of complete excuse for the promisor. In most situations, however, the promisor will have assumed some risk and will be precluded from getting full market price. *See* notes 178 & 179 and accompanying text *supra*.

191. In most situations, it would make little sense to impose a remedy with which a party is financially unable to comply. This would be true especially if the contract as modified were to be specifically enforced. *See* D. DOBBS, *supra* note 177, at 63.

192. *See* notes 176 & 177 and accompanying text *supra*.

193. *See* notes 69 & 70 and accompanying text *supra*.

194. *See* notes 145-59 and accompanying text *supra*.

impracticability. That theory, however, presents several strong barriers to relief, and promisors generally have been unsuccessful. The promisor will have a better chance of gaining relief if he can convince the court to adopt *Alcoa's* more flexible application of the commercial impracticability doctrine. But most courts probably will continue their past practice of applying a strict approach.

Based on *Alcoa*, a promisor might consider asserting the frustration of purpose doctrine. If it is only his purpose to earn money or avoid loss that is frustrated, most courts will find the frustration doctrine inapplicable. In that instance, commercial impracticability appears to be the proper theory. Since most courts appear to use the same strict standards for both commercial impracticability and frustration of purpose, the promisor has little to gain, even if the court holds such purposes to be within the scope of the frustration doctrine.

The promisor also might assert the mutual mistake of fact doctrine as a basis for relief. Whereas commercial impracticability and frustration of purpose generally are triggered by supervening events, the mistake doctrine applies to mistakes relating to facts existing at the time the contract was made. The promisor, therefore, must first consider whether he can characterize the cause of his losses as relating to an "existing fact." If so, the mistake doctrine is a desirable theory because it does not require severe hardship as a condition to relief.

Whatever theory the promisor asserts, he should consider asking for equitable adjustment. The promisor still may end up with an undesirable contract, but the court might be willing to grant him *some* relief if it has the flexibility to avoid placing a heavy burden on the promisee. Courts will be reluctant to grant equitable adjustment because it does not offer simple solutions. In view of the flexibility offered by the remedy, however, a court would be unwise to reject it without adequate consideration of its merits.

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