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Revolting Developments

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ABSTRACT

Impracticability and frustration of purpose are important exceptions to the principle that contracts must be performed, come what may. At common law, the general rule is that the promisor bears the risk that a contract may become more burdensome or less desirable to her as a result of changes in circumstances for which she did not plan. But when an extraordinary circumstance renders a promised performance so different from what was to be expected that it changes the essential nature of that performance, the courts hold that justice requires a departure from the general rule.

The law of impracticability and frustration, as it has evolved under section 2-615 of the Uniform Commercial Code (UCC), and section 261 of the Restatement (Second) of Contracts (Second Restatement), is more confusing than it should be and frequently and unnecessarily fails to achieve its purpose. Some easily implemented changes to the rules will render outcomes in these cases more predictable and more just.

INTRODUCTION

“What a revolting development this is.”

– The Great Gildersleeve¹

In 1868 in St. Paul, a contractor named Leonard agreed to construct a building for Stees and others on their lot on Minnesota Street.²

¹ The Great Gildersleeve was the lead character in a radio show of the same name some years ago. See *The Great Gildersleeve*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Great_Gildersleeve (last modified Sept. 18, 2012).

After Leonard and his co-venturers had built the building to a height of three stories, it collapsed.³ They tried again, and it collapsed again. The problem, it soon appeared, was quicksand.⁴

From Leonard's standpoint, this was a revolting development. He had made an unqualified contractual commitment to build the specified building on the designated site. As things turned out, in order for him to do it, the entire site would have to be drained⁵ – presumably at great expense in relation to the contract price. There are indications in the opinion that he foresaw he might encounter quicksand.⁶ From the fact that he made an absolute commitment, it can be inferred that he reckoned that he would not. It may be that Stees and the other owners made the same assumption; they furnished plans for a building that could not be built on quicksand. But this is far from clear.

When Stees sued to enforce the contract, Leonard defended on the basis that the plaintiffs' plans called for footings that were inadequate to support the building on quicksand.⁷ The court was unimpressed. If the specifications for the footings were flawed, it was up to Leonard to substitute proper footings.⁸ If the building could not be built on quicksand, it was Leonard's duty to drain the site.⁹ *Pacta sunt servanda*. Contracts are to be performed.

If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility¹⁰ will excuse him from doing what he has expressly agreed to do.

The court went on to note:

This doctrine may sometimes seem to bear heavily upon contractors; but, in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified,

² See *Stees v. Leonard*, 20 Minn. 449, 449 (1874).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 455.

⁶ *Id.* at 455–56.

⁷ *Id.* at 455.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 49.

liability. The law does no more than enforce the contract as the parties have made it.¹¹

If *Steas v. Leonard* were tried today, Leonard might still lose, but he would not be at such a desperate disadvantage. The doctrine of impossibility applied in the original case has given way to the doctrine of impracticability. As stated in the leading case of *Mineral Park Land Co. v. Howard*, in which a contractor who had agreed to extract earth and gravel from a particular site unexpectedly encountered the water table:

A thing is impossible in legal contemplation when it is not practicable, and a thing is impracticable when it can only be done at excessive and reasonable cost. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated But, where the difference in cost is as great as here, and has the effect, as found, of making performance impracticable, the¹² situation is not different from a total absence of earth and gravel.

What exactly Leonard would have to show now varies with the jurisdiction.¹³ Among the many formulations available, the most

¹¹ *Id.* In these passages, the court was echoing precedents going back at least to the seventeenth century. *See, e.g.*, *Paradine v. Jane*, (1646) 82 Eng. Rep. 897 (K.B.) 897 (“[W]hen the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.”).

¹² *Mineral Park Land Co. v. Howard*, 156 P. 458, 460 (Cal. 1916) (internal quotation marks omitted).

¹³ *See, e.g.*, *Opera Co. of Bos., Inc. v. Wolf Trap Found. for the Performing Arts*, 817 F.2d 1094, 1102 (4th Cir. 1987) (“[A] party relying on the defense of impossibility of performance must establish (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable.”); *J & G Assocs. v. Ritz Camera Ctrs., Inc.*, Civ. A. No. 9811, 1989 WL 115216, at *4 (Del. Ch. Oct. 3, 1989) (“Discharge by reason of impracticability requires proof of three elements. First, the party claiming discharge must establish the occurrence of an event the non-occurrence of which was a basic assumption of the contract. Second, it must be shown that continued performance is not commercially practicable. Finally, the party claiming discharge must show that it did not expressly or impliedly agree to performance in spite of impracticability that would otherwise justify his non-performance.”); *Columbian Nat’l Title Ins. Co. v. Township Title Servs., Inc.*, 659 F. Supp. 796, 802 (D. Kan. 1987) (“Under [*Restatement (Second) of Contracts* section 261], performance will not be discharged if (1) the promisor caused the impracticability; (2) the promisor had reason to foresee the impracticability; or (3) the language or the circumstances indicate that the promisor assumed the risk.”); *Nebaco, Inc., v. Riverview Realty Co.*, 482 P.2d 305, 307 (Nev. 1971) (“[Performance will be excused if the promise] is made impossible or highly

careful is found in section 261 of the Second Restatement, which the drafters derived from section 2-615 of the UCC:

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 whic[h] was a basic assumption on which the contract was made, his duty to render that performance is discharged¹⁴ unless the language or the circumstances indicate the contrary.

The formulations of the defenses of impracticability and frustration of purpose in the Second Restatement¹⁵ are an improvement over most of the others. However, they leave open a lot of important questions:

- (1) Frequently, in impracticability and frustration cases, it is clear enough what the promisor assumed about the unwelcome development. If the matter was not discussed, how can we reliably determine what was in the promisee's mind? Often we can't.
- (2) If the promisor's assumption was reasonable, why do we care what the promisee assumed?
- (3) What exactly is the significance of the fact that the revolting development was foreseeable to the promisor?

impractical by the occurrence of unforeseen contingencies, but if the unforeseen contingency is one which the promisor should have foreseen, and for which he should have provided, this defense is unavailable to him." (citation omitted)).

¹⁴ RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). Similarly, section 2-615(a) of the UCC provides:

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

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

UCC § 2-615(a) (1978). For useful discussions of this provision and the companion provisions of the UCC (sections 2-613, 2-614, and 2-616), see Alphonse M. Squillante & Felice M. Congalton, *Force Majeure*, 80 COM. L.J. 4, 6-7 (1975); sources cited *infra* notes 21-22. See generally Brian S. Conneely & Edmond P. Murphy, *Sections 2-615 and 2-616 of the Uniform Commercial Code: Partial Solutions to the Problem of Excuse*, 5 HOFSTRA L. REV. 167 (1976).

¹⁵ RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 265 (1981). Section 261 defines the defense of impracticability and section 265 the defense of frustration of purpose.

- (4) Where is the line between a mere increase in the promisor's cost of performance, and a cost increase so severe that (as in *Mineral Park*) it renders performance impracticable?
- (5) What is a "basic assumption"? If the parties assume that an event will not occur, and its occurrence renders performance impracticable, could their assumption ever fail to be "basic"?
- (6) Other than acting on an unreasonable assumption, what fault on the promisor's part will defeat her defense?
- (7) If an erroneous assumption renders performance impracticable, and the language of the contract does not expressly allocate the risk of the unwelcome event to the promisor, when will the circumstances justify a finding that the promisor assumed that risk nevertheless?
- (8) In determining whether and on what terms the promisor's duty is discharged, why are the financial consequences to the *promisee* ignored?

The comments to the basic provisions, and other provisions of the Second Restatement, address some of these questions, but they do not narrow the range of uncertainty very much.

The Second Restatement formulation of the defense of supervening frustration is similar to that of impracticability:

Where, after a contract is made, a party's principal purpose is substantially frustrated 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 remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.¹⁶

All of the same questions arise, except that the vexing question of whether performance has become impracticable is replaced by the somewhat less vexing question of whether the promisor's principal purpose has been substantially frustrated.

It should be noted at the outset that the rules on impracticability and frustration are default rules. A party can waive these defenses by agreeing to perform come hell or high water.¹⁷ Conversely, the parties

¹⁶ *Id.* § 265.

¹⁷ *See id.* § 261 cmt. c ("A party may, by appropriate language, agree to perform in spite of impracticability that would otherwise justify his non-performance under the rule stated in this Section. He can then be held liable for damages although he cannot perform."). Cases enforcing such a clause are collected and the rationale for doing so is nicely summarized in *Citicorp of N. Am., Inc. v. Lifestyle Commc'ns Corp.*, 836 F. Supp. 644, 656 (S.D. Iowa 1993).

can agree on exculpatory language, which often takes the form of a “force majeure” clause.¹⁸ Take, for example, this clause in an oil and gas lease:

This lease shall not be terminated in whole or in part, nor lessee held liable in damages, because of a temporary cessation of production or of drilling operations due to breakdown of equipment or due to the repairing of a well or wells, or because of failure to comply with any of the express provisions or implied covenants of this lease if such failure is the result of the exercise of governmental authority, war, armed hostilities, lack of market, act of God, strike, civil disturbance, fire, explosion, flood or any other cause reasonably beyond the control of lessee.¹⁹

Such clauses, in which the parties make their own law with respect to impracticability, supersede the default rules.²⁰

On the whole, the history of published scholarship concerning impracticability and frustration in the United States has been one of benign neglect. There have been two small clusters of articles. One group appeared after the UCC was promulgated; by and large, the authors welcomed section 2-615.²¹ Another group of articles appeared in the 1950s and 1960s after a number of prominent cases were decided in England and the United States arising out of Egypt’s closure of the Suez Canal and the consequent rerouting of cargo

¹⁸ A force majeure clause is meant to “relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated.” *Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).

¹⁹ *L & L Energy Co. v. Chesapeake Exploration, LLC*, 2010 Ark. App. 422, at 3.

²⁰ See *infra* notes 29 and 43 for a discussion of some of the problems promisors have encountered in trying to enforce force majeure clauses. Hell-or-high-water clauses and force majeure clauses are not the only possibilities. The parties may agree, for example, that if conditions are unexpectedly encountered that render performance as stipulated in the contract impracticable, the promisor will not be discharged. Rather, the time for performance or the contract price will be “equitably adjusted” by a procedure set forth in the contract.

²¹ See Richard W. Duesenberg, *Contract Impracticability: Courts Begin to Shape § 2-615*, 32 BUS. LAW. 1089 (1977); William D. Hawkland, *The Energy Crisis and Section 2-615 of the Uniform Commercial Code*, 79 COM. L.J. 75 (1974); Thomas R. Hurst, *Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks Under UCC Section 2-615*, 54 N.C. L. REV. 545 (1976); Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 NW. U. L. REV. 1032 (1978); Conneely & Murphy, *supra* note 14; John B. Haley, Note, *UCC § 2-615: Sharp Inflationary Increases in Cost as Excuse from Performance of Contract*, 50 NOTRE DAME LAW 297 (1974).

ships.²² Since then, considering the frequency with which cases involving the two defenses have surfaced in the reports, the scholarly output has been slight. Over the whole period since *Mineral Park* was decided in 1916, there is not one article that stands out. If there is a commentator whose work has influenced the development of the law to a noticeable extent, it would be Arthur Corbin. His multi-volume treatise is cited twelve times in the comments and the reporter's notes that accompany the major sections of the Second Restatement.²³ Apart from Professor Corbin, Professor Williston, and their successors, whose comments are distributed throughout the pertinent volumes of their respective treatises,²⁴ nobody in any recent year has made a serious attempt in print to view the doctrines whole.²⁵

²² See Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963); Robert L. Birmingham, *A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory*, 20 HASTINGS L.J. 1393 (1969); John Henry Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419 (1969). *Aluminum Co. of America v. Essex Grp., Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980), also attracted a lot of scholarly attention. See *infra* notes 200–18 and accompanying text.

²³ See RESTATEMENT (SECOND) OF CONTRACTS §§ 178–315 (1981) (citing 6 ARTHUR LINTON CORBIN, CONTRACTS ch. 74 (1962 & Supp. 1980)).

²⁴ See generally 30 RICHARD A. LORD, WILLISTON ON CONTRACTS (4th ed. 2004); 14 JAMES P. NEHF, CORBIN ON CONTRACTS (Joseph M. Perillo ed., rev. ed. 2001).

²⁵ The most ambitious article published in the last forty years is Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUDIES 83, 94–97 (1977). In this article, the authors, approaching the defenses from the perspective of the University of Chicago Law School, argue that the law should be reoriented in such a fashion that a promisor is entitled to claim the defense only if the promisee is the superior risk spreader. The article has not been influential. More recently, Professor Melvin Eisenberg of Harvard Law School published a thoughtful piece devoted to two topics, tacit assumptions and the remedies of the promisee if the promisor's duty to perform is discharged. Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207 (2009) [hereinafter Eisenberg 2009]. Some of his major contentions are discussed in the present article. See *infra* note 197 and accompanying text. The article led to an unrewarding exchange between Professor Victor Goldberg of Columbia Law School and Professor Eisenberg. See Victor P. Goldberg, *Excuse Doctrine: The Eisenberg Uncertainty Principle*, 2 J. LEGAL ANALYSIS 359 (2010); Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration—Professor Goldberg Constructs an Imaginary Article, Attributes It to Me, and Then Criticizes It*, 2 J. LEGAL ANALYSIS 383 (2010). In another recent article, Professor Goldberg argues that once a promisor has been found to be entitled to discharge on grounds of impracticability, the promisee should not be entitled either to restitution or to compensation for harm resulting from the discharge. Victor P. Goldberg, *After Frustration: Three Cheers for Chandler v. Webster*, 68 WASH. & LEE L. REV. 1133, 1135–36 (2011). He maintains that this would entail a change in the law. *Id.* at 1137–65. In an earlier article that Professor Goldberg does not cite, Professor Andrew Kull

In this Article, it is submitted that the law of revolting developments, as it has evolved under the Second Restatement and UCC section 2-615, is more confusing and uncertain than it has to be, and that it frequently and unnecessarily fails to accomplish its purpose. Vague and variable though the idea of justice surely is, few of us would want to live in a system in which the law does not strive toward justice. And a key function of contract law is to introduce an element of predictability into human affairs. The whole point of entering into a contract is to bring an aspect of the future under some degree of control.²⁶ If it is possible that modest changes in the rules that define the defenses of impracticability and frustration will render outcomes in the cases in which these defenses are claimed more certain and more fair, the effort should be made.

Part I of this Article addresses the strengths and weaknesses of the Second Restatement provisions. Part II makes the case for an alternative formulation. These two parts are brought together in a brief conclusion.

I THE RESTATEMENT

A. *Strengths of the Restatement Formulations*

Warts and all, the Second Restatement provisions on impracticability and frustration of purpose are in many respects well crafted. They address important problems and further important objectives. They make due allowance for fault on the promisor's side, and for circumstances under which the promisor can fairly be held to have assumed extraordinary risks in the contract, and they deal in a principled way with the troublesome issue of foreseeability.

argued that, to the contrary, American courts generally do exactly what Professor Goldberg thinks they should do. See Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1 (1991).

²⁶ See E. ALLAN FARNSWORTH, *CHANGING YOUR MIND* 24 (1998); E. ALLAN FARNSWORTH, *CONTRACTS* § 1.3 (3d ed. 1999) (“[f]rom the perspective of the parties themselves, the function [of contract law] might have been viewed . . . as aiding them in planning for the future by protecting their expectations.”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.7 (7th ed. 2007).

1. *Important Objectives*

As the drafters cogently observe in the introductory note to the chapter on impracticability and frustration,

An extraordinary circumstance may make performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance. In such a case . . . *justice requires a departure from the general rule* that the obligor bear the risk that the contract may become more burdensome or less desirable.²⁷

If there were no default rules for revolting developments, a promisor wishing to undertake a risky course of action would have only two choices—try to protect herself in the contract with exculpatory language or bite the bullet and make an absolute commitment. There are good reasons not to force this choice on the promisor.

First, unsophisticated contractors, like the builder in *Steels v. Leonard*, will be blind-sided. Perhaps this is not the problem it once was. Presumably it is more likely now than it was in 1868 that a contractor will consult an attorney first. But not everyone will, and if the default rule is *pacta sunt servanda*, some prospective promisors will get hammered, since they do not know enough to try to negotiate for exculpatory language.

Second, a prospective promisee may refuse to consent to exculpatory language or may set the price too high. The result may be that some prospective promisors will be deterred from entering into contracts involving normal risks for fear that something unexpected will happen, and they will get hammered.

Third, promisors will rely on force majeure clauses, which cannot safely be relied on in all jurisdictions.²⁸ Some courts have used tenets like *ejusdem generis* to gut force majeure clauses or have arbitrarily

²⁷ RESTATEMENT (SECOND) OF CONTRACTS ch. 11, intro. note (1981) (emphasis added). On doing justice as the fundamental purpose of the defenses of impracticability and frustration, see *Opera Co. of Bos., Inc. v. Wolf Trap Found. for the Performing Arts*, 817 F.2d 1094, 1099 (4th Cir. 1987); *Gulf Oil Corp. v. Fed. Power Comm'n*, 563 F.2d 588, 599 (3rd Cir. 1977); and J. Denson Smith, *Some Practical Aspects of the Doctrine of Impossibility*, 32 ILL. L. REV. 672, 675 (1938). On the topic of these defenses as a last resort, when circumstances render performance fundamentally different from what was bargained for, see *Cook v. Deltona Corp.*, 753 F.2d 1552, 1557–58 (11th Cir. 1985); and *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 310 N.E.2d 363, 367 (Mass. 1974).

²⁸ In many jurisdictions, such clauses are routinely enforced. See Squillante & Congalton, *supra* note 14, at 2–6 (citing cases).

held that such clauses do not apply to developments that were foreseeable but not specifically enumerated.²⁹

If it is important, from the standpoint of justice, that contracting parties be protected against contingencies which they reasonably failed to anticipate and which turn the deal into a nightmare, default rules will be required to protect the parties.³⁰

²⁹ “Under the rule of *eiusdem generis*, general words following particular or specific terms are restricted in meaning to those things or matters that are of the same kind as those first mentioned; that is, general terms following an enumeration of specific terms are construed with reference only to the specific terms” 17A C.J.S. *Contracts* § 416 (1999). On the application of this doctrine to force majeure clauses generally, see the leading New York state case, *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295 (N.Y. 1987). In *Kel Kim*, the lessee of a roller skating rink covenanted to acquire and maintain liability insurance with one million dollars of coverage. *Id.* at 295. During the lease term, the lessee’s insurance company notified it that for reasons that did not reflect in any way on the lessee, it did not intend to renew the policy. *Id.* at 295–96. The lessee tried to obtain insurance elsewhere in the required amount but was unsuccessful. *Id.* at 296. When the lessor was informed of the problem, it threatened to oust the lessee. *Id.* The lessee sought a declaratory judgment, invoking the force majeure clause in the lease, which stipulated:

If either party to this Lease shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance of such obligation shall be excused for the period of the delay.

Id. The court held that on the facts, the force majeure clause afforded the lessee no defense.

[C]ontractual *force majeure* clauses—or clauses excusing nonperformance due to circumstances beyond the control of the parties—under the common law provide a . . . narrow defense. Ordinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party’s performance will that party be excused. Here, of course, the contractual provision does not specifically include plaintiff’s inability to procure and maintain insurance. Nor does this inability fall within the catchall “or other similar causes beyond the control of such party.” The principle of interpretation applicable to such clauses is that the general words are not to be given expansive meaning; they are confined to things of the same kind or nature as the particular matters mentioned.

Id. at 296–97 (citations omitted); *accord* *Excelsior Motor Mfg. & Supply Co. v. Sound Equip.*, 73 F.2d 725, 726 (7th Cir. 1934); *Team Mktg. USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242, 245–46 (N.Y. App. Div. 2007).

³⁰ Decisions like *Kel Kim* and *Excelsior* put undue pressure on the draftsman:

It would be costly if not impossible to lay out [a truly exhaustive force majeure clause]. There are a number of possible contingencies, the occurrence of which can be contemplated by both parties, and provision for the effects of which would be desirable to one or both of the parties. Wars, embargoes, changes in government rules and regulations, destruction of key supply facilities, hyperinflation, etc., can all lead to effects on the supply and demand of [a] commodity . . . which would make performance by one or both parties

2. *Fault*

Under the Second Restatement provisions, a promisor's duty is not discharged if her performance was frustrated or rendered impracticable as a result of her fault. This seems entirely appropriate for a defense based on the equities.³¹

The most common allegation of fault in cases is some version of "you brought it on yourself." A useful example is the Chicago depot case.³² Two major railroads ran passenger trains into and out of Chicago.³³ Though they were losing money on the service and cutting back when they could, the Interstate Commerce Commission would not let them discontinue it altogether.³⁴ Looking to save money, they agreed that railroad A would share its Chicago passenger terminal with railroad B for ten years, for a price.³⁵ Then came Amtrak, which neither party foresaw, and a chance for each to turn over its Chicago passenger service to Amtrak and get out of the business, which they did.³⁶ B, arguing that its primary purpose in contracting for the use of A's terminal was now frustrated, stopped paying rent.³⁷ The court held that B was not entitled to a discharge.³⁸ B's decision to transfer away its passenger business was a rational business decision, but it was a business decision. If B was now going to have to pay rent for a

unattractive. These contingencies could all conceivably be listed in a contract along with the possible occurrences of each and the nature of performance in each instance.

Paul L. Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119, 154 (1977). Professor Joskow observes that it would make more sense to have a rule that would render all of that unnecessary. For a collection of force majeure clauses with commentary, see Squillante & Congalton, *supra* note 14, at 9, 43. Some of those clauses would not fare well before a court favorably disposed toward the doctrine of *ejusdem generis*.

³¹ See *supra* note 27 and accompanying text on doing justice as the fundamental purpose of the defenses of impracticability and frustration.

³² Chi., Milwaukee, St. Paul & Pac. R.R. v. Chi. & N. W. Transp. Co., 263 N.W.2d 189 (Wis. 1978).

³³ *Id.* at 190.

³⁴ *Id.* at 194.

³⁵ *Id.* at 191.

³⁶ *Id.*

³⁷ *Id.* at 192.

³⁸ *Id.* at 196.

while for the use of a depot it could not use, it had brought the problem on itself.³⁹

3. *The Allocation of Extraordinary Risks*

The Second Restatement default rules allocate “normal” risks like market shifts and changes in the promisor’s general financial condition to the promisor, but provide for discharge of the promisor’s duty in extraordinary situations if certain conditions are met. One of those conditions is that the contract terms and the circumstances must not “indicate the contrary.”⁴⁰ Comment c to section 261 elaborates on this: “A party may, by appropriate language, agree to perform in spite of impracticability that would otherwise justify his non-performance under the rule Even absent an express agreement, a court may decide, after considering all the circumstances, that a party impliedly assumed such a greater obligation.”⁴¹ Interpreting this language and the corresponding language in UCC section 2-615, which words the condition somewhat differently,⁴² courts have not hesitated to give effect to language in the contract expressly allocating to the promisor the risk that a particular extraordinary event will occur.⁴³

³⁹ *Id.* at 194; *see also* Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258, 267 n.7 (S.D.N.Y. 1978) (national-brand brewer that acquired the rights to a competing brand and ran it into the ground in order to maximize profits on its own brand could not then defend on the ground of impossibility); Bitzes v. Sunset Oaks, Inc., 649 P.2d 66, 69 (Utah 1982) (promisor could not defeat promisee’s claim to an option on a designated parcel by changing the designation of the parcel on its plat); Liner v. Armstrong Homes of Bremerton, Inc., 579 P.2d 367, 370 (Wash. Ct. App. 1978) (on contractor’s counterclaim for breach, owners could not defend on grounds of impracticability, where the obstacle to their performance was their own material misrepresentation). *See generally* Henry Chajet, Comment, *Contractual Excuse Based On a Failure of Presupposed Conditions*, 14 DUQ. L. REV. 234, 244–48 (1976).

⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

⁴¹ *Id.* at cmt. c.

⁴² *See* UCC § 2-615 (1987) (“*Except so far as a seller may have assumed a greater obligation . . . [d]elay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency.*” (emphasis added)).

⁴³ In *Rose v. Freeway Aviation*, a lease on a building to be used for repairing airplanes provided that the lessor “shall be responsible for . . . maintaining the leased premises in at least a good condition as they are presently.” *Rose v. Freeway Aviation*, 585 P.2d 907, 907 (Ariz. Ct. App. 1978). In the course of the lease a gasoline truck crashed into the building, doing major damage to the doors and frame. *Id.* Despite repeated requests by the lessee, the lessor declined to do anything to restore the building to its original condition. *Id.* In the lessee’s suit, the lessor sought to defend on grounds of impracticability. *Id.* at 908. The court held, not surprisingly, for the lessee:

Courts have also sometimes astutely inferred from the contract language that the parties intended the promisor to assume the risk that an unwelcome event will occur. In *Publiker Industries Inc. v. Union Carbide*, the parties' contract for the sale of ethanol to Publiker contained an escalation clause tying the contract price to increases in Carbide's standard cost for ethylene used in the production of ethanol at its Texas City, Texas plant.⁴⁴ The clause also placed a cap on any such escalation in the price.⁴⁵ Carbide alleged that, as a result of action by the OPEC cartel to restrict the supply of oil, the cost of ethylene had risen much faster than contemplated.⁴⁶ Judge Weiner refused to conclude that the cost increases had rendered performance impracticable, holding that "the existence of a specific provision which put a ceiling on contract price increases resulting from a rise in the cost of Ethylene impels the conclusion that the parties intended that the risk of a substantial and unforeseen rise in its cost would be borne by the seller."⁴⁷

Proceeding under the UCC and the Second Restatement, some courts have gone a step further and have allocated the risk that performance will prove to be impracticable to the promisor, even though there is no indication that the promisor intended or agreed to assume the risk. A well-known case in point is Judge Friendly's opinion in *United States v. Wegematic*.⁴⁸ Responding to the government's bid for a large order for computers, Wegematic

Black's Law Dictionary . . . defines "maintain" as " * * * keep in repair; keep up; preserve; preserve from lapse, decline, failure or cessation; provide for; *rebuild*; repair; replace * * *." A covenant to maintain includes a covenant to rebuild.

Agreements which are clear and unambiguous will be enforced according to their terms and the words used will be given their normal ordinary meaning Freeway did not see fit to restrict its general covenant to maintain, and the case does not present any circumstances compelling a conclusion contrary to the general rule.

Id. (citations omitted). For a similar outcome, see, e.g., *Swift Textiles, Inc. v. Lawson*, 219 S.E.2d 167, 171-72 (Ga. Ct. App. 1975), in which the court denied relief to a cotton broker whose suppliers defaulted, where the contract authorized the buyer to cover and sue if performance was prevented by a contingency not mentioned in the force majeure clause, and the clause was silent as to defaults by the broker's suppliers.

⁴⁴ *Publiker Indus. Inc. v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. (West) 989, 990 (E.D. Pa. 1975).

⁴⁵ *Id.*

⁴⁶ *Id.* at 991-92.

⁴⁷ *Id.* at 992.

⁴⁸ *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966).

characterized its machine, which was still in development, as “a truly revolutionary system utilizing all of the latest technical advances.”⁴⁹ It represented that “maintenance problems are minimized by the use of highly reliable magnetic cores for not only the high speed memory but also logical elements and registers.”⁵⁰ Wegematic got the contract.

The contract contained a strict deadline reinforced with a liquidated damages clause.⁵¹ Wegematic first reported that the computers would be late and then announced that, due to unforeseen engineering difficulties, performance had become impracticable.⁵² The Second Circuit declined to let Wegematic off the hook, saying:

We see no basis for thinking that when an electronics system is promoted by its manufacturer as a revolutionary breakthrough, the risk of the revolution's occurrence falls on the purchaser; the reasonable supposition is that it has already occurred or, at least, that the manufacturer is assuring the purchaser that it will be found to have when the machine is assembled⁵³

Judge Friendly continued:

Acceptance of defendant's argument would mean that though a purchaser makes his choice because of the attractiveness of a manufacturer's representation and will be bound by it, the manufacturer is free to express what are only aspirations and gamble on mere probabilities of fulfillment without any risk of liability. In fields of developing technology, the manufacturer would thus enjoy a wide degree of latitude with respect to performance while holding an option to compel the buyer to pay if the gamble should pan out. We do not think this the common understanding—above all as to a contract where the manufacturer expressly agreed to liquidated damages for delay and authorized the purchaser to resort to other sources in the event of non-delivery.⁵⁴

The court held that Wegematic's defense based on impracticability had no merit because Wegematic had assumed the risk.

⁴⁹ *Id.* at 675.

⁵⁰ *Id.*

⁵¹ *Id.* at 676.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 676–77 (citation omitted). For a discussion of the assumption of risk in impracticability cases, see generally John M. Vogel, *Impossibility of Performance—A Closer Look*, 9 PUB. CONT. L.J. 110, 123–24, 127–34 (1977).

4. *Foreseeability*

Many courts have said and held that proof that a revolting development was “foreseeable” or “reasonably foreseeable” to the promisor defeats the defenses.⁵⁵ A leading case is *Lloyd v. Murphy*, in which Justice Traynor wrote for the California Supreme Court:

The purpose of a contract is to place the risks of performance upon the promisor, and the relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably foreseeable. If it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.⁵⁶

The practice of setting up foreseeability as an insurmountable obstacle to discharge has been roundly criticized in the literature.⁵⁷ In the introductory note, the drafters of the Second Restatement rejected the proposition that foreseeability bars discharge: “The fact that the event was unforeseeable is significant in suggesting that its non-occurrence was a basic assumption. However, the fact that it was

⁵⁵ See, e.g., *E. Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 441 (S. D. Fla. 1975) (“If a contingency is foreseeable, it and its consequences are taken outside the scope of UCC § 2-615, because the party disadvantaged by fruition of the contingency might have protected himself in his contract”); *Berline v. Waldschmidt*, 156 P.2d 865, 867–68 (Kan. 1945) (“[The doctrine of commercial frustration] is predicated upon the fundamental premise of giving relief in a situation where the parties could not reasonably protect themselves by the terms of their contract against contingencies which later arose, and . . . it never applies to give such relief where the risk of the event that has supervened to cause the alleged frustration was reasonably foreseeable[,] and could and should have been anticipated by the parties and provision made therefore within the four corners of the agreement which it is contended should be supplemented through operation and application of the doctrine. If the events relied upon as bringing the doctrine into force and effect appear to have been reasonably foreseeable and controllable by the parties, they may not invoke its principles as a defense to escape their obligations and the contract is enforceable in accordance with the provisions to be found therein.”); see also *Specialty Beverages, L.L.C. v. Pabst Brewing Co.*, 537 F.3d 1165, 1176 (10th Cir. 2008) (“[T]he defense does not apply if the promisor had any reason to anticipate the facts that rendered performance impossible.”).

⁵⁶ *Lloyd v. Murphy*, 153 P.2d 47, 54 (Cal. 1944).

⁵⁷ See, e.g., E. Allan Farnsworth, *Disputes Over Omissions in Contracts*, 68 COLUM. L. REV. 860, 884–87 (1968); Hurst, *supra* note 21, at 567–69; Joskow, *supra* note 30, at 157; Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 833–38 (1961).

foreseeable, or even foreseen, does not, of itself, argue for a contrary conclusion”⁵⁸

The drafters’ approach is entirely sound. Couching the inquiry in terms of foreseeability, rather than in terms of whether the promisor acted reasonably in disregarding the risk, leads to unpredictable results, and, not uncommonly, bad ones.⁵⁹

B. Weaknesses in the Restatement Formulations

Notwithstanding their merits, the Second Restatement provisions fall short in four important respects. First, they assign too much significance to the state of mind of the promisees with regard to the promisors’ over-optimistic assumptions, and not enough to the reasonableness of those assumptions. Second, they cloud the issue of when the promisor’s increased costs rise to the level necessary to make out a case of impracticability. Third, they purport to treat events and conditions differently, without an adequate reason to do so. Finally, they do not sufficiently focus attention on the need, if justice is to be done, to protect the legitimate interests of the promisee as well as the promisor.

1. Shared Basic Assumption

The Second Restatement formulations of the defenses⁶⁰ require the promisor to show that her mistaken assumption was “basic.”⁶¹ As the law has evolved, starting with the case of *Taylor v. Caldwell*,⁶² the promisor must show not only that the assumption was basic, but also that both parties made the same assumption.

⁵⁸ RESTATEMENT (SECOND) OF CONTRACTS ch. 11, intro. note (1981). Interestingly, and somewhat surprisingly, the drafters of the UCC took the opposite view. Official comment 4 to section 2-615 states: “Increased cost alone does not excuse performance, unless the rise in cost is due to some unforeseen contingency” UCC § 2-615 cmt. 4 (1978).

⁵⁹ See *infra* text accompanying notes 222–23.

⁶⁰ See *supra* note 14.

⁶¹ RESTATEMENT (SECOND) OF CONTRACTS § 261. This seemingly vague requirement has given rise to very little trouble—perhaps because, if the failure of the assumption renders performance so different from what could reasonably have been expected that the courts are willing to say that it has become impracticable, that is enough in their view to warrant treating the assumption as “basic.” Cf. *id.* § 152 cmt. b (dealing with mutual mistake).

⁶² *Taylor v. Caldwell*, (1863) 122 Eng. Rep. 309 (K.B.) 309. I am grateful to Robert Lloyd for putting me on the path to *Taylor v. Caldwell*.

In the celebrated case of *Taylor v. Caldwell*, Caldwell, an impresario, contracted with Taylor, the owner of the Surrey Gardens in London, for the use of the gardens and hall to put on four grand fetes and concerts.⁶³ Before the fourth could be held, the hall burned down.⁶⁴ Caldwell brought an action for damages. He was probably optimistic about his chances, since the general rule as the law then stood was that “[w]here there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible.”⁶⁵

How disappointing for Caldwell, then, that the court chose his case in which to announce a new general rule: “[I]n contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.”⁶⁶ It was apparent, the court said, that the parties—that is, both of them—had “contracted on the basis” that the hall would exist on all four relevant dates.⁶⁷ That being so, an implied condition to that effect must be read into the contract, and since the condition was not fulfilled as to the fourth date, Taylor was entitled to a directed verdict.⁶⁸

For many years after *Taylor v. Caldwell*, the courts in England and the United States analyzed the problems now addressed by the rules about impracticability and frustration in terms of implied conditions.⁶⁹ Eventually, under the influence of Corbin and others,⁷⁰

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 314.

⁶⁷ *Id.* at 310–11 (Caldwell, J.).

⁶⁸ *Id.* at 315.

⁶⁹ See Hawkland, *supra* note 21, at 75–76 (tracing this evolution).

⁷⁰ In a memorable address subsequently published in the *Harvard Law Review*, Mr. Justice Holmes condemned in strong terms the practice of deciding cases based on implied conditions:

You can always imply a condition in a contract. But why do you imply it? Is it because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours . . . Such matters really are battle grounds . . . where the decision can do no more than embody the preference of a given body in a given time and place.

the law moved away from that approach, to the rules in their present form. However, a vestige of the old way of looking at the problems lives on, here as in the law of mutual mistake,⁷¹ in the requirement that both parties have assumed that something would occur that did not in fact occur.⁷²

The requirement of a shared basic assumption works better in some situations than in others. In the impracticability and frustration cases, it is sometimes plain that the promisee made the same basic assumption as the promisor. Consider, for example, *City of Savage v. Formanek*.⁷³ The City of Savage (City) persuaded the Formaneks and other owners of wetland property to agree to a special tax assessment.⁷⁴ The owners were willing to enter into those contracts because plans were under way to develop their property.⁷⁵ It appears that they expected to recover the amount they had paid in tax and more when they sold their land at a premium. Everyone knew it was possible that the United States Army Corps of Engineers (Corps) would intervene to block the project and protect the wetlands.⁷⁶ Everyone, including the City, thought it would not happen. The city engineer specifically told the Formaneks that the City thought it would not happen.⁷⁷ The Corps did intervene,⁷⁸ and killed the project for the indefinite future. The City tried to hold the Formaneks to the bargain.⁷⁹ The court held, under the Second Restatement, for the Formaneks: Their primary purpose in entering into the contract had

O.W. Holmes, Justice, Supreme Judicial Court of Mass., Address at the Dedication of the New Hall of the Boston University School of Law: The Path of the Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 466 (1897). In a subsequent article, Professor Page, reasoning similarly, argued that in using implied conditions to justify a defense for promisors based on impossibility, the courts were invoking a fiction that was “at best unnecessary and at worst misleading.” William Herbert Page, *The Development of the Doctrine of Impossibility of Performance*, 18 MICH. L. REV. 589, 598–99 (1920).

⁷¹ See RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981) (“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 . . .”).

⁷² *Id.*

⁷³ *City of Savage v. Formanek*, 459 N.W.2d 173 (Minn. Ct. App. 1990).

⁷⁴ *Id.* at 174.

⁷⁵ *Id.* at 173.

⁷⁶ *Id.* at 174.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 175.

been substantially frustrated because of an event both parties clearly assumed would not occur.⁸⁰

Sometimes, by contrast, it is by no means clear what the promisee assumed. An instructive example is *Renner v. Kehl*.⁸¹ The Renners were looking for property in Arizona on which to grow jojoba,⁸² a plant that required a lot of water.⁸³ They contracted with the Kehls to purchase the Kehls' leases on a large parcel of fallow land in the Arizona desert.⁸⁴ After the Renners signed the contract, they ran the necessary tests, and they discovered it was not feasible to drill wells that would reach the water table.⁸⁵ They sought to get out on grounds of mutual mistake.⁸⁶ The court held for the buyers and granted rescission.⁸⁷

In the *Renner* case, the trial judge found that the sellers assumed, along with the buyers, that there would be water.⁸⁸ That finding was doubtful at best. There did not seem to be anything in the facts to support it, other than the fact that the Kehls knew what the Renners hoped to do with the land. But the mere fact that the sellers entered into the contract with that knowledge does not tell us what they assumed. It may be that the sellers thought, "Well, they're probably right about the water. Good luck to them." But it may also be that the sellers thought, "These people are taking a big risk buying the land to grow jojoba without testing for water first. Nothing has been grown here since who knows when. Well, it's their call. Maybe they're right and maybe they're not. There's an awfully good chance that they're not. Good luck to them." Unless they actually said they thought there was water, which apparently they did not, there is no way to know what the sellers assumed about the water. It was wrong of the trial court to ascribe to the sellers any assumption at all.⁸⁹

⁸⁰ *Id.* at 176 (citing RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981)).

⁸¹ *Renner v. Kehl*, 722 P.2d 262 (Ariz. 1986).

⁸² Pronounced "Ho-HO-ba."

⁸³ *Renner*, 722 P.2d at 264.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* The case was tried as a case of mutual mistake. It could also have been tried as a case of existing frustration, since clearly the lack of sufficient water substantially frustrated the Renners' principal purpose in purchasing the leases.

⁸⁷ *Id.* at 267.

⁸⁸ *Id.* at 265.

⁸⁹ If the sellers had known that there was no water there and said nothing, their conduct would have bordered on fraud. However, if as appears to have been the case, they were

The problem is difficult enough when the risk is one to which both parties consciously adverted. It is compounded when there is no evidence that they gave it any thought. A case on point is *Mineral Park Land Co. v. Howard*.⁹⁰ Needing earth and gravel to fulfill another contract, Howard agreed to pay Mineral Park to let him mine and haul away earth and gravel from Mineral Park's land.⁹¹ The land was located in California's Arroyo Seco⁹²—the famously Dry Gulch.⁹³ Presumably, neither party dreamed that Howard would hit the water table, as he did.⁹⁴ Is it fair then to say that Mineral Park assumed that he would not?

Some eminent scholars would say that the answer is, “Yes, of course.”⁹⁵ They are comfortable with the notion of “tacit assumptions.”⁹⁶ Professor Farnsworth offers the example of someone who steps into a room without checking first to see if the floor is there.⁹⁷ Obviously, she assumed—tacitly, in that she didn't think about it—that a floor would be there. That's fine, but if liability for breach is going to be made to depend on what the promisee assumed about some unwelcome development, the analogy to rooms and floors is not very satisfying. In fact, the whole enterprise is suspect.⁹⁸

That said, whatever one's position on it, the really important point is this: Whether the promisee shared the promisor's assumption should not make any difference. The law is asking the wrong question.

One example is the *Transatlantic* case, one of a group of cases involving shipments of goods that had to be rerouted when the Egyptians closed the Suez Canal.⁹⁹ *Transatlantic* contracted to carry

merely agnostic on the subject, they were not at fault. Both the trial court and the appellate court expressly absolved them of any wrongdoing. *Id.* at 266.

⁹⁰ *Mineral Park Land Co. v. Howard*, 156 P. 458, 462 (Cal. 1916).

⁹¹ *Id.* at 458.

⁹² *Id.*

⁹³ “Seco” is Spanish for “dry.”

⁹⁴ *Mineral Park Land Co.*, 156 P. at 459.

⁹⁵ See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* § 9.3 (4th ed. 2004); Eisenberg 2009, *supra* note 25, at 209.

⁹⁶ See, e.g., FARNSWORTH, *supra* note 95.

⁹⁷ *Id.*

⁹⁸ See Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for the “Wisdom of Solomon,”* 135 U. PA. L. REV. 1123, 1153 (1987).

⁹⁹ *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966).

wheat for the United States Department of Agriculture from an American port to a port in Iran.¹⁰⁰ The route through Suez was the “usual and customary” route, and Transatlantic assumed it would be able to use the canal.¹⁰¹ While the ship was en route, the Egyptian government closed the canal and sank ships in it.¹⁰² The carrier had no choice but to send the vessel around the horn of Africa, adding 3,000 miles to what would have already been a 10,000-mile voyage.¹⁰³ Transatlantic sought relief on grounds of impracticability.¹⁰⁴

Quite possibly, Transatlantic’s assumption about the canal was unreasonable. Egypt had already seized the canal.¹⁰⁵ Perhaps the government’s representative also thought it would be possible to use the canal when she signed the contract. But suppose that in the circumstances, at the time the contract was signed, it was unreasonable for the carrier simply to assume that. Suppose that the buzz in the shipping industry was that you had better plan to go the long way around. Transatlantic decided to gamble and quoted the government a rate for the charter it knew or should have known it would very likely regret.

If, knowing what Transatlantic had reason to know, a prudent carrier would not have done this, the law should not come to its aid. This is so, even if the government shared its erroneous assumption. The case would be like the famous case involving Rose the Second of Aberlone, a supposedly barren cow sold by a farmer to a banker.¹⁰⁶ The cow turned out to be fertile.¹⁰⁷ Both parties were mistaken.¹⁰⁸ The court rescinded the contract for that reason.¹⁰⁹ Suppose, however, there were indications, which every competent farmer would have recognized, that Rose was pregnant. Presumably the court would not have granted rescission—even if the banker, lacking a farmer’s expertise, made the same mistake.

¹⁰⁰ *Id.* at 314.

¹⁰¹ *Id.* at 315.

¹⁰² *Id.* at 314.

¹⁰³ *Id.* at 319.

¹⁰⁴ *Id.* at 315.

¹⁰⁵ *Id.* at 314.

¹⁰⁶ *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887).

¹⁰⁷ *Id.* at 920.

¹⁰⁸ *Id.* at 923.

¹⁰⁹ *Id.* at 924.

When a promisor proceeds on an assumption that she should know is not a sound assumption, there should be no discharge on grounds of impracticability, even if performance was rendered impracticable and even if the promisee made the same assumption. And the converse is also true. Suppose the facts in *Transatlantic* were otherwise. The smart money in the shipping industry was betting that Egypt would not close the canal, since if it did it would take an economic hit and risk retaliation. Egypt would not do so unless further provoked, and Israel and the European powers, though they might huff and puff, did not have enough at stake to provoke Egypt by declaring war. This turned out to be wrong. But suppose that in basing its quote on the continuing availability of the canal, *Transatlantic* had no reason to bet against the smart money. The fact that its assumption was reasonable should satisfy the law's requirements. This is so regardless of what the shipper assumed. Perhaps the shipper, which happened in this instance to be the United States government, had private knowledge strongly suggesting that the conventional wisdom was misguided. That should in no way prejudice the carrier's defense. There is no reason why the promisor should have to show that the promisee made the same assumption she did, if it was reasonable for her to make that assumption.¹¹⁰

2. "Impracticability"

If the promisor's erroneous assumption meets the Second Restatement's requirements, she must then prove that its failure to materialize rendered her performance "impracticable." The Second Restatement starts from the proposition that the promisor, in making her commitment, assumes the risk that things will not turn out exactly as she hopes. Specifically, "[t]he continuation of existing market conditions and of the financial situation of the parties are . . . not . . . [basic] assumptions [for purposes of the rule], so that mere market shifts or financial inability do not usually effect discharge"¹¹¹

¹¹⁰ It is hard to find, in the literature or cases, an argument in favor of the requirement of a shared, basic assumption. Possibly this is because the soundness of the requirement has never been seriously questioned. There is a case to be made for it. *See infra* Appendix.

¹¹¹ RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (1981); *cf.* UCC § 2-615 cmt. 4 (1978) ("Increased cost alone does not excuse performance [on grounds of impracticability] unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance.").

That said, however, really radical changes in circumstances can trigger the defenses. As the drafters of the Second Restatement observe:

Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved. A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule¹¹²

Then the drafters revert to their original point:

A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that fixed-price contract is intended to cover.¹¹³

By and large, in frustration cases, determining where to draw the line has not presented a serious problem. When someone rents a room from which he hopes to have a good view of the new king's coronation parade, and the king falls ill and the coronation does not take place, without a doubt his primary purpose has been substantially frustrated.¹¹⁴

Drawing the line in impracticability cases has proven much more difficult. Groping for a criterion, the courts have tended to focus on increased costs. In *Mineral Park*, for example, where the totally unexpected encounter with the water table increased the buyer's cost of extracting gravel tenfold, the court did not hesitate to hold the buyer discharged. But in less clear-cut cases, what passes for analysis tends to degenerate into a numbers game.

Consider *Transatlantic*, the Suez Canal case discussed above. When the Egyptians shut down the canal and the carrier had to route the ship around the Cape of Good Hope, its costs unquestionably increased. Judge Wright wrote for the D.C. Circuit:

¹¹² RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d.

¹¹³ *Id.* Cases decided under UCC section 2-615 have adopted the same interpretation. *See, e.g.,* Neal-Cooper Grain Co. v. Tex. Gulf Sulphur Co., 508 F.2d 283, 294 (7th Cir. 1974) ("We will not allow a party to a contract to escape a bad bargain merely because it is burdensome Barring circumstances not existent here, the buyer has a right to rely on the party to the contract to supply him with goods regardless of what happens to the market price. That is the purpose for which such contracts are made.").

¹¹⁴ *Krell v. Henry*, [1903] 2 K.B. 740 (Eng.).

The only factor operating here in appellant's favor is the added expense, allegedly \$43,972.00 above and beyond the contract price of \$305,842.92, of extending a 10,000 mile voyage by approximately 3,000 miles. While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, *to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case*, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone.¹¹⁵

Judge Wright declined to say how, eyeballing the cost figures, he had arrived at this judgment. In that respect the opinion he chose to write is unfortunately quite typical.

There were a number of Suez Canal cases, some of them decided in English courts. On the issue of quantitative impracticability, the courts in some Suez Canal cases appeared to be influenced by decisions in other Suez Canal cases. For example: in the *American Trading* case the re-routing of the ship around the horn of Africa added \$131,978.44 to the cost of a performance for which the shipper had agreed to pay \$417,327.36.¹¹⁶ The court noted, and seemed to be struck by, the fact that the one-third increase was virtually the same as the increase in the *Transatlantic* case discussed above.¹¹⁷ What the court did not mention, and probably did not notice, was that the court in *Transatlantic* had held the one-third increase to be insufficient without a shred of analysis or justification as to why it was insufficient.

One cannot help wondering whether, in the Suez Canal cases, the carriers were penalized because they did the responsible thing. Once they were notified that the canal was closed, having ostensibly determined that performance was now impracticable, they directed the ships to complete the voyage anyway by another, longer route.¹¹⁸ In so doing, they mitigated the shippers' damages. Whatever harm resulted to the shippers from delay in delivery to the intended destination was presumably far less than the harm that would have

¹¹⁵ *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966) (emphasis added).

¹¹⁶ *American Trading & Prod. Corp. v. Shell Int'l Marine Ltd.*, 453 F.2d 939, 940 (2d Cir. 1972).

¹¹⁷ *Id.* at 943.

¹¹⁸ *Id.* at 940; *Transatlantic*, 363 F.2d at 314–15.

resulted if the carriers had returned the goods to the original ports or dropped them off somewhere else. But the carriers also weakened their case. Recall that the impracticability defense springs from the proposition that “a thing is impossible in legal contemplation when it is not practicable.”¹¹⁹ It is going to be hard to impress a tribunal that something should be held to be “impossible in legal contemplation” when you have done it.

Notwithstanding the peculiar posture of the Suez Canal cases, the opinions in those cases have been cited respectfully in a number of subsequent opinions dealing with garden-variety impracticability.¹²⁰ The practice of deciding cases on this issue by analogy to other decided cases, without inquiry into the reasoning or lack of reasoning in those cases, has become commonplace. When the percentage increase is on the order of five percent,¹²¹ perhaps this is harmless. When the percentage increase is ten times that, however, the practice becomes pernicious. Consider, for example, *Iowa Electric Light and Power*, a case in which the seller claimed impracticability based on a cost increase of 52.2%.¹²² The court rejected the defense, noting that in other cases “increases of 50-58 percent have generally not been recognized as a basis for excusing or adjusting contractual obligations.”¹²³ Thus, the promisor’s impracticability defense failed, in a case in which, if the promisor had performed the contract at the contract price, it would have incurred a loss on the contract of \$2,673,125.00.¹²⁴

The *Iowa Electric Light and Power* case illustrates another serious problem. Sometimes, as in that case, the promisor proves that due to unexpected cost increases, performance would have resulted in “hardship,” that is, the cost of performance would have exceeded the contract price. Sometimes the promisor does not prove that. On the

¹¹⁹ *Mineral Park Land Co. v. Howard*, 156 P. 458, 460 (Cal. 1916).

¹²⁰ *See, e.g., La. Power & Light Co. v. Allegheny Ludlum Indus., Inc.*, 517 F. Supp. 1319, 1324–25 (E.D. La. 1981); *Iowa Electric Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 139 n.7 (N.D. Iowa 1978), *rev’d on other grounds*, 603 F.2d 1301 (8th Cir. 1979).

¹²¹ *See, e.g., Freidco of Wilmington, Del., Ltd. v. Farmers Bank of State of Del.*, 529 F. Supp. 822, 830 (D. Del. 1981); *Wilson & Co. v. Fremont Cake & Meal Co.*, 43 N.W.2d 657, 666 (Neb. 1950), *abrogated on other grounds by Dowd v. First Omaha Sec. Corp.*, 495 N.W.2d 36 (Neb. 1993).

¹²² *Iowa Electric Light & Power, Co.*, 467 F. Supp. at 140.

¹²³ *Id.*

¹²⁴ *Id.*

relevance *vel non* of hardship, opinions differ, but there is a pattern: Proof of hardship does not help the promisor's case, but the absence of such proof hurts it.¹²⁵ Someone, apparently, is not thinking. It seems clear that courts could do with more guidance on this issue than they have received to date.

3. Events and Conditions

The Second Restatement has two impracticability rules, one for events the parties assumed would not occur and one for conditions they assumed did not exist.¹²⁶ It has two frustration rules, similarly differentiated.

Section 266 on "Existing Impracticability or Frustration" 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.¹²⁷

In comment a to section 266, the drafters note two respects in which these rules differ from the rules for supervening events:

First, under the rules stated in this Section, the affected party must have had no reason to know at the time the contract was made of the facts on which he later relies. Second, the effect of these rules is to

¹²⁵ Compare *id.*, and *Maple Farms, Inc. v. City School Dist.*, 352 N.Y.S.2d 784, 788–90 (N.Y. Special Term 1974) (promisors' prospective losses dismissed as immaterial), with *Gulf Oil Corp. v. Fed. Power Comm'n*, 563 F.2d 588, 598–99 (3rd Cir. 1977) (discharge denied where promisor's evidence suggested that it would not lose money on the contract), and *E. Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 440–41 (S.D. Fla. 1975) (no impracticability because no proof of hardship). For more on hardship as a factor in evaluating impracticability defenses, see *infra* note 195 and accompanying text.

¹²⁶ RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981) (impracticability for supervening occurrences); *id.* § 266(a) (impracticability for existing conditions).

¹²⁷ *Id.* § 266.

prevent a duty from arising in the first place rather than to discharge a duty that has already arisen.¹²⁸

If the revolting development is an event rather than a condition, the promisor must have had “no reason to know” of it when the contract is made.¹²⁹ And this is true, even if both parties made a contrary assumption.¹³⁰ No reason is given for this distinction between events and conditions, and it is hard to see what a good reason might be. Perhaps the point is that in a case like the quicksand case, it may not be reasonable for the contractor to assume that subsurface conditions will be benign. But people make unreasonable assumptions about events, too. If St. Paul was prone to floods, it might not have been reasonable for the builder to assume he would not be flooded out. It would seem that the two kinds of developments, events and conditions, should be judged by the same standard.

Further, if the revolting development is a condition and the requirements of the rule on existing conditions are met, the promisor’s duty is not discharged, as it would be in the case of an event. Rather, the duty never arose. No reason is offered for this, either. Perhaps the object is to bring the rules on existing impracticability and frustration into line with the rule on mutual mistake. It is a bit anomalous if the outcome in the *jojoba* case¹³¹ differs depending on whether the buyers prevail on the ground of mutual mistake (so that the contract is rescinded) or existing frustration (so that their obligation is discharged). But the problem is a minor one, and it would not seem to warrant the creation of a whole separate set of rules.

¹²⁸ *Id.* at cmt. a. Illustration 8 accompanying section 266 provides qualified approval for the result in the hoary old quicksand case, *Steers v. Leonard*, 20 Minn. 494 (1874):

A contracts with B to build a house on B’s land according to plans furnished by A. Because of subsoil conditions, of which A has no reason to know, this cannot be done unless the land is drained at great expense. After the house is partly completed, it collapses because of these conditions, and A refuses to continue the work. The court may determine from all the circumstances, including the fact that A furnished the plans, that A is under a duty to build the house in spite of the impracticability of doing so, and that A is liable to B for breach of contract

RESTATEMENT (SECOND) OF CONTRACTS § 266 cmt. b, illus. 8.

¹²⁹ *Id.* § 266.

¹³⁰ *Id.*

¹³¹ *Renner v. Kehl*, 722 P.2d 262 (Ariz. 1986).

4. Remedy

Sitting quietly at the end of the chapter on impracticability and frustration, where litigants and their lawyers may not know to look for it, is section 272(2) of the Second Restatement, which addresses relief, including restitution.¹³² This section states, “In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties’ reliance interests.”¹³³ This provision effectively places the entire Second Restatement chapter on remedies at the disposal of a promisee who has been damaged by the promisor’s discharge on grounds of impracticability under section 261, and authorizes additional remedies besides.¹³⁴

Section 272(2) has not had a lot of play. The fights are waged over discharge, and once that issue is resolved, the promisees almost always retire from the field. From the standpoint of fairness, that is unfortunate.¹³⁵ Consider the *Asphalt International* case.¹³⁶ Asphalt International chartered a tanker from its owner, Enterprise Shipping.¹³⁷ While taking on asphalt alongside a pier in Curacao, the vessel was rammed amidships by the bow of another ship and sustained extensive damage.¹³⁸ The shipowner conducted an investigation, determined that the cost of repairing the ship was prohibitive, informed Asphalt International that it was terminating the

¹³² RESTATEMENT (SECOND) OF CONTRACTS § 272(b).

¹³³ *Id.*

¹³⁴ The possibilities opened up by section 272(2) are explored in W.F. Young, *Half Measures*, 81 COLUM. L. REV. 19, 33–34 (1981). For a forceful argument that what is being opened up here is Pandora’s box, see generally John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U. L. REV. 1 (1984).

¹³⁵ Commentators have called attention to this problem. See Birmingham, *supra* note 22, at 1398 (“As currently conceived, the frustration option does not explicitly permit a graduated response to differing equities. Since performance must be either required or excused there is generally no solution other than clear victory for one contestant.”); T. Ward Chapman, Comment, *Contracts – Frustration of Purpose*, 59 MICH. L. REV. 98, 117 (1960) (“In all but three of the twenty-nine holdings [in the author’s survey] relieving the frustrated party, the court merely declared all rights and duties under the contract terminated by the frustrating event. The courts appear unable to evolve any alternative to simple discharge of the contract.”).

¹³⁶ *Asphalt Int’l, Inc. v. Enter. Shipping Corp., S.A.*, 667 F.2d 261 (2d Cir. 1981).

¹³⁷ *Id.* at 263.

¹³⁸ *Id.*

charter, and sold the ship for scrap.¹³⁹ Enterprise Shipping had an incentive to find, as it did, that the vessel was a total loss: it was carrying \$2,500,000 of marine hull insurance on a ship worth about \$750,000.¹⁴⁰ The trial judge raised an eyebrow at this, but he let it pass. Enterprise Shipping collected insurance proceeds in the amount of \$1,335,000.¹⁴¹ Asphalt protested and then sued. It sought damages in the amount of \$1,278,831 for lost business and profits.¹⁴² So far as the court had reason to know, this was the amount by which Asphalt International stood to be damaged if Enterprise Shipping was granted an unconditional discharge.¹⁴³

The trial court held that the carrier's duty to perform was discharged because it was impracticable to repair the ship,¹⁴⁴ and the Second Circuit affirmed.¹⁴⁵ In a smug opinion full of maritime lore, Judge Kaufman invoked both UCC section 2-615 and Second Restatement section 261.¹⁴⁶ The court decided that Asphalt International's damages were immaterial:

[W]e cannot agree with the argument advanced by Asphalt that Enterprise may not enjoy the defense of impracticability because it suffered no financial hardship, but rather received a windfall profit of \$961,000 by virtue of the insurance proceeds it collected. The doctrine of commercial impracticability focuses on the reasonableness of the expenditure at issue, not upon the ability of a party to pay the commercially unreasonable expense.¹⁴⁷

On the issue of discharge, once the court bought into the carrier's numbers, this was the right decision. It would have been unsound to require Enterprise Shipping to spend \$1,500,000 to repair an old ship that stood badly in need of repair when it was rammed.

At this point, having lost the fight over discharge, Asphalt International evidently gave up. That was a bad mistake. Typically, it seems, Asphalt International's lawyers overlooked section 272(2)—a

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 263–64.

¹⁴¹ *Id.* at 264.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 264, 267.

¹⁴⁶ *Id.* at 266 n.4.

¹⁴⁷ *Id.* at 266.

provision that empowered the courts, if an unconditional discharge would work an injustice, to set matters right.¹⁴⁸

As a result, the carrier made out like a bandit, and the shipper suffered a large uncompensated loss. The law of impracticability, the courts and commentators say over and over, is rooted in considerations of fairness.¹⁴⁹ Surely a court asked to consider a remedy for Asphalt International could have seen fit to require Enterprise Shipping to cough up some healthy portion of its insurance proceeds in the interest of fairness.¹⁵⁰

II PROPOSAL

The defense of impracticability should be framed this way:

When an event or condition which the promisor reasonably assumed would not develop renders his performance impossible or impracticable, absent fault on his part and provided that he has not assumed the risk of the development, his duty to perform as promised is discharged, subject to an obligation to compensate the promisee in such amount as justice may require.

Similar revisions should be made to the law of frustration of purpose.¹⁵¹ The changes proposed are these:

- (A) A shared basic assumption should not be required. In order for the defenses to succeed, it should neither be necessary nor sufficient that the promisee made the same erroneous assumption as the promisor.
- (B) Instead, the focus of the inquiry should be whether the promisor, in proceeding on the basis of her erroneous assumption, acted reasonably.
- (C) The quantitative component of the impracticability defense should be recast in terms of hardship to the promisor.

¹⁴⁸ RESTATEMENT (SECOND) OF CONTRACTS § 272 (1981).

¹⁴⁹ See *supra* note 27.

¹⁵⁰ Cf. *Spur Indust., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 708 (Ariz. 1972) (in nuisance law the price of an injunction is due compensation to the party enjoined).

¹⁵¹ The revised definition for the defense of frustration of purpose should be: When an event or condition which the promisor reasonably assumed would not develop substantially frustrates his principal purpose, absent fault on his part and provided that he has not assumed the risk of the development, his duty to perform as promised is discharged, subject to an obligation to compensate the promisee in such amount as justice may require.

(D) The problems of fault and the allocation of extraordinary risks should be dealt with as they are now, with one minor change.

(E) When the promisor qualifies for discharge and chooses that option, she should be held to acquire thereby a duty to compensate the promisee for any resulting loss in such amount as justice may require.

(F) The judicial inquiry into “foreseeability” should be replaced by the inquiry into the reasonableness of the promisor’s assumptions.

The proposed changes will be addressed in that order.

A. Erroneous Assumption

The rule must cover, as it does now, both situations in which the promisor sees the risk but decides to go ahead and make an absolute commitment anyway and situations in which the promisor is blindsided.

Consider the case of *Lloyd v. Murphy*.¹⁵² In August of 1941, the Lloyds leased a piece of prime commercial real estate on Wilshire Boulevard in Los Angeles to Murphy for five years.¹⁵³ The lease stipulated that Murphy would sell new cars from the premises and could not sublease without the Lloyds’ consent.¹⁵⁴

At the time the lease was signed, Pearl Harbor had not yet been attacked.¹⁵⁵ However, the National Defense Act had been in force for more than a year.¹⁵⁶ The Act authorized the President to allocate materials and mobilize industry for the national defense.¹⁵⁷ The automotive industry was in the process of conversion to meet the needs of the country’s growing mechanized army and to meet lend-lease commitments to the British.¹⁵⁸ Greenland and Iceland had been occupied by the Army.¹⁵⁹ Automobile sales were spiking, because the public anticipated that sales of new cars to ordinary citizens would soon be restricted.¹⁶⁰

¹⁵² *Lloyd v. Murphy*, 153 P.2d 47 (Cal. 1944).

¹⁵³ *Id.* at 48.

¹⁵⁴ *Id.* at 49.

¹⁵⁵ Pearl Harbor was attacked on the morning of December 7, 1941. See *Tokyo Bombers Strike Hard at Our Main Bases on Oahu*, N.Y. TIMES, Dec. 8, 1941, at 1.

¹⁵⁶ The National Defense Act was enacted on June 28, 1940. *Lloyd*, 153 P.2d at 51.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

Five months after the lease was signed, the federal government took control of the sale of new cars.¹⁶¹ At first only military personnel could buy them.¹⁶² Shortly thereafter, the Government established a system of priorities under which sales were restricted to buyers who had a high preferential rating.¹⁶³

Back on Wilshire Boulevard, as he later testified, Murphy found he “couldn’t make a go” of the new car business.¹⁶⁴ He blamed the action of the government, and sought to cancel the lease on grounds of commercial frustration.¹⁶⁵

From the report of the case, it is impossible to tell, as it often is, whether when Murphy signed the lease he saw the handwriting on the wall and ignored it, or whether he was oblivious. Promisors often maintain they were blindsided by events, even when that is hard to believe. It should not matter. The question is (or should be) whether the promisor’s assumption that an event or condition would not develop was reasonable. If a reasonable person in Murphy’s position would have seen the signs that the clientele for new cars was about to shrink drastically and would have refused to commit himself without qualification to sell new cars from the lot for that reason, the court was right to enforce the commitment. This is true regardless of whether Murphy was merely imprudent or totally clueless. And it is true whether or not the Lloyds happened to be as benighted as Murphy was.

B. Reasonable Assumption

Courts generally do not address head-on the question of whether the promisor’s assumption was reasonable. Many courts, however, do assign importance to the “foreseeability” of the unwelcome event. Sometimes focusing on the second question rather than the first leads to anomalous results.

In the peculiar case of *Bende & Sons, Inc. v. Crown Recreation Inc.*, where a train carrying promised combat boots crashed en route

¹⁶¹ *Id.* at 48–49.

¹⁶² *Id.* at 49.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

and the goods were destroyed,¹⁶⁶ the court declined to hold the seller discharged on grounds of impracticability because it could have foreseen the train wreck.¹⁶⁷

On the facts, it seems more than merely possible that nobody in the seller's organization gave a train wreck a moment's forethought. Suppose, however, the contrary. Suppose, just for fun, that the operations manager, having perhaps been burned before by her superiors for failure to think ahead, asked her director of fulfillment to come up with a list of events that might cause the combat boots to fail to arrive in merchantable shape. Suppose the resourceful director came up with a list of thirty-seven such events, ranging from the plausible (shortage of railroad cars, flash flood) to the preposterous (destruction of the boots by spontaneous combustion, a meteor shower, the action of an evil wizard). And suppose a train wreck was on the list.

Now, if, as the court thought, the controlling question was whether a train wreck was foreseeable,¹⁶⁸ the buyer would be entitled to prevail. The revolting development was not just foreseeable, it was foreseen. But clearly that's the wrong question. The question should be whether the seller, having consciously adverted to the possibility of a train wreck, acted reasonably in disregarding it. And in the absence of any fact in the record that would have put the seller on notice that a train wreck was appreciably more likely than a meteor shower, the court's decision was not only wrong, but silly.

In this context, it appears, reasonableness is a function of two things: the probability that an event or condition will develop, and the severity of harm if it does.¹⁶⁹ As a practical matter, the question is whether the damage from a particular development would be so great and so likely to occur that the promisor should insist on appropriate exculpatory language or suffer consequences. So far as severity is concerned, we are only interested in developments that will render performance impracticable or that will substantially frustrate the promisor's principal purpose. Recall that the director of fulfillment was given the job of coming up with a list of things that would cause

¹⁶⁶ *Bende & Sons, Inc. v. Crown Recreation, Inc.*, 548 F. Supp. 1018, 1020 (S.D.N.Y. 1982), *aff'd*, 722 F.2d 727 (2d Cir. 1983).

¹⁶⁷ *Id.* at 1022.

¹⁶⁸ *Id.*

¹⁶⁹ I am grateful to Gregory Stein for suggesting this line of analysis.

the combat boots not to reach their destination in salable condition. Suppose the director had recently seen on television that mice like to breed in railway cars and included mice on the list of possible events. Given a great likelihood of mice, the operations manager might like to have mice in her force majeure clause. Assume, however, that based on everything she had reason to know, if mice did get at the boots, the damage they could do would not rise to the necessary level. Of course, she might be wrong about that. It might turn out that mice can do grievous harm to combat boots. However, on the facts assumed, if she were to decide not to clutter up the negotiations and the contract with a proviso regarding mice, and if mice turned out to be a really serious problem after all, that should not defeat the seller's impracticability defense.

A meteor shower would be a different matter. It is unlikely that the boots would survive a direct hit. However, that only answers the question of severity. It remains to consider probability. The operations manager would be entitled to take notice of the fact that meteor showers are exceedingly rare. Once again, if she decided not to press for exculpatory language and the boots perished in a meteor shower, her impracticability defense should remain intact. And so it is with respect to spontaneous combustion, the intervention of an evil wizard, and also—one would think—a train wreck.

Sometimes an additional variable enters in. Sometimes—though surely not in the train wreck case—the promisor knows or has reason to know of facts that would prompt a reasonable person to make inquiries. This was the situation in *Renner v. Kehl*, the case in which the purchasers of property in Arizona on which they intended to grow jojoba were excused from their commitment because they could not find water.¹⁷⁰ They discovered that there was no water when, after they had contracted to buy the property, they ran tests.¹⁷¹ Obviously, then, good tests were feasible. Surely the fact that this was property in a notoriously dry state, on which nothing was growing,¹⁷² should have alerted the buyers to the wisdom of running those tests before they made the commitment to buy. Even if, as the courts thought, the sellers shared the buyers' assumption about available water,¹⁷³ that

¹⁷⁰ *Renner v. Kehl*, 722 P.2d 262, 265 (Ariz. 1986).

¹⁷¹ *Id.* at 264.

¹⁷² *Id.*

¹⁷³ *Id.* at 265.

assumption on the buyers' part was unreasonable. Their commitment to buy the property willy-nilly should have been enforced.

Compare these cases with the case of *Sunflower Electric Cooperative v. Tomlinson Oil*.¹⁷⁴ Tomlinson, an experienced producer of natural gas, contracted to supply the Sunflower Electric Cooperative with a minimum of three million cubic feet of gas per day for a minimum of four years from a location in Kansas, the Stranger Creek field.¹⁷⁵ As part of the deal, each party agreed to build a pipeline, at its own expense.¹⁷⁶ At the time the parties entered into the contract, the Stranger Creek field was not producing.¹⁷⁷ It was located not far from the McLouth Field, which had been producing gas in commercial quantities for some time.¹⁷⁸

Tomlinson commissioned studies and analyzed the yield from twelve wells in the Stranger Creek field, six of which it dug for testing purposes.¹⁷⁹ It interpreted the results as promising.¹⁸⁰ On the strength of those results, Tomlinson entered into a binding long-term commitment.¹⁸¹ The contract included a force majeure clause that the courts determined did not cover the contingency that later arose.¹⁸²

Contrary to the assumption of both parties, the Stranger Creek field was a disaster.¹⁸³ In Sunflower's suit for specific performance or damages, Tomlinson pled impracticability.¹⁸⁴ In a thoughtful opinion,

¹⁷⁴ *Sunflower Elec. Coop., Inc., v. Tomlinson Oil Co.*, 638 P.2d 963 (Kan. Ct. App. 1981).

¹⁷⁵ *Id.* at 964–65.

¹⁷⁶ *Id.* at 965.

¹⁷⁷ *Id.* at 966.

¹⁷⁸ *Id.* at 965.

¹⁷⁹ *Id.* at 966–67.

¹⁸⁰ *Id.* at 967.

¹⁸¹ *Id.*

¹⁸² *Id.* at 973–74.

¹⁸³ *Id.* at 966, 968 (“As production declined, Tomlinson found heavy oil fouling up all of its separators, tubing and meters. Kerosene and steam would not clean this equipment. The oil changed to a solid-like asphalt. A sample of the heavy oil from the Pauley # 1 well was found to have a viscosity of 100,000 centipoise at 100° F with a pour point of 90° F. Normal crude oil has a viscosity of 10 to 100 centipoise. Because of the heavy oil problem, Tomlinson decided not to spend any additional time or money in developing or producing in the Stranger Creek field. . . . From [the] conflicting testimony the trial court found: [t]hat the gas in the Stranger Creek field is exhausted and that heavy oil is a problem only because of the depletion of gas. The Tomlinson estimates of reserves when the contract was signed were over optimistic.” (second alteration in original) (internal quotation marks omitted)).

¹⁸⁴ *Id.* at 963.

the Court of Appeals of Kansas denied specific performance, but held Tomlinson liable in damages.¹⁸⁵ It rejected Tomlinson's defense on two grounds. First, Tomlinson should have foreseen the problem.¹⁸⁶ Second, as an experienced producer with knowledge and expertise that the other party did not have, it assumed the risk.¹⁸⁷

It was, of course, reasonably foreseeable to Tomlinson that the Stranger Creek field would prove to be a disappointment. Anticipating the problem, it commissioned studies and ran tests. The difficulty was that those inquiries did not dispel the uncertainty.¹⁸⁸ Though Tomlinson conducted a responsible investigation, its assumption, based on the results, that gas would be available in commercial quantities, could fairly be characterized as unreasonable. That, in any case, was what the appellate court thought.¹⁸⁹ If the court was correct, the court was right to hold Tomlinson to the bargain.

The result is a harsh one, because Tomlinson did almost everything right. Its mistake was committing to the deal without the protection of a nice, tight force majeure clause. And of course Sunflower, which wanted a guaranteed long-term source of supply at a tolerable price and was willing to spring for a pipeline to reach one, might well have refused to agree to such a clause. But if the result is harsh, there is no help for it. A party who chooses improvidently to gamble on a known substantial risk cannot be excused from performing if the gamble fails.

C. Event or Condition

In running an impracticability analysis, there is no good reason to distinguish, as the Second Restatement does, between events and

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 971.

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* at 966 (“Prior to entering into the contract with Sunflower in November of 1973, Tomlinson had purchased 6 wells and drilled 6 wells. Of these twelve wells, only five . . . were potential producers, with the remainder being dry holes or abandoned as not commercial. Multipoint back pressure tests, most of which were performed in October, 1972, by Cities Service revealed gas flows for these five wells. . . . A multipoint back pressure test measures the relationship of short-term gas flow to the back pressure of a pipeline but is not a measure of the well's long-term capacity or the gas reserves. The presence of heavy oil in all these wells was noted early.”).

¹⁸⁹ *See id.* at 973.

conditions.¹⁹⁰ The appropriate standard, the standard of reasonableness, is the same for both.

Suppose the test results in *Sunflower* had been more reassuring, but the Stranger Creek field was located twenty miles from a field that had been producing nicely until geological shifts introduced water into the underground site, hopelessly contaminating it. Those geological shifts would be enough to put a reasonable producer in Tomlinson's position on notice that it had better inquire into the likelihood that something similar would happen at the Stranger Creek field. Suppose that the results of the inquiry were equivocal, as they were in the actual case, but Tomlinson elected to proceed anyway. Applying the standard of reasonableness, the court's question would be exactly the same—was Tomlinson's optimistic assumption reasonable—and so would the consequences. The fact that the revolting development was a condition, rather than an event, should not in itself prejudice the promisor's case.

D. Impossible and Impracticable

The cases of strict impossibility are in a class of their own. When the chosen hall burns or the chosen painter dies, no troublesome questions of degree arise.

It appears that the courts have protected this class of promisors to a greater extent than makes sense. By and large, on the issues of foreseeability and assumption of the risk, courts have given those promisors a free pass. Consider *Taylor v. Caldwell*, the case of the concert hall that burned prior to the last performance.¹⁹¹ The opinion of the King's Bench in that case is widely regarded as the source of the modern doctrine of impossibility.¹⁹² The hall was destroyed; performance was impossible; end of discussion. There was no inquiry into the frequency of fires in the district, the composition of the exterior (was it a wooden structure?), or the preparations or lack of preparations made for fire.

That was wrong; someone should have inquired. Suppose a booking agent contracts to furnish a particular band for a particular concert, and before the concert the band breaks up. It is impossible for the booking agent to perform. The band, we might say, "brought this

¹⁹⁰ See *supra* Part I.B and notes 129–30.

¹⁹¹ *Taylor v. Caldwell*, (1863) 122 Eng. Rep. 309 (K.B.) 309.

¹⁹² See Posner & Rosenfield, *supra* note 26, at 85 n.7.

on itself.” But this is not the case for the booking agent, who is the one on the hook. However, not so fast. Bands break up. How much did the agent know about the internal dynamics of the band? In light of what she knew, was it reasonable for her to make an unqualified commitment? The fact that the band’s performance has become not merely impracticable, but impossible, should not immunize the booking agent from having to face this question.

As noted above, in cases where a revolting development has rendered performance not impossible but unexpectedly expensive, courts have not come up with a good solution to the problem of what might be called “quantitative impracticability.” There is probably no good way to solve it in the rule itself. However, the gloss on the rule can and should focus the inquiry.

When the promisee refuses to acquiesce in the promisor’s request to be relieved of her duty on grounds of impracticability, the chances are that the promisee has something to lose. The lost benefit may simply be a portion of his expectancy—rent, royalty payments, goods at a favorable price. It may be that in the expectation of receiving that benefit, the promisee has made extensive expenditures in reliance, as on a pipeline to transport natural gas or the adaptation of railway cars to a specific purpose. It may be that the promisee has incurred substantial opportunity costs.

One may well ask why, in the name of impracticability, the promisee should be deprived of the benefit of the bargain, unless the unwelcome event either renders performance impossible or increases the promisor’s costs to the point of hardship. Suppose that a whopping increase in the cost of inputs reduces the promisor’s unit profit, but performance remains profitable.¹⁹³ The promisor does not have a compelling case for extricating herself at the promisee’s expense. Indeed, it is hard to see why fairness requires that the law intervene to protect the promisor, to the promisee’s loss and damage, if the worst the promisor can say is that if she is compelled to complete the promised performance, she will break even.

Perhaps, then, as has been suggested,¹⁹⁴ the touchstone of quantitative impracticability should be hardship. Forced to send the S.

¹⁹³ In this context, “profitable” means that the contract price exceeds the cost of performance.

¹⁹⁴ See Edwin W. Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 949–50 (1942) (quoting section 454 of the first Restatement of Contracts: “That the degree of hardship caused to the promisor is influential in determining what facts

S. Christos around the Cape of Good Hope, the carrier transporting the Government's wheat should have to show, not that its costs increased by some elusive multiple, but that it now stood to lose money on the trip.

How much money should the performing party have to lose? More than a token amount, to be sure. But suppose the *de minimis* principle does not dispose of the case. From the standpoint of clarity it would be splendid if proof of any degree of hardship were enough to trigger the defense. That would not, however, be a good solution. In practice, unforeseen contingencies arise all the time. Rational firms know that some percentage of their contracts will turn into losers, and budget for it. If proof of any degree of hardship, no matter how slight, were enough, an overwhelming number of contracts would qualify for the impracticability defense—far more than makes any sense.

If some degree of hardship is a necessary condition for recovery, but not a sufficient one, this line of analysis will not put an end to the numbers game.¹⁹⁵ The most that can be said is that it will point the inquiry in the right direction. The courts will be addressing real questions. First, would the promisor have suffered any actual harm from completing performance? And, if so, how much harm should a promisor who has acted responsibly be required to suffer before the law will come to her aid?

If hardship is the touchstone, some difficult questions remain. How exactly is the accounting to be done? What if the promisor is so large

constitute frustrations excusing promisors, is scarcely to be doubted. The recognition that 'impossibility' includes 'impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved,' is an implicit recognition of this factor.'"(footnotes omitted)). For a noteworthy decision and opinion reflecting this view, see generally *E. Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975). In a long-term contract first entered into in 1959 and renewed with amendments, Gulf contracted to meet Eastern's requirements for airplane fuel at certain airports. *Id.* at 432. The fuel was refined by Gulf from crude oil supplied mainly by domestic producers at prices regulated by the government. In the early 1970s, a series of events occurred that resulted in a drop in domestic production, with a corresponding increase in the importation of foreign crude oil, the price of which was not regulated by the government. *Id.* at 433. Computed by the method chosen by Gulf, Gulf's costs rose steeply. *Id.* at 434. When the parties were unable to agree on a price adjustment, Eastern sued Gulf to enforce the contract. Gulf defended on the ground of impracticability. *Id.* at 432. The court held that performance was not impracticable because if Gulf had performed, it would have suffered no hardship. *Id.* at 440.

¹⁹⁵ The reference is to the courts' fruitless search for some magic multiple by which the promisor's costs must have increased in order for performance to be held to be impracticable. See *supra* text accompanying notes 116–26.

or doing so well that requiring it to operate at a loss on this one contract will not cause serious financial harm? What if the promisor, in the exercise of foresight, insured against the risk?

These are not new questions. Past cases suggest possible answers.¹⁹⁶

E. Fault and the Allocation of Extraordinary Risks

This Article proposes no changes to the law stated in this section of the Second Restatement, except for an explicit reference in the rule to assumption of extraordinary risks by the promisor.

*F. Remedy*¹⁹⁷

As noted above,¹⁹⁸ though the Restatement contains a provision that could serve to draw attention to the possible need for some kind of remedy for the promisee in the event that the promisor's duty is discharged, the provision has seldom been invoked.

A good example of what can happen when a thoughtful court squarely addresses this problem is supplied by the opinion of the federal district judge in *Aluminum Co. of America v. Essex Group*.¹⁹⁹ The Aluminum Company of America (ALCOA) and Essex had

¹⁹⁶ Concerning the relevance of the promisor's financial condition on the issue of whether increased costs have rendered performance impracticable, compare *E. Air Lines, Inc.*, 415 F. Supp. at 441, with *Asphalt Int'l, Inc. v. Enter. Shipping Corp., S.A.*, 667 F.2d 261, 266 (2d Cir. 1981). Richard Duesenberg has explored some of the ramifications of the court's opinion in *Eastern Air Lines*:

What is impracticable for one seller might not be for another. The difference could be attributable to size, profitability, management capabilities, competence of engineers, scientists, and almost any other of the many qualities which distinguish individual from individual and organization from organization [I]n the surge of cases spawned by recent inflationary conditions, most of the opinions seem to search for a magical mathematical line past which an increase in costs would support an impracticability defense. That yearning is implicit when relief is denied because of the absence of any precedence for granting it where the cost increase is "something less than 100%" A 100% cost increase to some sellers might be disastrous; to others, the profit and loss charts might not even register a minor blip.

Duesenberg, *supra* note 21, at 1094 (quoting *Publicker Indus. Inc. v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. (West) 989 (E.D. Pa. 1975)).

¹⁹⁷ In a recent article, Professor Eisenberg explores this neglected aspect of revolting developments jurisprudence. See Eisenberg 2009, *supra* note 25, at 225–47.

¹⁹⁸ See *supra* Part I.B.4.

¹⁹⁹ *Aluminum Co. of Am. v. Essex Grp., Inc.*, 499 F. Supp. 53 (W. D. Pa. 1980).

signed a long-term contract in which ALCOA agreed to smelt alumina furnished by Essex into molten aluminum, which Essex would then collect.²⁰⁰ The contract contained a price escalation clause tied to ALCOA's non-labor production costs: three cents per pound of the original price was to increase in accordance with increases in the Bureau of Labor Statistics' Wholesale Price Index for Industrial Commodities (the WPI-IC).²⁰¹ As the contract progressed, ALCOA's non-labor production costs increased so much faster than the WPI-IC that, according to ALCOA's calculations, if the contract were enforced according to its terms, it stood to lose \$60 million.²⁰² The court accepted ALCOA's calculations.²⁰³

ALCOA sought relief on many theories. Judge Teitelbaum held that it was entitled to prevail on several, including impracticability.²⁰⁴ To succeed on this theory, ALCOA had to first overcome Essex's argument that production cost increases are not normally considered events that will sustain an impracticability claim.²⁰⁵ Then, it had to overcome the argument that by committing itself in the contract to a price escalation formula of its own design, ALCOA assumed the risk that the formula would not prove to be an accurate predictor of its production costs.²⁰⁶ Judge Teitelbaum distinguished the cases in which promisors who agreed to price escalation clauses were held to have assumed the risk.²⁰⁷ Concerning quantitative impracticability, he noted that "[t]he focus of the doctrines of impracticability and frustration is distinctly on hardship."²⁰⁸ He concluded that

[t]his strict standard of severe disappointment is clearly met in the present case. ALCOA has sufficiently proved that it will lose \$60 million dollars out of pocket over the life of the contract due to the extreme deviation of the WPI-IC from Alcoa's actual costs.²⁰⁹

²⁰⁰ *Id.* at 53.

²⁰¹ *Id.* at 58.

²⁰² *Id.* at 53.

²⁰³ *Id.* at 66.

²⁰⁴ *Id.* at 76.

²⁰⁵ *Id.* at 73.

²⁰⁶ *Id.* at 68.

²⁰⁷ *Id.* at 68–70.

²⁰⁸ *Id.* at 72.

²⁰⁹ *Id.* at 73.

The question of remedy remained. ALCOA had not prayed for discharge, but for an “equitable modification” of the contract.²¹⁰ Why it did so is not clear; perhaps its lawyers thought ALCOA had a shot at getting a new price term that would make the contract profitable again. If so, they were right. The court, however, was careful to note that “equitable” had to mean, fair to everyone.²¹¹ Essex too had interests that were entitled to protection:

To decree rescission in this case would be to grant ALCOA a windfall gain in the current aluminum market. It would at the same time deprive Essex of the assured long term aluminum supply which it obtained under the contract and of the gains it legitimately may enforce within the scope of the risk ALCOA bears under the contract. A remedy which merely shifts the windfall gains and losses is neither required nor permitted by Indiana law. . . . A remedy modifying the price term of the contract . . . 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.²¹²

In light of all this, Judge Teitelbaum wrote a new formula for the parties that guaranteed to ALCOA a one percent profit per pound of aluminum converted.²¹³ He relieved ALCOA of all hardship, but required it to settle for one percent rather than the four percent profit it claimed to have anticipated when it embarked on the deal.²¹⁴

What exactly the new arrangement would do for Essex does not clearly emerge from the opinion. The judge said that the new term would “generally yield Essex the benefit of its favorable bargain.”²¹⁵ His decision was appealed. At oral argument, the court let it be known that it thought Judge Teitelbaum’s decision was too favorable to ALCOA; whereupon, without waiting for a decision on appeal, the parties resumed negotiations and settled on new terms.²¹⁶

Judge Teitelbaum’s decision, which had the useful effect of forcing the parties back to the bargaining table to make a new agreement for themselves, was creative. It is not the only such decision in the

²¹⁰ *Id.* at 57.

²¹¹ *Id.* at 79.

²¹² *Id.*

²¹³ *Id.* at 80.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 475–76 (1985).

reported cases, but there are not many.²¹⁷ Perhaps this is attributable to the courts' often-avowed reluctance to "make a contract for the parties." In fact, what the reported cases suggest is not so much that, as that courts are simply very seldom tasked by promisees in these cases to impose conditions on the discharge of the promisors' obligations.

Perhaps there should simply be a standing condition: If the promisor opts for discharge, she must compensate the promisee in such amount as justice may require. Protection of the promisee's interests should become not an occasional thing, but the norm.

Despite what some courts say about rewriting the parties' contract for them, it happens all the time.²¹⁸ In fact, in effect, the default rules

²¹⁷ There is extensive literature on the case. *See id.* at 465, 475–76 n.59. *See generally* Stewart Macaulay, *The Real and Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44 (2003). For a particularly thoughtful appreciation of the decision and opinion in *Aluminum Co. of America v. Essex Group*, see Richard E. Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369, 370–81 (1981). For a vigorous statement of the opposing view, see generally Dawson, *supra* note 134.

Though goods were involved in the Essex Group transaction, the contract was a contract for services—ALCOA's commitment was to smelt the ore furnished by Essex. Thus the UCC did not apply. As Professor Speidel has noted, however, "the spirit if not the precise content" of the court's remedy "is caught by the intriguing comments to section 2-615 of the Uniform Commercial Code, which state that when 'neither sense nor justice' is served by an either/or answer on discharge, changed circumstances may 'require . . . a good faith inquiry seeking a readjustment of the contract terms.'" Speidel, *supra*, at 416.

²¹⁸ As Judge Clark wrote candidly for the Second Circuit many years ago in *Parev Prods. Co. v. I. Rokeach & Sons*:

Should, therefore, a covenant be implied under all the present circumstances? When we turn to the precedents we are met at once with the confusion of statement whether a covenant can be implied only if it was clearly "intended" by the parties, or whether such a covenant can rest on principles of equity. . . . *One may perhaps conclude that in large measure this confusion arises out of the reluctance of courts to admit that they were to a considerable extent "remaking" a contract in situations where it seemed necessary and appropriate so to do. "Intention of the parties" is a good formula by which to square doctrine with result. That this is true has long been an open secret.* Of course, where intent, though obscure, is nevertheless discernible, it must be followed; but a certain sophistication must be recognized—if we are to approach the matter frankly—where we are dealing with changed circumstances, fifteen years later, with respect to a contract which does not touch this exact point and which has at most only points of departure for more or less pressing analogies.

Parev Prods. Co. v. I. Rokeach & Sons, 124 F.2d 147, 149 (1941) (citations and footnotes omitted) (emphasis added); Z. Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 398 (1941); L. L. Fuller, *Legal Fictions*, 25 U. ILL. L. REV. 363, 369 (1930); Holmes, *supra* note 70, at 466.

on impracticability and frustration do exactly that. They give the promisor an avenue of escape she did not bargain for. They are the functional equivalent of a good force majeure clause, interpolated into the contract and bestowed upon a promisor without her ever having had to negotiate for it.

Under the law as it operates now, discharge comes too cheaply. The default should be *quid pro quo*: If the promisor wants out based on a contingency she did not plan for, she should be required to do right by the promisee. This will introduce an element of uncertainty into every decision to claim a discharge based on a revolting development. Obviously the promisor cannot know for sure what a court would decide that the promisee is entitled to as a matter of justice. Such an element of uncertainty is present, however, in every considered decision to break a contract. The informed prospective breaching party knows that she may be liable in damages and almost never knows for certain what the extent of that liability will be. Often in such cases, the prospective victim will happily provide relevant information. In any event, in impracticability and frustration cases, the promisor can reasonably expect that she will not be taxed with the full extent of the promisee's damages. In those cases, unlike the cases involving simple breach, her failure to complete performance is justified.

Possibly the promisor will conclude that it is not worth the risk and will go ahead and render the impracticable performance, pouring money down a rat-hole. In assessing the likelihood that this will happen, it is worth remembering that, by hypothesis, the promisor is unexpectedly facing "extreme and unreasonable difficulty, expense, injury, or loss."²¹⁹ The cost of continuing performance is likely to loom large in the promisor's calculations. Taking the *Asphalt* case as an example and using the ship owner's figures, its choice would be between (1) spending \$1,500,000 to repair a decrepit ship worth far less than that, and (2) recovering \$1,335,000 in insurance proceeds, plus the salvage value of the ship, some of which it would then have to share.²²⁰ Not, one would think, a hard choice.

It should be clear that the promisor's discharge is not contingent on making a fair arrangement with the promisee. To provide otherwise would leave matters in too uncertain a state in those instances in

²¹⁹ Restatement (Second) of Contracts § 261 cmt. d (1981).

²²⁰ See *supra* notes 140–47 and accompanying text.

which the parties cannot agree on the promisee's due. Once the promisor has opted for discharge, her election should be binding on the parties. But when she elects discharge, she should be held to acquire, in consequence, an obligation to the promisee to pay fair compensation.

G. Foreseeability

The drafters of the Second Restatement chose not to make foreseeability a bar to discharge, and explained why in the comments to section 261.²²¹ Notwithstanding that, even courts purporting to apply the Second Restatement provision or its UCC counterpart have read a foreseeability bar into the law.

In cases, foreseeability operates as a kind of wild card. On the one hand, we have cases like *Bende & Sons*, in which a seller was denied a discharge on the ground that it should have foreseen a train wreck.²²² On the other hand, there are cases like the *jojoba* case, *Renner v. Kehl*, in which the court permitted the buyers of useless real property to rescind their contact because of a condition they should surely have foreseen.²²³

The doctrine of foreseeability has performed one useful service: It has directed the courts' attention to the question of whether the promisor, in proceeding on an erroneous assumption, acted reasonably. The case of the hapless Murphy, who ignored the indications apparent to others that the high retail price of new cars at the outset of the government's wartime preparations was a bubble, is an excellent case in point.²²⁴ So is *Sunflower*, the case of the unrecoverable natural gas.²²⁵ In *Sunflower*, both parties to the contract assumed that the designated field would be productive, but Tomlinson, an experienced natural gas producer staring at a group of equivocal studies and ambiguous test results, should have known better.

²²¹ Restatement (Second) of Contracts § 261 cmt. b (1981) ("The fact that the event was foreseeable, or even foreseen, does not necessarily compel a conclusion that its non-occurrence was not a basic assumption.").

²²² See *supra* notes 166–69 and accompanying text.

²²³ See *supra* notes 170–73 and accompanying text.

²²⁴ See *supra* notes 152–65 and accompanying text.

²²⁵ See *supra* notes 174–90 and accompanying text.

With that said, all of the good done by the foreseeability doctrine can be done, and all of the mischief avoided, by inquiring explicitly into whether it was reasonable for the promisor to make the assumption she did. Once this becomes the standard inquiry and proper provision has been made for the allocation of extraordinary risks to the promisor, the doctrine of foreseeability should be interred.

CONCLUSION

If all of the elements of the proposal are adopted, the revised definition of the defense of impracticability would be:

When an event or condition which the promisor reasonably assumed would not develop renders his performance impossible or impracticable, absent fault on his part and provided that he has not assumed the risk of the development, his duty to perform as promised is discharged, subject to an obligation to compensate the promisee in such amount as justice may require.

The defense of frustration of purpose would be similarly redefined.²²⁶

It should be noted that, with one exception, the elements of the proposal are independent of one another.

- The requirement of a shared assumption should be dropped. If a court decided it was unwilling to make that much law, since arguably a shared basic assumption is more likely to be reasonable than one entertained by one party alone, proof of a shared assumption might still be held to satisfy the rule. Such proof should not, however, be required. If the promisor acted reasonably in assuming what she assumed, that should be enough.
- Though the word “impracticable” has given rise to a lot of confusion, the major surgery required to substitute something else for it is not warranted. What is important is that the touchstone should be understood to be hardship to the promisor.
- Whatever the law is, it should be the same for events and conditions, but this is a minor point.

²²⁶ When, as a result of an event or condition which the promisor reasonably assumed would not develop, his principal purpose is substantially frustrated, absent fault on his part and provided that he has not assumed the risk of the development, his duty to perform as promised is discharged, subject to an obligation to compensate the promisee in such amount as justice may require.

- An explicit reference to assumption of the risk would also be desirable, but is not critical.
- The law should require that in any judicially sanctioned discharge based on impracticability or frustration, the legitimate interests of the promisee be identified and protected. While the other elements of the proposal are still worth adopting, it would be disappointing if this change was not made. A court might or might not choose, as a means to this end, to structure the law so as to require the promisor, at the time she elects to treat her duty as discharged, to compensate the promisee for at least part of the resulting damage.
- The one recommendation that is contingent on the others is that the promisee should not be able to defeat the promisor's case by showing that the unwelcome development was "foreseeable" to the promisor. This factor, read out of the rules by the drafters of the Second Restatement, has crept into decisions and become embedded. It has sewn endless confusion, and in some cases it has prevented the courts from doing justice. It should be relegated to history, in favor of a requirement that it be reasonable for the promisor to make the assumption she did.

These are not radical proposals. Treating events and conditions the same, and calling assumption of the risk by that name, are tweaks. The requirement that the promisor's assumption be reasonable is already foreshadowed in many jurisdictions by the notion of foreseeability. Casting the quantitative component of the impracticability defense in terms of hardship to the promisor focuses an inquiry that has already tended to proceed in that direction. The existing rules provide for remedies for the injured promisee, so the only strenuous change would be to task the promisor specifically to do the right thing.

The proposed changes to the law would clear up some unnecessary confusion. More importantly, however, the proposed changes would aid the courts in doing justice, relieving promisors of burdens so severe that enforcement of their bargains according to the original terms would be unfair, while protecting the legitimate interests of promisees as well.

APPENDIX
THE REQUIREMENT OF A SHARED ASSUMPTION²²⁷

As noted in the text,²²⁸ there is an argument to be made for requiring, in revolting development cases, that the promisor's erroneous assumption be not only reasonable, but shared by the promisee. The argument, however, is not conclusive.

Suppose these facts: A key element in the making of Manufacturer M's principal product is thallium. Thallium is rarely found in nature and is difficult to synthesize. It is available in the United States only from a handful of firms, each of which imports it from mines in a developing country, where its production is lucrative. M is aware that governments in developing countries sometimes nationalize profitable industries. Knowing this, it passes up offers of thallium from firms that insist on price escalation clauses or force majeure clauses in their contracts. Instead, M enters into a long-term contract with supplier S, who is willing to make an unqualified commitment to supply thallium at a fixed price. The government of the country where S mines thallium nationalizes production of the product, restricts supply, and raises the price. This has the effect of increasing the price of thallium on the world market. It is no longer possible for S to cover its costs at the price stated in the contract with M. S seeks to get out and claims impracticability.

Assuming that the price of thallium to S rises to the point that continuing to perform the contract will result in substantial hardship, S's principal difficulty will be in proving that its assumption that the price would not rise significantly was reasonable. One obstacle will be that its competitors, who insisted on price escalation or force majeure clauses, apparently assumed the contrary. But it is hard to know in advance what a court will consider to have been a reasonable assumption, and S will press the point that no government anywhere has previously nationalized its country's thallium mines.

Under the Second Restatement rule, M has another argument. S must prove not only that its assumption about price was reasonable, but also that M made the same assumption. Perhaps M is in a position to refute that completely, through internal correspondence and memoranda in its files. Under the Restatement rule, that will kill S's

²²⁷ I am indebted to Robert Lloyd for suggesting this line of analysis.

²²⁸ See *supra* note 110.

defense. But without the shared-assumption requirement, what M assumed, though it will be relevant on the issue of reasonableness, will no longer be controlling. M will be forced to choose between taking its chances on this issue in litigation, and acquiescing in S's demand for an adjustment in the price. And this will be true, though it exercised reasonable foresight, and arguably, at least, S did not. That is not a good outcome.

Now suppose different facts. Since thallium represented a small part of M's manufacturing costs, and the thallium market had been stable for years, M gave little thought to the possibility that the supply would be interrupted. The suppliers were equally untroubled, and M had its choice of suppliers who were willing to enter into fixed-price contracts without force majeure clauses. It chose S because S consistently supplied high-grade thallium. When Kazakhstan, a U.S. ally, nationalized its thallium mines, causing the world price to rise significantly, everyone was stunned.

S's claim to impracticability now looks much better. S's argument that the assumptions it made were reasonable is strong. But under the Second Restatement rule, S will lose unless it can prove that M shared those assumptions. And it probably can't do that. It has no earthly way of knowing, let alone proving, what M assumed. Perhaps, in fact, there is a memorandum somewhere in M's files suggesting that an executive at M was mildly concerned that some government, perhaps Indonesia's, would take action that would raise the world price of thallium. By taking a hard line, M can force S to choose between (1) speculating on the outcome of litigation on this issue, or (2) abandoning its meritorious claim to a price adjustment. That is not a good outcome, either.