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Relief from Long-Term Coal Sales Contracts through Commercial Impracticability

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STUDENT MATERIAL

Note

RELIEF FROM LONG-TERM COAL SALES CONTRACTS THROUGH COMMERCIAL IMPRACTICABILITY

I. INTRODUCTION

Long-term coal sales agreements have been the center of discussion in many recent articles. Among the issues covered with regard to long-term contracts are allocation of risk,\(^1\) pricing provisions,\(^2\) and unforeseeable conditions that may arise during the operation of such agreements.\(^3\) Behind these issues lies the more basic question of who bears the loss when an unexpected condition occurs that adversely affects only one party to the contract. Within the context of long-term coal sales agreements, the seller has traditionally borne any loss due to conditions not provided for in the contract.\(^4\) The Uniform Commercial Code, however, has recognized the unfairness of placing strict liability on the seller and has provided an escape mechanism in the form of section 2-615, commonly known as the doctrine of commercial impracticability.\(^5\)

This Note explores the possibility of discharge for sellers in a long-term coal sales contract through the doctrine of commercial impracticability. This is a narrow exploration which deals only with discharge due to severe economic loss occasioned by unforeseen circumstances. The question of whether discharge is warranted under these circumstances has been squarely decided by only one court, the Missouri Court of Appeals.\(^6\) Because this decision has limited application as precedent, the issue largely remains open. Case analysis indicates however, that given the right circumstances and a sympathetic court, the possibility of discharge does exist.\(^7\)

Before further discussion of the possibility of relief, a brief history of long-term coal sales agreements is necessary to provide insight into the problems facing some sellers today. Following this, the development of the doctrine of commercial impracticability by the courts will be discussed. Lastly, this Note will examine the

\(^1\) See Carney & Metz, Risk Allocation in the Long-Term Coal Sales Agreement, 1 E. MIN. L. INST. 9-1 (1980).


doctrine in the context of coal sales agreements, and will attempt to identify the specific circumstances required for discharge.

II. LONG-TERM COAL SUPPLY AGREEMENTS

In the mid-sixties, the coal industry was fiercely competing with the oil producers for industrial fuel supply contracts. Therefore, once finding a purchaser, coal suppliers were more than willing to bind themselves to contracts for ten, twenty, and sometimes thirty years. In this manner, the coal producer could assure himself of a steady customer for long periods of time.

This competition among suppliers made the market for fuel a buyer's market, that is, the buyers were in the better bargaining position of the two parties to the contract. As a result, great concessions were made to the purchasers with respect to escalation clauses, escape clauses, and pricing provisions. Producers, however, were not very concerned at this point because productivity was constantly increasing and there was no reason to believe that the trend would falter. The seller therefore believed he would recoup any short-term profit losses due to contract concessions through increased productivity. The increased productivity would have resulted in decreasing per-unit costs of production, which in turn would have resulted in increased profit margins. This prediction by the producers would have been correct had it not been for a number of conditions, both foreseen and unforeseen, that occurred in the late sixties and throughout the seventies that astronomically raised the cost of producing coal.

In the late sixties, after long periods of relative stability, problems with labor arose. Although these problems contributed to the downward shift in productivity, they will not be discussed as contingencies because uncertainties with labor have existed since industrialization began, and should therefore have been foreseen by the producers. In addition to labor unrest, the Federal Coal Mine Health and Safety Act of 1969, rampant inflation caused by the oil embargo of 1973, and the Surface Mining Control and Reclamation Act of 1977 represented costly conditions that resulted in further reductions in productivity and increasing costs of production.

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8 See Carney & Metz, supra note 1, at 9-4.
10 Carney, supra note 2, at 202.
11 Carney & Metz, supra note 1, at 9-6.
12 Id. at 9-5.
13 Eckstein & Sichel, supra note 9, at 109.
14 President's Commission on Coal, Coal Data Book 124 (1980) [hereinafter cited as Coal Data Book].
17 J. Vernon, Macroeconomics 258 (1980).
19 Coal Data Book, supra note 14, at 124.
If the producer had no or inadequate pass-through provisions in his sales contract, the entire burden of this increase in costs fell on him. Furthermore, such standard escape provisions as force majeure and gross inequities clauses provided little help. Under such clauses, the issue would first have to go through arbitration to determine whether this particular condition was included as a covered contingency. Then, if the seller was successful in claiming the condition as a force majeure, the buyer could raise the prompt notice defense. Finally, the question remains whether force majeure requires that performance be impossible—rather than merely impracticable—before relief will be granted. It is easy to see from this scenario why a seller would seek relief from the courts.

III. THE DOCTRINE OF COMMERCIAL IMPRACTICABILITY

The doctrine of commercial impracticability arises under section 2-615 of the Uniform Commercial Code, which reads:

2-615 Excuse by Failure of Presupposed Conditions

Except so far as 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 seller who complies with paragraphs (b) and (c) [referring to partial performance and notice to buyer] 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.

Discharge by reason of commercial impracticability thus requires proof of three elements. First, a contingency must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or custom. Finally, performance of the contract must be commercially impracticable.

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22 Id. at 142. See also Gulf Oil Corp. v. Federal Energy Regulatory Comm'n, 706 F.2d 444, 452 (3d Cir. 1983), cert. denied, 104 S. Ct. 698 (1984) ("[T]he nonperforming party's duty extends to showing what action it took to perform regardless of the occurrence of the excuse.").
25 Transatlantic Fin. Corp., 363 F.2d at 315.
26 Id.
27 Id.
Section 2-615 is the codification of the common law doctrine of impossibility.\textsuperscript{28} However, this newer doctrine was intended to be a more flexible form of relief.\textsuperscript{29} To accomplish this end, the statute is written in general terms.\textsuperscript{30} In this manner, the equitable considerations of each individual factual situation may be weighed in applying the doctrine.\textsuperscript{31}

The adoption of this statutory defense was intended to reflect commercial sensibleness.\textsuperscript{32} Judge Skelly Wright wrote in \textit{Transatlantic Finance Company v. United States}, "The doctrine represents the ever-shifting line, drawn by the courts hopefully responsive to commercial practices and mores, at which communities' interest in having contracts enforced according to their terms be outweighed by the commercial senselessness of requiring performance."\textsuperscript{33}

Despite the flexibility rationale behind commercial impracticability, the courts have rarely granted relief under the doctrine. Judicial forums have continued to construe it strictly. There are two basic reasons for the courts' hesitation to apply the doctrine liberally. First, there is a great reluctance to upset the sanctity of a contract.\textsuperscript{34} The courts feel that there is a genuine need for the parties to be able to rely on their bargains. Without this reliance by commercial parties, the rationale behind contracting would be undermined.\textsuperscript{35} Second, the courts do not want commercial impracticability to be misused. There is a very real fear that parties may use the doctrine merely to escape bad deals or unprofitable business ventures.\textsuperscript{36}

Evidence of this type of abuse is apparent in a number of the cases that have been denied relief. The next section of this Note deals with an analysis of many of the unsuccessful attempts at utilizing commercial impracticability. This analysis will help answer two questions. First, what standards do the courts require to establish the elements of commercial impracticability. Second, have the courts been unnecessarily strict in their application of the doctrine, or has the denial of relief been more the result of weakly-based attempts to escape from unwise deals.

IV. THE COURTS' TREATMENT OF THE DOCTRINE

A review of recent cases involving commercial impracticability demonstrates that the judicial tribunals have thus far effectively denied relief under the doctrine.\textsuperscript{37}

\textsuperscript{28} Westinghouse, 517 F. Supp. at 450.
\textsuperscript{29} See \textit{Transatlantic Fin. Corp.}, 363 F.2d at 315.
\textsuperscript{30} \textit{Peabody Coal Co.}, 583 S.W.2d at 726.
\textsuperscript{31} Id.
\textsuperscript{32} \textit{Transatlantic Fin. Corp.}, 363 F.2d at 315.
\textsuperscript{33} Id.
\textsuperscript{34} See generally Murray, supra note 3, at 21.
\textsuperscript{35} Id.
\textsuperscript{36} United States v. Buffalo Coal Mining Co., 345 F.2d 517, 518 (9th Cir. 1965).
This has resulted from the demand for rigid compliance with the three elements of commercial impracticability. The courts’ task has further been facilitated by narrowly drawn definitions with respect to these elements. The courts also limit the types of contracts to which the doctrine may be applied. However, there is no indication that relief under the doctrine of commercial impracticability would still be denied if the circumstances complied with all the courts’ requirements.

Given the strictness of the courts’ standards, most of the cases that have already been decided under section 2-615 have failed to meet all or part of the test. In some instances, the claimant has failed to prove that the event involved was an unforeseeable contingency. Other cases have failed to show that the risk of the contingency was not allocated by agreement or otherwise, or that the cost of performance was so high as to render it impracticable. These cases have helped to define the requirements for relief under commercial impracticability.

When a party raises the section 2-615 issue, the entire burden of proof is placed upon him to establish the three elements. It is not enough that the party allege these elements; he must affirmatively prove each with substantially probative evidence.

First, the claimant must show that a contingency has occurred. In other words, there must be evidence that the condition making performance impossible was unforeseeable. The test for unforeseeability is an objective one. Therefore, the party asserting the doctrine will be held to what a normal, prudent person in his position should have foreseen. For example, in United States v. Buffalo Mining Company, the claimant was a mine operator who did not foresee that tunneling would be so difficult as to ruin the entire mining project. The Ninth Circuit held, however, that the risk was one that the average mining entrepreneur should have foreseen. Thus, claimant was deemed to have assumed the risk and relief was denied.

When deciding the foreseeability issue, the courts often look at an industry’s special knowledge of affairs. Particularly, the examination centers on the time before

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39 Murray, supra note 3, at 2-18.
40 Buffalo Coal Mining Co., 345 F.2d 517.
41 Transatlantic Fin. Corp., 363 F.2d 312.
43 Id. at 1324.
44 Westinghouse, 517 F. Supp. at 450.
45 Id. at 454.
46 BLACK’S LAW DICTIONARY 290 (5th ed. 1979) (definition of contingency).
48 Id.
49 Buffalo Coal Mining Co., 345 F.2d at 518.
50 Id.
51 Id.
the contract was made in order to determine whether the claimant knew of the state of events which later lead to the occurrence of the alleged contingency. When a party is deemed to have knowledge of the circumstances which lead to the contingency in question, the court reviews the claim of commercial impracticability strictly. Thus, in Transatlantic Financing Corporation v. United States, Mediterranean-based shippers were held to have knowledge of the problems in the Suez area, and no discharge was permitted despite increased costs resulting from the nationalization of the Suez Canal. The claimant’s knowledge seemingly raised the suspicions of the court, and the District of Columbia Circuit surmised from that knowledge that the shippers’ willingness to proceed despite the volatile conditions in that area indicated an assumption of risk on their part. In Eastern Air Lines, Inc. v. Gulf Oil Corporation, a federal district court followed the “special industrial knowledge” rationale. The court found that Gulf, having vast operations in the Middle East, had knowledge of the unstable conditions and could reasonably have foreseen the nationalization of oil fields and the ensuing oil embargo.

Recently, another court agreed with the rationale of the Eastern Air Lines court. In Morin Building Products Company v. Volk Construction, Inc., the court found that the general contractor should have contemplated problems of delivery from the subcontractors which greatly increased construction costs. It may be surmised that the court based its decision on the common knowledge that the construction industry is fraught with problems of delay.

Not only must the contingency be unforeseeable, but it must also be beyond the control of the party seeking discharge. The courts have uniformly denied relief where the contingency could have been avoided by the party invoking the doctrine. In Neal-Cooper Grain Company v. Texas Gulf Sulphur Company, Texas Gulf sought to be discharged from a contract under which it had agreed to supply Neal Cooper with potash, because of Canadian price control regulation. The Seventh Circuit found that it was Texas Gulf’s decision to switch from an American to a Canadian mine. The company had knowledge of price regulation in Canada, but not of the specific control which caused increased costs in the performance of its agreement with Neal-Cooper. The court held that Texas Gulf could have avoided the increase by retaining operations in its American mine.

53 Transatlantic Fin. Corp., 363 F.2d at 318.
54 Id. at 319.
56 Id.
58 Roth Steel Prod., 705 F.2d at 150.
59 Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974).
60 Id. at 293-94.
In addition, the courts will deny relief if the condition was actually created by the party seeking discharge. The Sixth Circuit, in *Roth Steel Products v. Sharon Steel Corporation*, held that a seller was not entitled to relief from supplying steel products based on a claim of a raw materials shortage.61 The court found that the seller’s inability to perform was due to an over-extension of its limited resources, rather than an unexpected shortage of raw materials.62 Also underlying this decision was the seller’s obvious attempt to sell its product at the much higher market price than the price reflected in the contract of sale.

The second element necessary to establish commercial impracticability is the requirement that the risk of the unexpected occurrence must not have been allocated either by agreement or custom.63 Proof that the risk was allocated may be implied or expressly stated in the agreement.64 Although the risk is generally placed on the seller, risk allocation is determined by the totality of circumstances surrounding the contract.65 The court will look at the comparative abilities of the parties to make informed judgments as to the extent of the risk, each party’s interest in avoiding the risk, and the extent to which that interest was a factor in negotiating the contract.66

Where a party has contracted to perform without regard to the existence of a contingency that was almost certain to occur, thereby rendering performance impracticable, the court will deny relief. The court has held that the assumption of risk was a bargained-for provision.67

In *Florida Power and Light v. Westinghouse Electric Corporation*, Westinghouse knew that the technology for reprocessing spent fuel from a nuclear power plant was largely unavailable at the time the contract was signed.68 Westinghouse was also aware that the viability of its business of manufacturing nuclear power generators depended on the signing of the contract.69 Therefore, Westinghouse agreed to reprocess the spent fuel when Florida Electric insisted upon that provision as a prerequisite to the contract.70 The District Court found that the risk was therefore allocated to Westinghouse as part of the bargained-for contract.71

The final criterion for triggering the doctrine is that the performance of the

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61 Roth Steel Prod., 705 F.2d at 150.
62 Id.
63 Westinghouse, 517 F. Supp. at 455-56.
64 Transatlantic Fin. Corp., 363 F.2d at 316.
65 Westinghouse, 517 F. Supp. at 456.
66 Id.
67 Id. at 457.
68 Id.
69 Id. at 456-57.
70 Id.
71 Id.
agreement be impracticable.\(^2\) In making this inquiry, the courts do not look to see whether one particular contract term has become impracticable. Rather, the examination is of the undertaking as a whole.\(^3\) Impossibility of performance is not required, but the courts do require that the cost of performance be excessive and unreasonable.\(^4\) Furthermore, it is not enough that the claimant be deprived of anticipated profits; there must be evidence of loss, and the loss must be shown to be severe.\(^5\)

These strict requirements appear to have come about to discourage future attempts to utilize commercial impracticability as a means to escape from bad business ventures. Many of the cases indicate that parties who have not realized profits due to changed circumstances have tried to capitalize on the commercial impracticability defense, even though it was intended to protect against the more serious commercial disaster.\(^6\) Some parties have even attempted escape from a contract, not because of loss of profits on that contract, but to be free to take advantage of higher profits available because of changed market conditions.\(^7\) Attempts have even been made by parent companies to claim loss due to unforeseen conditions, when those very circumstances have resulted in huge profits to their subsidiaries.\(^8\) Faced with this type of manipulation, the courts have been compelled to require greater proof of a more severe loss than was probably anticipated by the framers of the doctrine.

The Transatlantic Financing case gave no defined limits of loss, but did hold that a mere fourteen percent increase in cost did not warrant relief under the doctrine.\(^9\) American Trading and Production v. Shell International Marine, Ltd. further "tightened the belt" by denying relief where a thirty-one percent increase of the contract price was demonstrated.\(^10\) In dictum, the Second Circuit stated that an increase of greater than fifty percent may be sufficient.\(^11\) However, in Iowa Electric Light and Power v. Atlas Corporation, a federal district court found that an increase in the cost of performance of fifty-two percent, or any increase between fifty and fifty-eight percent, was not of sufficient magnitude to justify excuse of performance.\(^12\)

As a final note in this section, the courts will also deny relief when dealing with certain types of contracts. Of particular interest, the courts have held that,
even if a commercial impracticability situation arises, a promisor must perform where he has specifically warranted such performance. In other words, the defense of commercial impracticability is unavailable for bargained-for warranty contracts.\textsuperscript{83}

V. RELIEF FOR SELLERS IN LONG-TERM COAL SALES AGREEMENTS

The issue to be discussed in this section is whether commercial impracticability will relieve a seller in a long-term coal sales agreement due to changed economic conditions. In particular, the question is whether relief will be granted where the cost of performance has increased because of the Federal Coal Mine Health and Safety Act (FCMHSA),\textsuperscript{84} inflation induced by the oil embargo, and the Surface Mining Control and Reclamation Act (SMCRA).\textsuperscript{85}

The first issue to be considered is whether these conditions constitute unforeseeable contingencies. FCMHSA was enacted in 1969 in order to provide governmental regulation of safety in the mining industry. Danger in mining had been apparent from the industry’s inception, but no mandatory regulation had been passed until 1969. The catalyst for this legislation came in 1968 when an explosion at a Farmington, West Virginia mine killed seventy-eight workers.\textsuperscript{86} A public outcry for congressional action followed, and as a result, an extremely comprehensive and expensive set of mandatory regulations was passed to replace the previous voluntary guidelines.\textsuperscript{87}

The long span of time between the beginning of the mining industry and the eventual passage of safety legislation may be argued to indicate the unforeseeability of the FCMHSA. Furthermore, it may be held that the FCMHSA was not something that could have been anticipated at the time of the making of mid-sixties contracts. It would have been impossible to supplement every contract with price adjustment provisions in order to provide for an unknown regulation, the possible adverse effects of which were also unknown. It would have been unfair to expect a buyer to allow the inclusion of an open-ended pass through provision in case such a regulation turned out to be too expensive. Moreover, it would have been equally unfair to expect a seller to agree to a provision that could have accounted for only a fraction of the possible cost increases.

The Circuit Court in Transatlantic Financing stated the issue of foreseeability well: “Parties to a contract are not always able to provide for all the possibilities of which they are aware. Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency.”\textsuperscript{88} Although the court in Transatlantic Financing did find the

\textsuperscript{83} Gulf Oil Corp. v. Federal Power Comm’n, 563 F.2d 588, 599 (3d Cir. 1977).
\textsuperscript{86} J. McAteer, Coal Mine Health & Safety: The Case of West Virginia, at xiii (1973).
\textsuperscript{87} See supra note 85.
\textsuperscript{88} Transatlantic Fin. Corp., 363 F.2d at 318.
The foreseeability of political unrest to be an allocation of the risk to the seller, the FCMHSA may be distinguished from those risks surrounding the much-troubled Middle East. The many conflicts within the Suez region that lead to the closing of the canal existed at the time of the contract. FCMHSA was not in existence until 1969 and there had been no major legislation in this area until its passage.

One factor, however, militates against a finding of unforeseeability. The argument has been made that the inclusion of a contingency in an exculpatory clause in the agreement precludes a finding that the event was unforeseeable. The view of some courts is that the event had to be foreseeable at the time of contracting in order for it to be included in the contract provision. This argument could pose a major obstacle for sellers because most long-term coal sales agreements contain force majeure or delay clauses which include, in general terms, acts of government. However, this argument was effectively answered in Eastern Air Lines, Inc. v. McDonnell Douglas Corporation. The Fifth Circuit concluded that when a party has anticipated a general category of events, such as acts of government, but not the specific contingency which results in increased costs, he should not be penalized for his draftsmanship. Weighing all the arguments presented, there is a distinct possibility for a finding of unforeseeability as to the enactment and terms of FCMHSA.

A related question is whether the inflation caused by the oil embargo of 1973 was an unforeseeable event within the meaning of section 2-615. Of course, the embargo shocked the Western world. Despite the astonishment at this occurrence, certain parties have been held to have foreseen the possibility of the oil embargo. In Eastern Air Lines, Inc. v. Gulf Oil Corporation, the oil industry was held to have had special knowledge of the volatile conditions in the Middle East due to its extensive involvement in producing Arabian oil. Therefore, the court found that an international oil producer should have foreseen the embargo.

Although the Eastern Air Lines decision was a fair imputation of special industrial knowledge to Gulf, it may be argued that imputing that knowledge to all parties is manifestly unjust. However, in Missouri Public Service Company v. Peabody Coal Company, a Missouri Court of Appeals did just that. The Missouri court found that the embargo was a foreseeable event because some experts had discussed the possibility of concerted action for years, even though other reputable

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89 Id.
90 See supra note 85.
92 Id.
93 Id. at 992.
95 Id.
96 Id.
97 Peabody Coal Co., 583 S.W.2d at 728.
98 Id.
sources stated that the ability of the Arab world to unite for a successful embargo was contrary to the expectations of the Western world.\textsuperscript{99} Even in the wake of the Missouri decision, the unforeseeability issue with respect to the oil embargo is still an open one and, for the reasons noted above, may very well be decided in the seller's favor.

A seller must also attempt to prove that the inflation which occurred as a result of the embargo was unforeseeable. This should not be a difficult task. The embargo caused domestic inflation in the United States to rise from less than three percent in 1973 to greater than twelve percent in 1975.\textsuperscript{100} The highest jump recorded in the previous ten years was a two percent increase between the years of 1963 and 1965.\textsuperscript{101} Furthermore, the nature of the inflation was such that the government's fiscal policy was an ineffectual combatant.\textsuperscript{102} Keynesian theories of governmental stabilization that had worked on inflation since the 1930s failed to remedy the inflation caused by the embargo.\textsuperscript{103}

Lastly, we must consider whether SMCRA may properly be regarded as a contingency under section 2-615. Many of the same arguments that were made regarding FCMHSA may also be raised here. First, although governmental regulation of an industry is always a possibility, it is not always possible to make provision for its occurrence. Second, since acts of government are included as force majeure conditions, there is an implication that their occurrence should relieve a seller from performance.

In sum, all three of the events discussed—FCMHSA, inflation, and SMCRA—may be demonstrated to have been unforeseen contingencies. This finding is, however, only one of the three requirements of commercial impracticability. Even so, a finding of unforeseeability lends support to the contention that a seller had not assumed the risk of its occurrence, the second criterion under section 2-615. If the occurrence is foreseeable then the risk is assumed by the parties and, if no precaution is taken, the seller is left without recourse.\textsuperscript{104} If, however, the event is unforeseeable, then the risk is not assumed by either of the parties in the absence of agreement.\textsuperscript{105}

As was stated earlier, risk may be either expressly or impliedly allocated by agreement.\textsuperscript{106} For example, in a warranty contract, a party assumes the risk of the occurrence of any contingency by guaranteeing his performance. If seller has provided no such guarantee, then the risk should not be allocated to him unless the event was foreseeable.

\textsuperscript{100} J. Vernon, \textit{supra} note 17, at 6.
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} \textit{Id.} at 288.
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} Murray, \textit{supra} note 3, at 2-14.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Transatlantic Fin. Corp.}, 363 F.2d at 316.
The third and final element of commercial impracticability is showing that the contingency rendered performance impracticable. The case law indicates that an increase in cost of performance caused by the events must be at least in the range of sixty percent to relieve the seller. To be safe, however, the seller should be able to prove an even greater increase in cost due to the contingencies.

For example, assume that at the time of contracting, the cost of producing a ton of coal was three dollars and the contract price to buyer was four dollars. The seller must be able to prove that not only has the unanticipated increase in cost denied him his profit, he must also show that the cost increase has resulted in severe losses. Therefore, he must establish that the cost has increased to five dollars a ton (a sixty-seven percent increase) or more. Given the fact that most contracts contain certain price adjustment provisions, though these are woefully inadequate, the cost increase must also reflect the adjusted price to the buyer.

The seller must further show a causal nexus between the cost increases and the contingencies. FCMHSA resulted in enormous costs to the producers, who thereafter sought to sell their good on the market. The price of coal, which for the most part is based upon cost of production, rose from $31 per million BTUs in 1969 to $92 per million BTUs in 1977, a two hundred percent increase. In per ton measurements, the price of coal, free of costs to buyer, rose from $8.01 per ton in 1968 to $8.15 per ton in 1969, to $9.70 per ton in 1970, and finally to $20.50 per ton in 1977.

Not only did the Act result in increased costs directly, but it also affected costs indirectly by decreasing productivity at the worksite. Since 1969, productivity in the coal industry has decreased at an annual rate of 4.1%. In underground operations where the impact of safety regulations has been hardest felt, productivity fell nearly fifty percent between 1969 and 1977, from fifteen short tons per man-day to eight tons per man-day. The effect of the FCMHSA was thus to cause severe economic loss to producers and sellers in the coal industry.

Similarly, the fact that the inflation caused by the embargo was responsible for cost increases must also be proved by the seller. As stated previously, inflation rose from three percent to twelve percent in a span of two years. This represents a one-hundred fifty percent increase annually. Because of its abnormality, this inflation could not be accommodated by the standard inflation adjustment clause, which

107 Id. at 315.
109 Carney, supra note 2, at 218-19.
110 Roth Steel Prod., 705 F.2d at 149.
111 COAL DATA BOOK, supra note 14, at 99.
112 Id.
113 Id. at 96.
114 Id. at 124.
115 Id. at 125.
was based upon the industrial commodities index.\textsuperscript{116} Unlike the consumer price index, which includes the prices of imported goods and services\textsuperscript{117} and would therefore automatically reflect the oil-induced inflation, the industrial commodities index is a much slower moving indicator.\textsuperscript{118} Because this index does not automatically reflect the prices of imported goods, it could not accurately reflect inflation of this type at its current rate. Therefore, the seller had to assume much of the burden of that runaway inflation. As a result, cost of production rose even further.

Finally, the adverse effects of SMCRA must be demonstrated. In a report prepared by Consolidation Coal Company in 1979, Consol maintained that the Act would result in an increase of $2.785 billion in the cost of production over the next eleven years.\textsuperscript{119} In figures that represent cost per ton, the study found that compliance would cost $10.16 per ton.\textsuperscript{120} As a special note, producers in the Appalachian coal fields would be hardest hit by the regulations, experiencing a $14.53 per ton cost increase.\textsuperscript{121} This has been attributed to the steep slope nature of the terrain in that region.\textsuperscript{122} This study, though industry-biased in its perspective, clearly points to the severity of the effects of SMCRA. Indeed, all three contingencies have had drastic effects on the cost of production and, with respect to FCMHSA and SMCRA, on coal productivity.

VI. Conclusion

The defense of commercial impracticability is a viable method of escape from the harsh results of unforeseen economic circumstances. Furthermore, this method is available to sellers in long-term coal sales agreements. The burden of proof, however, is a heavy one which falls upon the seller who seeks to be relieved of performance. The courts are suspicious of claims of commercial impracticability, and carefully scrutinize all such claims. Therefore, the seller must be able to prove each element of his defense with probative, uncontroversible evidence. In view of the severe conditions that have arisen in the past fifteen years and the arguments attesting to their unforeseeable nature, a seller has a possible chance at relief from unduly burdensome contracts. As was stated before, given the proper set of circumstances and a sympathetic court, discharge by reason of commercial impracticability can be a reality.

\textit{M. Rosalee Juba}

\footnotesize{\textsuperscript{116} See Carney & Metz, supra note 1, at 9-6.  
\textsuperscript{117} Vernon, supra note 17, at 45.  
\textsuperscript{118} Peabody Coal Co., 583 S.W.2d at 723.  
\textsuperscript{120} Id. at 7-8.  
\textsuperscript{121} Id. at 14.  
\textsuperscript{122} Federal Surface Mining Regulations 4 (C. Joyce ed. 1980).}
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