IMPOSSIBILITY, IMPRACTICABILITY, AND FRUSTRATION—PROFESSOR GOLDBERG CONSTRUCTS AN IMAGINARY ARTICLE, ATTRIBUTES IT TO ME, AND THEN CRITICIZES IT

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ABSTRACT

Last year I published an article, "Impossibility, Impracticability, and Frustration," in this Journal (Eisenberg 2009). Professor Victor Goldberg, a leading figure in the law-and-economics of contracts, has now published a counter-article, "Excuse Doctrine: The Eisenberg Uncertainty Principle," also in this Journal (Goldberg 2010). Although Goldberg's article purports to be a criticism of mine, in fact most of his points are directed to an Imaginary Article he has constructed out of thin air, consisting of statements I did not make and positions I did not imply. Accordingly, a major reason for this response is to set the record straight by comparing what Goldberg says that I said and implied with what I actually said and implied.[2] In addition, those portions of Goldberg's article that addressed what I did write are for the most part either based on a fallacious rhetorical device, simply incorrect, or both. Therefore, a second reason for this response is to show where and why Goldberg's criticisms go astray. Finally, in one instance Goldberg has identified an erroneous sentence in "Impossibility, Impracticability, and Frustration," and I also write to acknowledge that error.

1. THE SHARED-ASSUMPTION TEST

1

One thesis of "Impossibility, Impracticability, and Frustration" was that judicial relief from a contract normally should be granted if (1) the contracting parties shared a tacit assumption that the occurrence or nonoccurrence of some circumstance during the life of the contract was certain rather than problematic; (2) the assumption was incorrect; and (3) the incorrectness of the assumption would have provided a basis for judicial relief if the assumption had been explicit rather than tacit. I called this the shared-assumption test.

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2 Professor Goldberg and I are long-time friends, and I'm sure he did not construct the Imaginary Article with the intent of misrepresenting "Impossibility, Impracticability, and Frustration." Instead, I suspect he either read that article too quickly, or read it to say what he expected me to say or imply, rather than what I did say or imply.

1.1. Goldberg's Imaginary Article

2 Goldberg begins his critique of the shared-assumption test by stating that "the core of [Eisenberg's] argument is the inability of private actors to anticipate remote risks." In reality, however, that is not even a part, let alone the core, of the test. Rather, it is the core of Goldberg's Imaginary Article. The core of the shared-assumption test expressed in "Impossibility, Impracticability, and Frustration" is that a contract consists not only of the writing in which it is partly embodied, but also includes, among other things, certain kinds of tacit assumptions (Eisenberg 2009, 207). Furthermore, nowhere in "Impossibility, Impracticability, and Frustration" did I say, as Goldberg says I did, that actors are unable to anticipate remote risks. Of course actors are able to anticipate remote risks. What I said was not that actors are *unable* to anticipate remote risks, but that they often *don't* anticipate a variety of risks, because they do not consciously recognize that they hold incorrect tacit assumptions that various occurrences or nonoccurrences are certain rather than problematic. I here quoted Randy Barnett:

> [When we add] to the infinity of knowledge about the present world the inherent uncertainty of future events . . . we immediately can see that the seductive idea that a contract can . . . articulate every contingency that might arise before, during, or after performance is sheer fantasy. For this reason, contracts must be silent on an untold number of items. And many of these silent assumptions that underlie every agreement are as basic as the assumption that the sun will rise tomorrow. They are simply too basic to merit mention. (Barnett 2003, 1027)

3 I added:

> In short, in contracting, as in other parts of life, some things go without saying. And a central characteristic of things that go without saying is—they are not said (Eisenberg 2009, 214).

4 Goldberg then states that I say that under the shared-assumption test "there would be no excuse" if the occurrence of a particular circumstance was foreseeable. This too is part of Goldberg's Imaginary Article; I nowhere said this in "Impossibility, Impracticability, and Frustration." In fact, I said the exact opposite:

> That the occurrence of a given circumstance during the contract time was reasonably foreseeable when the contract was made *suggests* that the parties did not assume that the occurrence was certain. Conversely, that the

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> occurrence of a given circumstance during the contract time was not reasonably foreseeable *suggests* that the parties tacitly assumed it was certain that the circumstance would or would not occur during that time. *But reasonable foreseeability normally should be only an index, not the test. The test should be what the parties tacitly assumed.* (Eisenberg 2009, 216, emphasis added.)

5 Next, Goldberg states that I implicitly assume "that courts will do . . . better ex post [at taking changed circumstances into account] than the parties could do it either in their original agreement or in a voluntary post-agreement modification." This too is part of Goldberg's Imaginary Article; my article implicitly assumes nothing of the kind. To begin with, there is a difference between changed circumstances and unexpected circumstances. Actors often do take into account the possibility that circumstances may change, but actors typically do not take account of circumstances that they tacitly assume will not change. Furthermore, I nowhere discussed the effect of voluntary post-agreement modifications. If I had, I would of course have said that the law should and does enable contracting parties to modify their contract ex post in light of unexpected circumstances, and that such a modification should and does preclude an excuse based on unexpected circumstances, because at the time of the modification the circumstances are no longer unexpected.

1.2. The Actual Article and Goldberg's Fallacious Reasoning

6 In addition to his criticisms of the Imaginary Article, Goldberg offers a few criticisms of what I actually said about the shared-assumption test. In particular, I discussed, as an exemplification of that test, the famous English case *Krell v. Henry*.[3] On June 20, 1902, Paul Krell had let his London flat to C. S. Henry for the days of June 26 and 27 for £75 for the purpose of viewing the coronation procession and the royal progress of Edward VII scheduled for those two days. Henry agreed to pay £75, of which £25 was payable immediately and £50 was payable on June 24. On June 24, the processions were canceled because the king had appendicitis, and Henry did not pay the remaining £50. Krell sued Henry to recover that amount, and Henry counterclaimed to recover the £25 deposit. At the trial, Judge Darling held for Henry on both the claim and the counterclaim. Krell appealed, and before the appeal was heard Henry dropped his counterclaim. The Court

3 [1903] 2 K.B. 740.

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of Appeal held that Krell could not recover the £50 due on June 24. Lord Justice Vaughan Williams said that "it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route . . . ."[4]

7 I commented:

> . . . [I]n *Krell v. Henry* we can be pretty confident that: (i) actors in the positions of the contracting parties would have shared the tacit assumption that the coronation would take place in six days, [as] scheduled; (ii) the contract was made on the basis of that assumption; (iii) Henry was not assuming the risk that the assumption was incorrect—was not gambling, and was not being paid to gamble, on whether the coronation would take place; and (iv) due to the phenomenon of loss-aversion, the impact on Henry of a £75 out-of-pocket loss would be greater than the impact on Krell of a £75 forgone gain.[5]

8 Goldberg argues that *Krell v. Henry* was wrongly decided because some or many persons *did* realize that the coronation processions might be canceled. Goldberg is a preeminent and perspicacious historian of the back stories of contracts cases. He reports that the contracts in some other coronation cases took into account that the procession as scheduled might be canceled. He cites eight coronation cases other than *Krell v. Henry.*[6] The contracts in some of these cases made some provision for cancellation of the processions; a majority of the contracts did not. Furthermore, most of these cases either follow, explicitly approve, or implicitly approve *Krell v. Henry* on the issue whether someone in Henry's position was obliged to pay the balance owing

4 *Id.* at 750.

5 *Accord Northern Indiana Public Service Co. v. Carbon County Coal Co.,* 799 F.2d 265, 277 (1986) (Judge Posner stated, "Surely Henry had not intended to insure Krell against the possibility of the coronation's being postponed . . . .").

6 *Chandler v. Webster, 1* K.B. 493 (C.A. 1904)*; Civil Service Co-Operative Society, Ltd. v. General Steam Navigation Co.,* [1903] 2 K.B. 756 (C.A. 1903)*; Elliott v. Crutchley,* [1903] 2 K.B. 476 (1903)*; Lumsden v. Barton & Co.,* 19 T.L.R. 53 (K.B. 1902)*; Victoria Seats Agency v. Paget,* 19 T.L.R. 16 (K.B. 1902)*; Fenton v. Victoria Seats Agency,* 19 T.L.R. 16 (K.B. 1902)*; Blakeley v. Muller,* 88 Law Times 90 (1903)*; Hobson v. Pattenden,* 88 Law Times 90 (1903). One of these cases, *Lumsden v. Barton & Co.,* was decided by Judge Darling, who decided *Krell v. Henry.* The eight cases resulted in six opinions, because the two *Victoria Seats* cases were consolidated and decided in one opinion, and so were *Blakely v. Muller* and *Hobson v. Pattenden.*

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under the contract, and none disapprove.[7]) Goldberg adds that Lloyd's was offering insurance against the possibility of cancellation or postponement (quoting odds of 300-to-1 against), and that some or perhaps many hotel and restaurant owners, reviewing-stand proprietors, hotel caterers, managers of places of amusement, and the like were protected by insurance. Finally, Goldberg also relies on several *front* stories, discussing at length contracts made by Paula Abdul, Michael Jackson, and Rod Stewart. He concludes that "if Eisenberg wants to place his reliance upon an event which no one could have foreseen, *Krell* turns out to be a poor vehicle." But who said that the cancellation of the processions was "an event which no one could have foreseen"? Not me.

9 Goldberg's critique of *Krell v. Henry* centers on fallacious reasoning. His implicit argument is that: (1) "Impossibility, Impracticability, and Frustration" used *Krell v. Henry* as an example of the shared-assumption test. (2) *Krell v. Henry* was incorrectly decided on the facts. Therefore, (3) the shared-assumption test is incorrect. However, even if, counterfactually, *Krell v. Henry* was incorrectly decided, proposition (3) does not follow from proposition (2). So, for example, if I argue that simple donative promises should not be legally enforceable; I cite *A v. B* as an example; and *A v. B* was incorrectly decided on its facts, that doesn't mean that simple donative promises should be legally enforceable.

10 In any event, *Krell v. Henry* was correctly decided. The fact that some persons, mostly business persons, did not hold the tacit assumption that the processions would take place as scheduled shows that cancellation was foreseeable, at least as a 1-in-300 chance. But except in the Imaginary Article Goldberg

7 Most of these cases held that the adversely affected party can't get back what he paid before the unexpected circumstance occurred. Goldberg also takes that position, but there is no way that position can be justified in light of the principles of unjust enrichment. Think what this position would mean. A, located in New York, is a manufacturer of machinery. A agrees to manufacture a custom-made machine for B, located in Iran, for a price of $100,000. Because the machine is custom-made, A insists on payment of $50,000 up front. After B pays the $50,000, but before A has done any work on the machine, the United States places an embargo on sales of machinery to Iran. Under Goldberg's rule, A can keep the $50,000 and walk away. Or suppose that A agrees to sell a standard type of machine to B for $100,000, payable by a letter of credit when the machine is loaded on board a ship. A has the machine loaded on a ship and collects the $100,000, but the United States places the embargo just after the ship departs, and A instructs the carrier to not deliver the machine. Under the rule supported by Goldberg, A can keep the $100,000 proceeds from the letter of credit, resell the machine to a third party for $100,000, and keep that $100,000 as well. Not surprisingly, both the English courts and Parliament later completely repudiated this rule (*See*, *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd* [1942] A.C. 32; *Frustrated Contracts Act,* R.S.O., ch. F.34 (1990)), and American courts never adopted it.

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has constructed, foreseeability is not dispositive in shared-assumption cases, and the fact that some business persons realized that the processions might not occur as scheduled is wholly consistent with the proposition that persons in the position of Krell and Henry were highly likely to have held the tacit assumption that the processions would occur as scheduled. Goldberg apparently believes that if some Englishmen did not tacitly assume that the coronation processions would take place as scheduled, then no Englishmen so assumed. That obviously does not follow, particularly when most of the persons who did not tacitly hold that assumption were presumably highly sophisticated business persons engaged in large-scale operations like hotels and restaurants, who probably had direct experience with cancellations of important events. I stressed this distinction in "Impossibility, Impracticability, and Frustration":

> Parties who are highly sophisticated, or who are engaged in large-scale contractual enterprises, might regard the nonoccurrence of a given circumstance during the contract time as problematic . . . even though the circumstance had a very low probability of occurring. In contrast, unsophisticated parties, or parties engaged in very small-scale enterprises, might tacitly assume that whether a given circumstance would occur or not during the contract time was certain rather than problematic (216-217).

11 I then cited Lon Fuller on this point:

> [W]here parties have entered into a contract, an unexpected obstacle to performance may operate disruptively in varying degrees depending on the context. To one who has contracted to carry goods by truck over a road traversing a mountain pass, a landslide filling the pass may be a very disruptive and unexpected event. But one who contracts to build a road through the mountains might view the same event, occurring during the course of construction, as a temporary set-back and a challenge to her resourcefulness (Fuller & Eisenberg 2005, 769).[8]

12 So yes, the possibility that the processions might be cancelled was foreseen by some, mostly sophisticated business persons, like hotel owners. And

8 Similarly, in *Missouri Public Service Co. v. Peabody Coal Co.,* 583 S.W.2d 721 (Mo. Ct. App. 1979), the court said that "A commercial, governmental or business trend affecting a contract's value . . . would be foreseeable to a party with wide experience and knowledge in the field, and perhaps, not to a party with less; and, the application of the doctrine and the equitable principles inherent therein might call for relief in one instance and not another based upon these factors, and others, outside the strict confines of the contract itself."

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yes, Krell and Henry *could* have foreseen the cancellation. But that is not the point. The point is whether Krell and Henry were highly likely to have tacitly assumed that the processions would take place as scheduled. And the answer is, they were. As Goldberg himself reports, quoting the *New York Times*, "only a few seats [for reviewing coronation processions] out of nearly half a million were sold with any specific proviso" concerning the cancellation of the processions. More to the point, recall that Lord Justice Vaughan Williams concluded that "*it cannot reasonably be supposed to have been in the contemplation of the contracting parties*, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route . . . ."[9] Whose judgment on the likely tacit assumptions of Krell and Henry deserves more weight: that of Lord Justice Vaughan Williams, an Englishman who lived in 1902, when the processions were canceled, or that of an American writing more than 100 years later, and relying in significant part on contracts made by Paula Abdul, Michael Jackson, and Rod Stewart?

13

Goldberg also argues that although "[a]t first glance [Eisenberg's] emphasis on the parties' awareness of the risk of low-probability events seems plausible," it is nevertheless an unsatisfactory rule, "relying as it does on difficult to verify facts." This is a Chicken Little argument, and like most such arguments it is a last-resort position: if you can't show that a proposed rule is substantively bad—and Goldberg acknowledges that the shared-assumption test is at least plausible—then argue that the rule depends on difficult-to-verify information. Arguments based on the difficulty of verification are only occasionally persuasive, and this one isn't. The determinations that Goldberg claims that courts can't make in this context are the kinds of determinations that courts make on a routine basis whenever they imply a term, set a default rule based on what most contracting actors would prefer, or determine how to fill a gap in a contract. This is equally or more true in other areas of law. Think of the determinations that courts must make in applying the Hand Test, in deciding whether an activity constitutes a nuisance, in imposing liability for defective products, and in an incalculable number of other common law and statutory issues. Compared to many of these determinations, determining the tacit assumptions of contracting parties is often child's play.

9 [1903] 2 K.B. 740, 750 (emphasis added).

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14 Goldberg concludes his discussion of the shared-assumption test by stating, "I do not mean to argue that the default rule should be never to excuse performance, nor do I undertake to specify the content of the default rule." But you can't fight someone with no one, and you can't fight something with nothing. In terms of a rule to govern unexpected-circumstances cases, Goldberg has nothing.

2. THE BOUNDED-RISK TEST

2.1. My Erroneous Sentence

15 Another thesis of "Impossibility, Impracticability, and Frustration" was that judicial relief normally should also be granted "if as a result of a dramatic and unexpected rise in the costs, performance would result in a financial loss significantly greater than the risk of loss that the parties would reasonably have expected the promisor to have undertaken" (234). I called this the *bounded-risk test.* I added that this test may be viewed either as free-standing or as a special application of the shared-assumption test, where the shared assumption concerned the amount of risk assumed by the promisor. Under this test, for purposes of unexpected-circumstances cases, a circumstance can be defined not only by its characteristics but also by its magnitude, that is, its dollar cost. An annual inflation of 5 percent is one kind of circumstance; an annual inflation of 200 percent is another.

16 Goldberg agrees that "if the event causing the rise in the seller's costs was specific to that seller, this test would be plausible." Correspondingly, he agrees that "The asymmetry [between the treatment of increased and decreased costs] implied by Eisenberg—only excuse for a cost increase—makes some sense if the event were specific to the promisor." "But," he says, "that is not what Eisenberg has in mind. He is concerned primarily with market-wide cost (and demand) changes." To establish this point, he quotes a sentence from "Impossibility, Impracticability, and Frustration": "[T]he bounded-risk test should apply *only when a cost increase is market-wide*" (Eisenberg 2009, 246, emphasis added by Goldberg).

17 Goldberg is right in criticizing this sentence; it's erroneous. The bounded-risk test should be applied, in appropriate cases, both to seller-specific and market-wide increases in costs. Mea culpa. But Goldberg is wrong in stating that both seller-specific and market-wide dramatic and unexpected cost increases are "not what Eisenberg had in mind." Although the *sentence*

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is in error, the bounded-risk test is stated correctly, that is, in a manner that includes *all* dramatic and unexpected cost increases, three times in "Impossibility, Impracticability, and Frustration": in the Abstract,[10] at the beginning of Part 2,[11] and in the Conclusion.[12] If Goldberg wanted to give a fair account of my article, I think he should have pointed out the divergence between the admittedly erroneous sentence he quotes and the three passages that correctly state the bounded-risk test, and let the reader then decide what "Eisenberg had in mind."

2.2. Goldberg's Fallacious Reasoning, Continued

Furthermore, it is one thing to say that the bounded-risk test should not be *limited* to market-wide cost increases. With this I agree, despite the anomalous sentence that Goldberg zeroes in on. It is quite another thing to say that the bounded-risk test should be *inapplicable* to market-wide cost increases. With this I do not agree. Goldberg critiques the application of the bounded-risk test to market-wide cost increases by taking issue with the facts in a hypothetical I used to illustrate that application. Here is that hypothetical:

18

> Suppose that Packer agrees to sell 10,000 pounds of N nuts, a delicacy, to Distributor at a price of $1.00/pound. Packer expects to purchase the nuts from farmers at 50¢/pound. Distributor operates at a 100 percent gross margin and expects to resell the nuts to retailers at $2.00/pound, for a total profit of $10,000. Because of a blight, the quantity of N nuts available on the market falls dramatically, and the price of N nuts to packers

10 "A seller should . . . be entitled to judicial relief if as a result of a dramatic and unexpected rise in her costs, performance would result in a financial loss that is significantly greater than the risk of loss that the parties would reasonably have expected that the seller had undertaken" (Eisenberg 2009, 207).

11 "Often a dramatic and unexpected increase in the promisor's cost of performance should support judicial relief even if the increase is not tied to a discrete event, because in many and perhaps most contracts, the parties do not expect that the promisor has undertaken an enormous financial risk. A special test is needed to address these cases. Under this test, which I will call the *bounded-risk test,* a promisor should be entitled to judicial relief if as a result of a dramatic and unexpected rise in costs, performance would result in a financial loss significantly greater than the risk of loss that the parties would reasonably have expected the promisor to have undertaken" (Eisenberg 2009, 234).

12 "Under the . . . bounded-risk test, a seller should be entitled to judicial relief if as a result of a dramatic and unexpected rise in costs, performance would result in a financial loss that is significantly greater than the risk of loss that the parties would reasonably have expected the seller had undertaken" (Eisenberg 2009, 259).

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> rockets to $6.00/pound. The demand for N nuts is relatively inelastic. The price charged by packers to distributors rises to $7.00/pound, and the price charged by distributors to retailers rises to $14.00/pound. If Packer does not perform and is not entitled to judicial relief, she will incur damages of $60,000 (based on the difference between the $1.00/pound contract price and the $7.00/pound market price to distributors). Distributor, in turn, will reap a windfall profit of $130,000 (based on damages of $60,000 plus the $70,000 difference between the $7.00/pound market price to distributors and the $14.00/pound charged by distributors), compared with its ex ante expected profit of $10,000 (Eisenberg 2009, 239).

19 Here is Goldberg's critique:

> [T]here is no good economic reason for the notion that the percentage markup is fixed. The margin is payment for the distributor's services and there is no reason to believe that these have become relatively scarcer. But that is merely a quibble when compared to the other problems. The example depends on the timing of the contracting of both parties. If the distributor entered into her distribution contract at the same time as her contract with the Packer, upon breach she suffers a serious loss—she has sold at $2, but now has to cover at $7.

20 This is another use of the same fallacious reasoning that Goldberg employed in critiquing the shared-assumption test. Again, Goldberg's implicit reasoning is as follows: (1) My hypothetical is used to exemplify the bounded-risk test in the context of a market-wide increase in costs. (2) The hypothetical is wrong on the facts. (3) Therefore the bounded-risk test is wrong in that context. But as in the case of Goldberg's critique of the shared-assumption test, even if the hypothetical is wrong, point (3) does not follow from point (2).

21 In any event, the hypothetical is not wrong. It is, after all, a hypothetical, and the actors in a hypothetical can do whatever the author of the hypothetical (me) wants them to do, at least if they don't act unrealistically. If the hypothetical depends on the timing of the contracting of both parties, that's what it depends upon, and it is certainly not unrealistic in this respect. Nor is it true, as Goldberg says, that "there is no good economic reason for the notion that the percentage markup is fixed." Based on observation, sellers often price by applying a rule-of-thumb markup. Furthermore, there is a good economic reason for pricing that way—it saves the administrative

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costs of one-by-one pricing decisions, and allows pricing decisions to be made lower down the food chain.

3. EX POST CONSIDERATIONS

3.1. Introduction

22 A third thesis of "Impossibility, Impracticability, and Frustration" was that in determining whether to grant relief, and what relief to grant, in appropriate unexpected-circumstances cases the courts may properly take into account ex post considerations, that is, "gains and losses to both parties that either arose under the contract prior to the occurrence of the unexpected circumstance or resulted proximately from, or were made possible by, the occurrence" (234). I illustrated this thesis in part by a discussion of *Missouri Public Service Co. v. Peabody Coal Co.*[13] Missouri Public Service, a public-utility company, entered into a ten-year contract with Peabody Coal, under which Peabody agreed to supply the coal that Missouri Public Service would require at a new coal-burning power plant, at a base price of $5.40 per net ton. The base price was subject to both specific price-adjustments for changes in designated costs and a general inflation-escalator based on the Industrial Commodities Index.

23 Performance under the contract was profitable for Peabody during the first two years. Thereafter, Peabody's production costs began to outpace the price-adjustment and inflation-escalator provisions, and in 1974 Peabody requested modification of the latter provision. For the most part, Public Service rejected Peabody's request. Peabody thereupon threatened to stop shipping coal, and Public Service sued for specific performance. Peabody defended on the ground that it was suffering excessive economic loss under the contract, because although the Industrial Commodities Index had been an accurate measure of inflation in the years prior to the contract, it had ceased to be an effective measure due to the 1973 oil embargo, runaway inflation, and the enactment of costly new mine-safety regulations. In response, Public Service showed that since performance of the contract had begun, Peabody had experienced an approximate three-fold increase in the value of its coal reserves, presumably brought about by the same causes that resulted in losses to Peabody under its contract with Public Service. The court awarded specific performance, relying in part on that ex post consideration:

13 583 S.W. 2d 721 (Mo. Ct. App. 1979).

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> [A] claim made by Peabody alleged to bring it within the doctrine of "commercial impracticability," is the Arab oil embargo. . . . Peabody failed to demonstrate that this embargo affected its ability to secure oil or petroleum products necessary to its mining production albeit at inflated cost. In fact. . . this embargo can reasonably be said to have, at least indirectly, contributed to the marked appreciation to the value of Peabody's coal reserves by forcing the market value of that alternative source of energy upward in this country.[14]

24 I commented, this is one "type of case in which ex post considerations should be taken into account: where an unexpected circumstance makes it more expensive for a seller to perform the contract at issue but simultaneously increases the profits that the seller will make on other contracts" (Eisenberg 2009, 256).

3.2. Goldberg's Imaginary Article—Continued

25 Goldberg states that "Implicit in [Eisenberg's] analysis is the notion that but for the profitability in the remainder of the business, he would have acceded to Peabody's demand to renegotiate the price." This implication comes from Goldberg's Imaginary Article, not from "Impossibility, Impracticability, and Frustration." On the contrary, I fully agree with Goldberg that Public Service should have prevailed even in the absence of the ex post consideration, for just the reasons he gives. Nothing in "Impossibility, Impracticability, and Frustration" says otherwise or gives rise to contrary implications.

26 Goldberg adds, "As a general rule, parties do not excuse performance because of changes in the market price." Goldberg's empirical skills have failed him here. His characterization of party behavior may be correct for moderate cost-based increases in the market price, but it's not correct for very large cost-based increases in the market price. As pointed out in "Impossibility, Impracticability, and Frustration," Russell Weintraub (1992, 41) conducted a survey of general counsels in which he asked the following question:

> Company A has contracted to sell B a fixed quantity of fuel oil per month at a fixed price for 10 years. An unprecedented OPEC oil embargo causes the cost of the oil to A to far exceed the price that B has agreed to pay. A's loss

14 *Id.* at 728

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> over the 10 years of the contract would be so large as to require liquidation of A. B can pass on the added cost of oil to its customers without suffering a competitive disadvantage. A refuses to deliver the oil at the contract price and B sues A for the difference between the contract price of the oil and the much higher price that B must pay to obtain oil from other sources. What result should the court reach?

27 In response, as I reported in "Impossibility, Impracticability, and Frustration," "35 percent of the general counsels stated that B should receive a judgment for the difference between the contract price and the market price, but 14 percent stated that A should be excused from performance, and 46 percent stated that the contract price should be adjusted to avoid ruinous loss to A but give B a significant savings over current market price" (256).

4. CONCLUSION

28 In "Excuse Doctrine: The Eisenberg Uncertainty Principle," Goldberg does an excellent job of critiquing an article that he attributes to me but that was actually constructed by him out of thin air. When Goldberg turns to the article I did write, his reasoning is in large part not only wrong but fallacious.

29 There is also a problem with the underlying thrust of Goldberg's article, which suggests that my article is revolutionary, in that it would significantly expand the excuses available to promisors under current law. That's not the case. "Eisenberg," he admits, "is not alone." Very true. Although the propositions in my article expand current law here and there, the main purpose of the article was to make the area of unexpected circumstances theoretically well grounded and, therefore, more precise. As Goldberg himself recognizes, except for "the boldness" of my article, the emphasis of the article "is not . . . out of line with the Restatement Second." My article reflects the purpose and approach of modern contract law. Goldberg would like to set the clock back 100 years to return to classical contract law.

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