INDIRECT GOVERNMENTAL PREVENTION OF PERFORMANCE: A NEW FACET OF SUPERVENING IMPOSSIBILITY

Interference in the performance of a contractual duty resulting from a judicial, executive or administrative order must be contemplated by every contractual draftsman. *City of Valdez v. Valdez Development Co.*[1] examined a federal injunction's effect on timely performance of an agreement and its subsequent impact on the doctrine of impossibility. The City of Valdez brought suit to regain title to a proposed urban renewal site on the ground that the developer, who presently held title, had failed to meet contractual construction deadlines.[2] The developer argued that an intervening federal injunction, which prohibited the Secretary of the Interior from issuing a permit for construction of the Trans-Alaska Pipeline,[3] prevented him from obtaining essential financing.[4] The injunction, it was argued, was an unexpected event, temporarily excusing performance.[5] The City contended that it had contracted for the building of new housing and that the injunction issued against the pipeline was totally unrelated to the performance of the contract.[6] The trial court held that the federal injunction barring construction of the pipeline[7] made the acquisition of financing and initiation of new construction in Valdez virtually impossible.[8] The decision was affirmed by the Supreme Court of Alaska.[9]

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1. 523 P.2d 177 (Alas. 1974).
2. *Id.* at 179.
3. Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).
4. Brief for Appellee at 12, City of Valdez v. Valdez Dev. Co., 523 P.2d 177 (Alas. 1974).
5. The contract expressly provided:
[I]n the *event of enforced delay in the performance of such obligations due to unforeseeable causes beyond its control and without its fault or negligence, including, but not restricted to,* act of God, acts of the public enemy, *acts of the Federal Government* . . . ; it being the purpose and intent of this provision that in the event of the occurrence of *any such enforced delay, the time or times for performance . . . shall be extended for the period of the enforced delay* . . . .
523 P.2d at 180.
6. *Id.* at 180-81.
7. Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).
8. 523 P.2d at 181.
9. *Id.* at 185.

At early common law contractual provisions were strictly construed.[10] Courts were unwilling to excuse performance in the event of an unexpected occurrence,[11] and as a result the doctrine of impossibility retained a very narrow interpretation. The evolution of the contract as an expression of social and economic relationships and the gradual recognition of the need for a more active judicial role in society,[12] however, necessitated a more equitable allocation of business risks.[13]

From a foundation of equitable allocation of business risks, the doctrine of impossibility was broadened to include impracticability of performance caused by extreme and unreasonable difficulty, expense or loss.[14] Impracticability[15] rather than strict impossibility was deemed sufficient to qualify for excused performance under the doctrine.[16] The doctrine of impossibility requires a determination that an unexpected occurrence has drastically transformed the performance initially bargained for into a totally different object.[17] This determination

10. *See* Atkinson v. Ritchie, 103 Eng. Rep. 877, 878 (K.B. 1809); Company of Proprietors of the Brecknock & Abergavenny Canal Navigation v. Pritchard, 101 Eng. Rep. 807, 807-08 (K.B. 1796); Smith, *Some Practical Aspects of the Doctrine of Impossibility*, 32 ILL. L. REV. 672, 672-73 (1938).

11. *See, e.g.*, Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1647). The court held: "[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." *Id. Accord*, Foster v. Atlantic Refining Co., 329 F.2d 485 (5th Cir. 1964); United States v. Huff, 165 F.2d 720 (5th Cir. 1948).

12. *See* Smith, *supra* note 10, at 673.

13. *See* Nickoll & Knight v. Ashton, Eldridge & Co., [1901] 2 K.B. 126, 135; Taylor v. Caldwell, 122 Eng. Rep. 309, 314-15 (Q.B. 1863); *cf., e.g.*, Tecon Corp. v. United States, 411 F.2d 1271, 1281-82 (Ct. Cl. 1969). *See generally* Page, *The Development of the Doctrine of Impossibility of Performance*, 18 MICH. L. REV. 589 (1920); *The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. PA. L. REV. 836, 880 (1957).

14. *See, e.g.*, H.B. Zachry Co. v. Travelers Indem. Co., 391 F.2d 43 (5th Cir. 1968); Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966); RESTATEMENT (FIRST) OF CONTRACTS § 454 (1933) [hereinafter cited as RESTATEMENT]. *See also* Merl F. Thomas Sons, Inc. v. State, 396 P.2d 76, 79 (Alas. 1964), *citing* 6 S. WILLISTON, CONTRACTS § 1963 (rev. ed. 1938).

15. *See, e.g.*, Natus Corp. v. United States, 371 F.2d 450, 456 (Ct. Cl. 1967); Northern Corp. v. Chugach Elec. Ass'n, 518 P.2d 76, 81 (Alas. 1974).

16. *See, e.g.*, Vernon Lumber Corp. v. Harcen Constr. Co., 60 F. Supp. 555, 559 (E.D.N.Y. 1945); Tombigbee Constructors v. United States, 420 F.2d 1037, 1049 (Ct. Cl. 1970); Natus Corp. v. United States, 371 F.2d 450, 456 (Ct. Cl. 1967).

17. *See* Texas Co. v. Hogarth Shipping Co., 256 U.S. 619, 629-30 (1921); Parrish v. Stratton Cripple Creek Mining & Dev. Co., 116 F.2d 207, 209-10 (10th Cir. 1940).

should represent an "ever-shifting line,"[18] drawn in accordance with current commercial practices and mores, at which the commercial senselessness of requiring performance outweighs the community's interest in strictly construing the contractual terms.[19]

The modern definition of impossibility is a practical rather than a technically exact meaning.[20] Mere unanticipated hardship not amounting to impracticability, however, does not fall within the scope of the modern definition.[21] Courts have continuously held that when the unanticipated difficulty involves inadequate finances, neither bankruptcy, insolvency, undercapitalization,[22] nor a rise or collapse of a market[23] will alone justify a holding of commercial impracticability.[24] The law traditionally will not excuse performance merely because fulfillment of a contractual duty is not possible under the most economical means.[25]

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18. Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966). Transatlantic had a government charter to deliver wheat to Iran. No route was specified. Following nationalization of the Suez Canal, the contract was consummated. Egypt subsequently closed the canal. The court refused to grant Transatlantic relief despite the additional cost of using an unanticipated and more expensive route.

19. *Id. See also* American Trading & Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939, 942 (2d Cir. 1972).

20. RESTATEMENT, *supra* note 14, § 454, comment *a*.

21. *Id.*

22. Consolidated Airborne Sys., Inc. v. United States, 348 F.2d 941, 946 (Ct. Cl. 1965).

23. UNIFORM COMMERCIAL CODE § 2-615, Comment 4 [hereinafter cited as U.C.C.]; *accord*, Ingham Lumber Co. v. Ingersoll, 93 Ark. 447, 452, 125 S.W. 139, 142 (1910) (financial panic of 1907); McCreery v. Green, 38 Mich. 172, 179-80 (1878) (financial panic of 1873); Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 1085-86, 352 N.Y.S.2d 784, 788-90 (Sup. Ct. 1974) (23% increase in milk prices); Levy Plumbing Co. v. Standard Sanitary Mfg. Co., 68 S.W.2d 273, 274 (Tex. Civ. App. 1933) (Great Depression).

24. *See, e.g.*, Lewis v. Harcliff Coal Co., Inc., 237 F. Supp. 6, 8 (W.D. Pa. 1965).

25. Natus Corp. v. United States, 371 F.2d 450, 457 (Ct. Cl. 1967). The modern approach was illustrated in a recent case in which the court rejected the impossibility defense when a town was unable to obtain adequate financing necessary for an urban renewal project. Dworman v. Mayor & Bd. of Aldermen, 370 F. Supp. 1056, 1070 (D.N.J. 1974). The project plan first called for the construction of an underground parking garage by the town followed by the construction of an office building above it by a developer. The building was to be leased to the developer upon completion of the garage by the town. The town contracted with a developer while expecting to receive federal assistance to supplement local bond financing. Serious problems arose when the town was unable to agree on a mode of financing and the federal money was not forthcoming. *Id.* at 1061-63. The town found it was not able to comply with the contractual

The *Valdez* court developed a two-pronged approach for dealing with the financing problem by first specifically categorizing the developer's finances and then evaluating the impact of the federal injunction on performance of the contract. The developer's finances were put in the category of necessities, such as labor and materials.[26] The court's view was that if a severe shortage of raw materials or a shutdown of all the major sources of supply were to cause a marked increase in cost or prevent acquisition of necessary supplies altogether, performance would be excused.[27]

The court in *Valdez* recognized that the inability to obtain adequate financing was not merely an additional difficulty. It found that financing was impossible to obtain,[28] and that inability to obtain

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provision requiring timely performance. *Id.* at 1062. The court held that a party who contracts to provide certain goods or services which initially require obtaining the financial assistance of third persons is not excused by the fact that the financing parties will not cooperate. *Id.* at 1070; *see* 6 A. CORBIN, CONTRACTS § 1340 (1962) [hereinafter cited as CORBIN].

26. 523 P.2d at 182.

27. *See id.*; U.C.C., *supra* note 23, § 2-615, Comment 4. *See also* Gilbride, *The Uniform Commercial Code: Impact on the Law of Contracts*, 30 BROOKLYN L. REV. 177, 197-200 (1964). A recent case in which the funding of an urban renewal project was at issue held that the unavailability of certain funding, although presenting the promisor with additional difficulties and inconveniences, did not excuse performance. Ogdensburg Urban Renewal Agency v. Moroney, 42 App. Div. 2d 639, 640, 345 N.Y.S.2d 169, 171 (1973).

28. 523 P.2d at 181 n.4. *See* note 32 *infra*. The dissent disregarded the trial court's finding of fact and argued that although performance may have been more difficult or expensive than the parties anticipated, performance should not be excused. 523 P.2d at 185 (Connor, J., dissenting). In Glidden Co. v. Hellenic Lines, Ltd., 275 F.2d 253 (2d Cir. 1960), which the dissent viewed as directly in point, the ship owner signed a contract to deliver ore by ship from India to a designated port in the United States. The contract listed three possible routes. Attached to the statement of the listed routes was a typed-in phrase stating that the American port should be designated "on the vessel's passing Gibralter." Shortly after signing the contract Egypt closed the Suez Canal. The ship owner refused to perform and claimed it was excused by either a *force majeure* clause or by the typed-in phrase which allegedly had been specifically inserted to designate Suez as the only route. The court ruled against the ship owner and held that he had been left with specific contractual alternatives to the Suez route. *Id.* at 255. Although it admitted that the contract could be viewed in favor of either party, the court found it difficult to imply that the typed-in phrase was intended to abrogate other specific references to alternative routes appearing in the same sentence. The court felt it was very doubtful that experienced businessmen, intent upon altering the terms of a printed contract, would act in such an ambiguous and indirect fashion. *Id.* at 256. In addition, uncontroverted testimony was introduced at trial that Hellenic, before concluding negotiations on the first charter order, had unsuccessfully urged Glidden to accept a clause

financing could not be attributed to a particular individual.[29] The unavailability of financial assistance to any developer in the area was not the result of a lack of competence[30] or diligence,[31] but rather grew out of the federal injunction.[32] Neither the developer nor the City were named parties in the suit to enjoin the pipeline,[33] and neither had any control over the outcome. This lack of any connection with the federal injunction viewed in the light of the specific contractual provision pertaining to circumstances beyond the control of either party[34] led the court to assume that neither party had intended to bind itself absolutely.[35]

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specifically excusing performance by the ship owner in the event the canal was closed. *Id.*

Valdez clearly can be distinguished from *Glidden*. No evidence of negotiations or proposals for including the pipeline construction permit as a condition precedent was presented in *Valdez*. No alternative financing plans were specifically enumerated in the contract, and the trial court found that there were none available. That finding of fact was not contested by the City on appeal. The dissent also argued that the early negotiations should have been viewed in the light of the vagaries of federal government action with regard to the pipeline. The dissent felt the parties could have adjusted their agreement, if indeed they desired to allow suspension of the project provided the pipeline permit was not granted.

29. 523 P.2d at 182; *see* note 32 *infra*. *See also* RESTATEMENT, *supra* note 14, § 455. The difference between objective and subjective impossibility is basically the difference between a party saying, "The thing cannot be done," and saying, "I cannot do it." *Id.* comment *a*; *accord*, United States v. Wegematic Corp., 360 F.2d 674, 676 (2d Cir. 1966); CORBIN, *supra* note 25, §§ 1325, 1332.

30. *Cf.* H.B. Zachry Co. v. Travelers Indem. Co., 391 F.2d 43, 45 (5th Cir. 1968).

31. *Cf.* Vernon Lumber Corp. v. Harcen Constr. Co., 60 F. Supp. 555, 559 (E.D.N.Y. 1945). The *Vernon* court rejected the allegation that an attempt to acquire the necessary material "from its usual and regular channels as well as elsewhere" was sufficient to satisfy a reasonable definition of impossibility.

32. 523 P.2d at 182. Testimony in the trial court by a representative of the Alaska State Housing Authority demonstrated that after issuance of the federal injunction, it became impossible for any developer to obtain financing for construction of housing in Valdez.

33. Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).

34. *See* note 5 *supra*.

35. *Cf.* 6 S. WILLISTON, CONTRACTS § 1953 (rev. ed. 1938) [hereinafter cited as WILLISTON]. The court never faced the City's argument that it had contracted for housing regardless of whether or not the pipeline was built. *See* note 6 and accompanying text *supra*. Perhaps the court felt a mere glance at official population figures of Valdez prior to its being considered as the prime location for the terminus of the Trans-Alaska Pipeline was sufficient to counter that argument. Official figures show:

Place	*1940*	*1950*	*1960*	*1970*
Anchorage	4,229	11,254	44,237	48,029
Fairbanks	3,455	5,771	13,311	14,771
Juneau	5,729	5,956	6,797	6,050
Valdez	529	554	555	1,005

The second prong involved the federal injunction and subsequent governmental interference. The modern view holds that disruption of contractual performance by judicial order or decree[36] may qualify as a valid defense in an action for non-performance,[37] providing the disruption was not caused by the defendant's own negligence[38] and no means of avoiding such interference were reasonably available.[39]

DIVISION OF ECONOMIC ENTERPRISE, ALASKA DEP'T OF ECONOMIC DEV., ALASKA STATISTICAL REVIEW 13, 45 (1972). Without the pipeline, Valdez would have little use for expansive new housing. Brief for Appellee at 10-11, City of Valdez v. Valdez Dev. Co., 523 P.2d 177 (Alas. 1974).

A similar approach was used by the court in disposing of the City's allegation that the developer be barred from relying on the contract to excuse performance because of the failure to give the required notice. The trial court found that because of the injunction prohibiting pipeline construction and its effects on local construction financing, no construction by any developer took place on other lands owned by the City while the injunction was in effect. The *Valdez* court held that specific written notice was not necessary, since the economic impact of the pipeline injunction on the City of Valdez was readily apparent to all. 523 P.2d at 182.

36. 523 P.2d at 181 n.6, *citing* RESTATEMENT (FIRST) OF CONTRACTS § 458*b* (1933). *See, e.g.*, Kuhl v. School Dist., 155 Neb. 357, 51 N.W.2d 746 (1952); Olyphant Borough School Dist. v. American Sur. Co., 322 Pa. 22, 184 A. 758 (1936).

37. U.C.C., *supra* note 23, § 2-615(a) & Comment 10; WILLISTON, *supra* note 35, § 1939.

38. *See generally* Thornton v. Arlington Independent School Dist., 332 S.W.2d 395 (Tex. Civ. App. 1960).

39. *See, e.g.*, Austin Square, Inc. v. City Prods. Corp., 24 Ohio App. 2d 158, 160, 53 Ohio Op. 2d 366, 367, 265 N.E.2d 322, 323 (1970). Austin Square leased a storeroom in a proposed shopping center to plaintiff. An injunction halted construction because the proposed project was not a neighborhood shopping center as defined by the city zoning code. Austin Square then submitted a revised building plan, but it too was turned down. Plaintiff sued for nonperformance. In finding for Austin Square the court held that construction of the shopping center was rendered legally impossible by the injunction. Even though Austin Square had been unsuccessful in its efforts to comply with the court order, the court held it had done everything legally required and was excused from performance. *Cf.* U.C.C., *supra* note 23, § 2-615, Comment 10; CORBIN, *supra* note 25, § 1346.

Another strong articulation of the modern view is presented in Kuhl v. School Dist., 155 Neb. 357, 51 N.W.2d 746 (1952). Plaintiffs in *Kuhl* brought an action to recover upon their respective teaching contracts. The contracts allegedly were breached by defendant school district's refusal to open or conduct school. The school district claimed that an injunction prevented the opening of the school during the period covered by the alleged contracts, and by operation of law, performance was excused. *Id.* at 358, 51 N.W.2d at 747. The court held that when judicial process interrupts an agreement and renders performance impossible, performance will be excused. *Id.* at 367, 51 N.W.2d at 752.

The dual approach in *Valdez* resulted in exposing the interdependence of the financing problem and the federal injunction and thereby forced the court to consider a previously unlitigated question. *Valdez* does not fit a conventional mold. Impossibility of performance by the developer was not caused by either financing problems or the injunction alone[40] but instead was a function of both.

As interpreted by the *Valdez* court, the acts of the federal government referred to in the contractual provision relating to enforced delay included injunctions.[41] The court acknowledged, however, that cases excusing timely performance on that ground involved situations in which the direct cause of the delay was the injunction itself.[42] The federal injunction did not directly prohibit the developer from constructing housing in *Valdez*. The developer, nevertheless, argued that the influence of the injunction on the entire course of events, and particularly its effect on the financing of new housing construction, was by no means inconsequential.[43] The effect of the injunction

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40. The *Valdez* court admitted that the injunction by itself would not excuse timely performance. 523 P.2d at 181. *See also* Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 1083, 352 N.Y.S.2d 784, 788 (Sup. Ct. 1974).

41. 523 P.2d at 181 & n.6; *see* note 5 *supra*.

42. 523 P.2d at 181; *see, e.g.*, Savannah Printing Specialties & Paper Prods. Local 604 v. Union Camp Corp., 350 F. Supp. 632, 636 (S.D. Ga. 1972). The *Union Camp* court held that a contractual obligation to perform is excused when intervening government regulations render performance impossible. In Acme Moving & Storage Corp. v. Bower, 269 Md. 478, 481-84, 306 A.2d 545, 547-48 (1973), plaintiff signed a lease for a warehouse defendant was building. Defendant soon encountered zoning difficulties. The difficulties were resolved when the District Council granted a special exception to use the property for warehouses totally enclosed by chain link fencing. Permission was conditioned on local Planning Board approval of defendant's landscaping plan. The Planning Board disapproved the proposed landscaping and ordered defendant to remove the chain link fence. Defendant was unable to meet the inconsistent special zoning requirements and the landscaping plan. The court held a contractual duty was discharged when performance was prevented or prohibited by a judicial, executive or administrative order, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the promisor. *See also* Boer v. Garcia, 240 N.Y. 9, 10, 147 N.E. 231, 232 (1925); Nitro Powder Co. v. Agency of Canadian Car & Foundry Co., 233 N.Y. 294, 297-98, 135 N.E. 507, 508 (1922); Mawhinney v. Millbrook Woolen Mills, Inc., 231 N.Y. 290, 300, 132 N.E. 93, 96 (1921).

43. Brief for Appellee, *supra* note 35, at 11-12. *See generally* ALASKA STATISTICAL REVIEW, *supra* note 35, at 10, 49. The loss of an opportunity to tap, effectively distribute, and tax oil reserves estimated at between 10 and 20 billion barrels would substantially affect any state. Alaska with a population barely over 300,000 was no exception. *See also* 523 P.2d at 182.

was the same as if it had been issued directly against the construction of housing. The court held that the federal injunction was the actual and proximate cause of the inability to obtain financing for housing construction in Valdez and found it was effectively impossible for the developer to perform.[44]

The holding cautiously moved beyond any previous judicial boundary. The court retained the criteria requiring the party who claims impossibility to carry the burden of proving that claim.[45] For the first time, however, the court found that the decisive factor was the interrelation of the inability to obtain adequate financing with substantial evidence of indirect governmental prevention of performance. This is not to say that the *Valdez* court gave any advantage to the party claiming impossibility. Although not required to show direct judicial intervention, if the developer had not met the burden of proving impossibility or commercial impracticability of performance, the City would have undoubtedly succeeded in its attempt to regain title to the land. When the burden was met, the *Valdez* court decided against discharging the parties from performance. Instead it extended the deadlines under the specific contractual provision for an enforced delay.[46]

The developer asserted the specific contractual provision throughout his entire defense.[47] The question arises, however, whether the contract was as impregnable as the developer claimed. The *Valdez* problem could have been avoided by anticipating the possibility of a financing problem and inserting a subjective financing clause into the

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44. 523 P.2d at 182. For a discussion of the elements of the actual and proximate cause test see text at notes 27-35 *supra*. The court felt that without the federal injunction there would have been no financing problem and without the financing problem there would have been no impossibility of performance.

45. *See* 523 P.2d at 181 n.4; Hensler v. City of Los Angeles, 124 Cal. App. 2d 71, 83, 268 P.2d 12, 21 (Dist. Ct. App. 1954); CORBIN, *supra* note 25, § 1329.

46. 523 P.2d at 180 n.3. *Cf., e.g.*, Colonial Trust Co. v. Bodek, 108 N.J. Eq. 584, 590-91, 155 A. 799, 802 (Ch. 1931), in which the State Board of Health secured an injunction against a municipality restraining it from tapping the municipal sewage system until the borough erected a suitable sewage disposal plant. The *Bodek* court, like the *Valdez* court, held that performance of the contract was only suspended, not excused, by the injunction. *See also* F.A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Prods. Co. [1916] 2 A.C. 397; CORBIN, *supra* note 25, § 1348; WILLISTON, *supra* note 35, § 1957; RESTATEMENT, *supra* note 14, § 462; Page, *supra* note 13, at 611.

47. 523 P.2d at 180; *see* note 5 *supra*.

contract.[48] Surely, any developer planning a project calling for the expenditure of $1,200,000[49] will need financial assistance.[50]

By failing to hold the developer responsible for anticipating problems in raising over a million dollars, the *Valdez* court ventured onto new ground. Prior to *Valdez*, a governmental act indirectly yet adversely affecting the performance of a contract was not given much weight.[51] The injunction against the pipeline, although admittedly affecting performance indirectly,[52] proved to be decisive in *Valdez*. Whether this expansion[53] of governmental prevention of performance

48. A subjective financing clause could consist of a provision allowing the developer to be excused from performance in the absence of circumstances showing contributing fault on his part, if financing became either impracticable or impossible. *See generally* Locke v. Bort, 10 Wis. 2d 585, 103 N.W.2d 555 (1960). *See also* Smith, *supra* note 10, at 677-80.

49. 523 P.2d at 181 n.4.

50. While the developer could argue that it was unreasonable to believe at the time of agreement that anything would possibly occur to prevent him from obtaining adequate financing, it is a rather naive approach given the prospective site of performance. The City of Valdez was almost totally destroyed by tidal waves resulting from the earthquake of 1964. Considering that fact, one could construct a hypothetical situation in which an earthquake and tidal wave, instead of a federal injunction, could have handicapped the developer's obtaining financing in 1970. It could reasonably have been suspected that given a hypothetical earthquake in 1970 and Valdez' susceptibility to tidal waves, the reoccurrence of such severe damage may have forced the oil companies to reconsider locating the terminus of the Trans-Alaska Pipeline in Valdez in favor of a more protected site. Arguably the hypothetical 1970 earthquake would cause *Valdez* to be presented again. The developer in the hypothetical could argue that the earthquake and tidal waves had indirectly yet substantially adversely affected his ability to perform. He could also argue that the "act of God" term of the contract protected his inability to acquire financing. The City's argument would be much stronger in the hypothetical, for it had only been six years since the 1964 earthquake. The court in the hypothetical *Valdez* would have trouble finding the hypothetical 1970 quake unforeseeable. *Cf.* United States v. Buffalo Coal Mining Co., 345 F.2d 517, 518 (9th Cir. 1965).

To attain the same result as *Valdez*, the court in the hypothetical might be forced to go even further in its expansion. It would have to hold for the first time that in cases of prevention of performance due to *indirect acts of God*, performance would be excused. Such a holding, however, could have two alternatively undesirable results. It might have the effect of giving a judicial nod of approval to open-ended, ambiguous contracts. Secondly, such a holding may force the court to put even greater emphasis on what the subjective *spirit* of the contract was when signed.

51. *See* Dworman v. Mayor & Bd. of Aldermen, 370 F. Supp. 1056, 1071 (D.N.J. 1974); Ogdensburg Urban Renewal Agency v. Moroney, 42 App. Div. 639, 640, 345 N.Y.S.2d 169, 170-71 (1973).

52. 523 P.2d at 181.

53. The contractual language that enabled the court to develop its actual and proximate cause theory was the "including, but not restricted to" general phrase.

will enable the courts to render more equitable decisions or will result in severely overstraining an already tired legal term[54] has yet to be determined. The answer may lie in how courts view their function in society.[55]

A contract is the embodiment of an economic relationship. When the court examines such a relationship, it must look to the economic realities of the situation. In *Valdez* the court enabled the developer to save an opportunity to make a profit out of a situation he had not caused. On the other hand the court did not intend to cast the City of Valdez and other future sponsors of urban renewal projects adrift, completely at the mercy of unpredictable political tides. Nor was it the court's design to allow urban renewal to stagnate in inactivity as the result of inconsequential indirect governmental interference. After *Valdez* any party alleging impossibility growing out of indirect governmental prevention of performance will have to meet the actual and proximate cause test.[56] Thus it can be said that this is not an example of freewheeling judicial expansion. Instead, *Valdez* can serve as a model for a reasonable approach, avoiding a strict hypertechnical result, for dealing with a supervening situation beyond the control of either party to a contract.

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See note 5 *supra*; *cf.* Womack v. United States, 389 F.2d 783, 800 (Ct. Cl. 1968); Austin Co. v. United States, 314 F.2d 518, 519-20 (Ct. Cl. 1963).

54. "With a definition as broad as this some of the later stated rules of discharge by 'impossibility' may be 'impossible' of easy application." CORBIN, *supra* note 25, at 338 n.29. *See generally* Anderson, *Frustration of Contract —A Rejected Doctrine*, 3 DE PAUL L. REV. 1 (1953); Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 348, 352 (1924); Note, *The Fetish of Impossibility in the Law of Contracts*, 53 COLUM. L. REV. 94 (1953). *See also* A. BECHT & F. MILLER, FACTUAL CAUSATION (1961).

55. *See also* CORBIN, *supra* note 25, § 1329; Comment, *Apportioning Loss after Discharge of a Burdensome Contract: A Statutory Solution*, 69 YALE L.J. 1054 (1960).

56. *See* text at notes 27-35, 44 *supra*.