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Maybe Dick Speidel Was Right about Court Adjustment

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Maybe Dick Speidel Was Right About Court Adjustment

ROBERT A. HILLMAN*

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Dick Speidel was a giant in the field of contract and commercial law for over four decades and a respected leader in legal education and law reform. Still, to his great credit, he did not take himself too seriously and always saw the other side of issues on which he opined. So when his measured support for court adjustment of long-term supply contracts that were disrupted by unanticipated circumstances unleashed an immediate barrage of criticism, characteristically, Speidel processed the responses with a smile.

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I. INTRODUCTION

As the title of this Article suggests, I will argue that Dick Speidel may have been correct in asserting that court adjustment makes sense in limited circumstances. But years ago, I allied myself with Speidel and I will only briefly review my reasons why here.¹ My main goal in this Article is to argue that nothing courts have decided or writers have analyzed since *Aluminum Co. of America v. Essex Group, Inc. (ALCOA)*, a somewhat infamous case in which the court adjusted a long-term contract, proves that court adjustment is always wrongheaded. In fact, as with so many policy issues, we may never identify the *best* judicial approach to disrupted long-term contracts because resolution depends on too many variables and unknowns.² So Speidel may have been right. Of course, he also may have been wrong.

I will focus on recent literature and cases to enumerate the unresolved questions about court adjustment. Part II briefly reviews Speidel's approach to court adjustment. Part III outlines the judicial and scholarly reaction to court adjustment, focusing on the more recent treatments. Part IV claims that too many questions remain unanswered to know whether Speidel was right or wrong.

II. SPEIDEL ON COURT ADJUSTMENT

The decision in *ALCOA*³ engendered a spirited debate in the law reviews. Speidel wrote the most important defenses of the approach.⁴

The *ALCOA* long-term contract was detailed and complex, but much boiled down, Aluminum Company of America (ALCOA) and Essex Group, Inc., (Essex) agreed in a long-term contract that ALCOA would

1. Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1.

2. "It is easy to talk about efficiency, but it is hard to know whether any particular rule or approach will produce an efficient result in the real world." Mark P. Gergen, Victor Goldberg, Stewart Macaulay & Keith A. Rowley, Transcript, *Transactional Economics: Victor Goldberg's Framing Contract Law*, 49 S. TEX. L. REV. 469, 476 (2007) (quoting Stewart Macaulay). The same could be said about any norm whether it be fairness, autonomy, equality, or something else.

3. *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980) [hereinafter *ALCOA*].

4. See Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193, 206-08 (1982) [hereinafter Speidel, *New Spirit*]; Richard E. Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369, 395-400, 421 (1981) [hereinafter Speidel, *Court-Imposed Adjustments*]; Richard E. Speidel, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management*, 32 S.C. L. REV. 241, 276-79 (1980).

convert alumina to aluminum for Essex.⁵ The price of conversion was indexed, in part, to the wholesale price index for industrial commodities (WPI).⁶ The parties used this formula believing that it would accurately reflect ALCOA's nonlabor costs.⁷ The parties did not utilize a "cost-plus" formula apparently because ALCOA did not want to disclose its costs directly to Essex.⁸ But that was a mistake. The parties' formula ultimately "served as a lousy approximation of the project's cost to [ALCOA]" due to inflation in oil prices and other circumstances that, among other things, increased the price of electricity—a major cost in the conversion process.⁹ As a result, ALCOA would have had to supply the aluminum at below-market prices and below its own costs, at a loss of between \$60 and \$75 million.¹⁰ The court found in part that "the shared objectives of the parties with respect to the use of the WPI have been completely and totally frustrated."¹¹ Nonetheless, Essex had refused to negotiate a contract modification with ALCOA.¹² The court therefore rewrote the contract's pricing term so that Essex would pay, at minimum, ALCOA's costs of processing plus one cent per pound profit.¹³ Stewart Macaulay wrote that this remedy was a compromise position in that it created "a good price, but not the 'you-can't-believe-it good price'" that Essex had enjoyed under the contract's express terms.¹⁴

In a measured defense of the decision, Speidel pointed out that the court's remedy was "sharply limited."¹⁵ Court adjustment would occur only if the circumstances causing a major disruption were unanticipated and if performance was impracticable, meaning excessively costly.¹⁶

5. Essex supplied alumina to ALCOA for conversion, which Essex purchased from a subsidiary of ALCOA. VICTOR GOLDBERG, *FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE* 351 (2006).

6. *ALCOA*, 499 F. Supp. at 58.

7. *Id.*

8. GOLDBERG, *supra* note 5, at 351; George S. Geis, *Economics as Context for Contract Law*, 75 U. CHI. L. REV. 569, 580 (2008) (reviewing GOLDBERG, *supra* note 5). See generally Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885 (2000).

9. Geis, *supra* note 8, at 580–81.

10. *Id.* Goldberg questions the accuracy of the amount of ALCOA's loss. GOLDBERG, *supra* note 5, at 359.

11. *ALCOA*, 499 F. Supp. at 56.

12. *Id.*

13. *Id.* at 80; Geis, *supra* note 8, at 581.

14. Gergen, Goldberg, Macaulay & Rowley, *supra* note 2, at 482.

15. Speidel, *Court-Imposed Adjustments*, *supra* note 4, at 380.

16. *Id.*

Further, the remedy applied only to long-term contracts and would be utilized only if the parties failed to agree to a reasonable modification.¹⁷ In fact, Speidel criticized the *ALCOA* court for failing to delve further into reasons why the parties did not reach such an agreement.¹⁸

Under the conditions that Speidel outlined, he asserted that the *ALCOA* decision reflected a “new spirit of contract,” consistent with the good faith performance and fair and equitable contract modification standards.¹⁹ According to Speidel, the decision meant that the party “advantaged” by an unanticipated event had a duty to accept a fair adjustment proposal made by the disadvantaged party.²⁰ Dereliction of the duty meant that “the court may impose a price adjustment for the advantaged party’s failure to accept an equitable adjustment proposed in good faith.”²¹ The court’s remedy of court adjustment therefore forced Essex to do what it should have done under the new spirit of contract.²²

III. JUDICIAL AND SCHOLARLY RESPONSES TO COURT ADJUSTMENT IN A NUTSHELL

A. Judicial Responses

Most courts have exhibited lots of skepticism about the *ALCOA* case.²³ But much of the criticism has focused on the court’s determination that *ALCOA* did not assume the risk of a rise in costs of the magnitude it had experienced, not on the court’s decision to adjust the contract assuming some relief was in order.²⁴ And even on the former issue, a few courts

17. *Id.*

18. *Id.* at 381.

19. *Id.* at 380 (quoting *ALCOA*, 499 F. Supp. at 91).

20. Speidel, *New Spirit*, *supra* note 4, at 206–08.

21. Speidel, *Court-Imposed Adjustments*, *supra* note 4, at 421.

22. *Id.*

23. See, e.g., *Beaver Creek Coal Co. v. Nev. Power Co.*, 968 F.2d 19, No. 89-4114, 1992 WL 113747, at *4 (10th Cir. 1992) (unpublished table decision) (“*ALCOA* has generally not been found convincing by other courts.”). But see *Unihealth v. U.S. Healthcare, Inc.*, 14 F. Supp. 2d 623, 637–40 (D.N.J. 1998); *McGinnis v. Cayton*, 312 S.E.2d 765, 780 (W. Va. 1984) (Harshbarger, J., concurring). Professor White and David Peters argue that these cases do not support judicial adjustment. James J. White & David A. Peters, *A Footnote for Jack Dawson*, 100 MICH. L. REV. 1954, 1973–77 (2002).

24. With respect to the substantive issue of risk allocation, the *ALCOA* court incorrectly stated that “[t]he law of mistake has not distinguished between facts which are unknown but presently knowable, and facts which presently exist but are unknowable.” *ALCOA*, 499 F. Supp. at 64 (citations omitted). Another court pointed out that the court in the venerable *Sherwood v. Walker* recognized that “where the *existence* of a fact is unknowable, the parties . . . cannot make a mistake about it.” *Atlas Corp. v. United States*, 895 F.2d 745, 751 (Fed. Cir. 1990); see also *Morgan Guar. Trust Co. of N.Y. v. Am. Sav. & Loan Ass’n*, 804 F.2d 1487, 1494 (9th Cir. 1986) (citing *ALCOA*, 499 F. Supp. at 68) (“[P]arties that have entered a contract or made payments knowing that they were

have cited the decision favorably,²⁵ or have recognized that the risk of unanticipated events is not always allocated to the promisor—although these courts have not found the *ALCOA* court’s line of reasoning applicable to their particular facts.²⁶

A few courts have singled out the *ALCOA* court’s adjustment remedy for scorn primarily because of the perceived lack of certainty and finality in the approach: “Under the logical consequences of [*ALCOA*] there would be no predictability or certainty for contracting parties who selected a future variable to measure their contract liability. Whichever way the variable fluctuated, the disappointed party would be free to assert frustrated expectations and seek relief via reformation.”²⁷ Another court characterized judicial reformation as an improper role for courts: “It is not the responsibility or function of this court to rewrite the parties’ contract to provide for [unforeseen] circumstances.”²⁸ Overall, Sheldon Halpern’s observation is no doubt correct that the *ALCOA* decision has “faded into obscurity” in the courts.²⁹ But the reasons for this are not

uncertain of material facts are barred from claiming resulting mistakes as a basis for equitable relief.”).

25. See, e.g., *Camerlo v. Howard Johnson Co.*, 710 F.2d 987, 992 (3d Cir. 1983) (noting impracticability or frustration may apply due to a change in economic circumstance); *Mill Run Assocs. v. Locke Prop. Co.*, 282 F. Supp. 2d 278, 295 (E.D. Pa. 2003) (“The doctrine of failure of essential purpose provides that the subject matter of a contract is an implied condition of the continuance and enforceability of the contract, and that the contract is dissolved when the subject matter no longer exists.”); *Specialty Tires of Am., Inc. v. CIT Group/Equip. Fin., Inc.*, 82 F. Supp. 2d 434, 439 (W.D. Pa. 2000) (noting that foreseeability does not conclusively prove allocation of risk). But see *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440, 458 (E.D. Va. 1981) (“While the Court has, most respectfully, some difficulty with the holding in *Alcoa*, it has no difficulty in finding that, even under that court’s expansive reading of mutual mistake, Westinghouse’s reliance on that defense is misplaced.”); *Golsen v. ONG W., Inc.*, 756 P.2d 1209, 1222 (Okla. 1988) (“[*ALCOA*] has been soundly criticized, and even if an expansive view of *ALCOA* were adopted, the party presenting the defense of impracticability has the burden of establishing the defense [and this burden was not met].”).

26. See, e.g., *Exelon Generation Co. v. Gen. Atomics Techs. Corp.*, 559 F. Supp. 2d 892, 903 (N.D. Ill. 2008) (distinguishing *ALCOA* because the Exelon contract had a fixed price without an escalation clause).

27. *Wabash, Inc. v. Avnet, Inc.*, 516 F. Supp. 995, 999 n.5 (N.D. Ill. 1981); see also *Printing Indus. Ass’n of N. Ohio, Inc. v. International Printing & Graphic Communications Union, Local 56*, 584 F. Supp. 990, 998 (N.D. Ohio 1984) (“This Court is respectfully at odds with the reasoning and result in *ALCOA*. . . . The willingness of courts to reform contracts on the basis of subsequent knowledge may undermine the policy of finality which is so essential and revered in contract law.”). White discusses both cases in *White & Peters*, *supra* note 23, at 1976–77.

28. *Aultman Hosp. Ass’n v. Cmty. Mut. Ins. Co.*, 544 N.E.2d 920, 924 (Ohio 1989).

29. Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability:*

necessarily the lack of wisdom in court adjustment. For example, Allan Farnsworth reported a “toughening judicial attitude toward excuse based on changed circumstances.”³⁰ This observation points to the substance of an excuse, not to the judicial remedy once a court finds grounds for relief. Perhaps courts have become tougher in recognizing an excuse because disruptions of the kind experienced by ALCOA became more widespread and foreseeable, not because of a judicial aversion to court adjustment. Further, perhaps courts have resisted court adjustment simply because of their wariness of major doctrinal change, not because of the merits. Consider the amount of time before courts recognized the theory of promissory estoppel.³¹

B. Scholarly Discussions

1. Immediate Reactions

Jack Dawson led the charge against court adjustment, writing that the ALCOA court’s adjustment remedy was thoroughly “bizarre.”³² Two of Dawson’s reasons stand out: courts lack the knowledge and resources to write a better contract than the parties, and courts do not have the power or authority to do so.³³

As for the court’s expertise and resources, Dawson wrote: “Nothing in their prior training as lawyers or their experience in directing litigation and giving coherence to its results will qualify them to invent viable new designs for disrupted enterprises, now gone awry, that the persons most concerned had tried to construct but without success.”³⁴ Concerning the court’s power, Dawson opined: “[F]rom what source does any court derive the power to impose on [the parties] a new contract without the free assent of both? . . . For myself, I do not propose to spend time looking

Searching for “the Wisdom of Solomon,” 135 U. PA. L. REV. 1123, 1127 (1987); see also *United States v. Sw. Elec. Coop., Inc.*, 869 F.2d 310, 315 n.7 (7th Cir. 1989) (stating that ALCOA has “faded into obscurity” (quoting Halpern, *supra*)); E. Allan Farnsworth, *Developments in Contract Law During the 1980’s: The Top Ten*, 41 CASE W. RES. L. REV. 203, 214 (1990) (observing that the ALCOA case has had “negligible impact”). But David Hoffman points out that many disputes that could be prime candidates for court adjustment may go to arbitration instead.

30. Farnsworth, *supra* note 29, at 215.

31. For a treatment of the history of promissory estoppel, see ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* 79–111 (5th ed. 2006).

32. John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U. L. REV. 1, 28, 30–38 (1984); see also Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521, 522–24 (1985).

33. Dawson, *supra* note 32, at 37–38.

34. *Id.* at 37.

for the source of the power. I am convinced that it does not exist.”³⁵ In part inspired to write by Dawson’s piece, I found a limited role for court adjustment.³⁶ I argued both that courts could handle adjustment and that they had the power to do so. Later, I summarized portions of my argument:

[S]urely the parties could do a better job [of rewriting their contract] themselves. However, when parties cannot agree . . . on an appropriate adjustment formula, judicial reformation, such as in *ALCOA*, doesn’t seem that outlandish. For example, the parties’ goals in entering the contract and the contract’s express terms may offer guidance concerning how to adjust the contract. *ALCOA* bargained for a guaranteed market for its services, which it achieved by contracting with Essex Group. Obviously, it also desired to make a profit on the deal. Essex Group sought *ALCOA*’s commitment to perform the processing of Essex Group’s aluminum at a reasonable price. . . .

Other guidance also may be available. A court could look to similar contracts made or modified by others under comparable conditions. A court could also investigate documents or statements concerning the purpose of the use of the WPI in the *ALCOA* contract. For example, if the parties intended the provision to assure that *ALCOA* made a profit, a court could adjust the contract to ensure such a result.

....

As mentioned, critics also claim that courts do not have the power (meaning authority) to adjust a contract for the parties because the strategy restricts the parties’ freedom of contract. But lots of evidence suggests that business parties expect flexibility and cooperation when things go awry in their contracts. More concretely, they expect their contracting counterpart to agree to an adjustment when an unanticipated event means that one of them will suffer losses much greater than either imagined when they made the contract. If the parties reasonably expect adjustment, judicial reformation is only a form of specific performance that supports parties’ freedom of contract. . . .

[In addition, i]f the court finds that the parties did not foresee the magnitude of the problem that has developed and did not allocate its risk, then court reformation does not impinge on the parties’ freedom because the parties have left a gap in their agreement. . . . The parties’ failure to allocate the risk themselves arguably constitutes implicit consent to allow the court to intervene to adjust the agreement for them.

Finally, the criticism of court reformation based on freedom of contract fails to recognize that courts often “make” portions of contracts for the parties. . . . [F]or example, . . . the UCC authorizes courts to fill gaps in contracts based on reasonableness, instructs courts to excise unconscionable terms from contracts, and allows specific performance according to terms the court views as “just.” In fact, a UCC comment expressly authorizes judicial reformation in excuse cases.³⁷ In addition, courts have long adjusted non-sale-of-goods contracts, including covenants not to compete, and land-sale contracts.³⁸

35. *Id.* at 37–38.

36. See Hillman, *supra* note 1.

37. U.C.C. § 2-615 cmt. 6 (2005) (“In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of ‘excuse’ or ‘no excuse,’ adjustment under the various provisions of this Article is necessary . . .”) (footnote in original).

38. ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 319–20 (2004) (footnotes omitted).

2. More Recent Discussions

Scholarly discussion of court adjustment has not “faded away,” at least not to the extent that the *ALCOA* case faded in the courts. In recent years, several writers have commented on the issue and it is fair to say that these comments are a bit more tempered than Dawson’s. Some writers even seem willing, albeit grudgingly, to acknowledge that there may be a place for court adjustment.

Some writers emphasized that the parties in the *ALCOA* case thought their price formula would more reliably track ALCOA’s costs. For example, George Geis asked: “Should the court reform the contract under the almost certainly correct assumption that the parties really meant to write a deal that tracked [ALCOA’s] actual costs more closely?”³⁹ For some, this assumption leads to the conclusion that Essex would have received an unfair windfall under the contract as written.⁴⁰ In fact, Donald Smythe pointed out that Essex “took advantage . . . by reselling millions of pounds of aluminum for an enormous profit.”⁴¹ Although these observations do not speak directly to court adjustment, the implication is that court adjustment should not automatically be ruled out. After all, if the court excused ALCOA, it would have received the windfall instead of Essex. If windfalls are the concern, the court’s intermediate approach therefore may make some sense.

A few writers thought that the *ALCOA* decision “signal[ed] to potential breachers” an opportunity to settle favorably to avoid their obligations.⁴² But if the decision created incentives to settle disputes, this may be beneficial, at least if the risk of the disruption was not clearly allocated to the “potential breacher.” For example, Stewart Macaulay recently surmised that the *ALCOA* case beneficially provoked settlement.⁴³ However, he worried that parties would plan better in the first place without the availability of judicial reformation.⁴⁴ Jim White and David Peters also think that parties would negotiate new terms without judicial reformation lurking in the background.⁴⁵

39. Geis, *supra* note 8, at 582.

40. Carla Spivack, *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse Under U.C.C. § 2-615 and CISG Article 79*, 27 U. PA. J. INT’L ECON. L. 757, 785 (2006).

41. Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227, 258 (2004).

42. Matthew Milikowsky, Note, *A Not Intractable Problem: Reasonable Certainty, Tractebel, and the Problem of Damages for Anticipatory Breach of a Long-Term Contract in a Thin Market*, 108 COLUM. L. REV. 452, 460 n.34 (2008).

43. Gergen, Goldberg, Macaulay & Rowley, *supra* note 2, at 482.

44. *Id.* at 483.

45. White & Peters, *supra* note 23, at 1972.

Those recent commentators most dissatisfied with the *ALCOA* decision are clearly motivated by ALCOA's failure to protect itself adequately in the contract. For example, Richard Posner pointed out that ALCOA was "highly sophisticated" with "long experience . . . in designing the price escalator clause" and noted that ALCOA consulted Alan Greenspan in formulating the term.⁴⁶ Macaulay thought ALCOA's mistake occurred even though ALCOA was a "well-represented major corporation" attuned to "transaction plann[ing]."⁴⁷ Despite the resources and experience of ALCOA, Victor Goldberg wrote that the parties' indexing technique was "doomed" from the outset.⁴⁸ But Goldberg did not rule out court adjustment, observing that "[r]easonable people might disagree" on whether court adjustment was justified "if the Alcoa-Essex contract was supposed to mimic a cost-plus contract" and failed.⁴⁹

Posner even intimated that ALCOA's experience and sophistication should not necessarily deny it relief because it may not have been cost effective for it to invest in allocating remote risks. In fact, he suggested that court adjustment might be cheaper than drafting if the risk is remote.⁵⁰ However, Posner concluded that ALCOA, not the court, might have been the cheapest cost avoider in this instance, in part because of Greenspan's help.⁵¹

Perhaps the strongest recent criticism of the *ALCOA* court comes from Jim White and David Peters in a recent summary of Dawson's views. White and Peters claim that the court "threw caution to the wind" in order "to impose a prospective solution."⁵² The result "undermine[d] public faith in the legal system and absolve[d] the parties of any responsibility to negotiate over risks that are predictable but the exact impact of which is unforeseeable."⁵³ I think White and Peters disagree with the remedy of court adjustment.

46. Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1601 (2005).

47. Gergen, Goldberg, Macaulay & Rowley, *supra* note 2, at 481.

48. GOLDBERG, *supra* note 5, at 349.

49. *Id.* And further: "The most charitable interpretation of the opinion . . . is that the judge imposed a cost-plus gloss on the contract which was not explicit in the contract, but most likely comported with the parties' intentions." *Id.* at 369.

50. Posner, *supra* note 46, at 1602.

51. But Goldberg points out that Essex denied that ACLOA had received any help from Greenspan. GOLDBERG, *supra* note 5, at 361. At any rate, would Posner reach the same conclusion now that Greenspan has proven to be fallible?

52. White & Peters, *supra* note 23, at 1962-63.

53. *Id.* at 1963.

IV. SPEIDEL MAY HAVE BEEN RIGHT

Here, I focus on the remedy of court adjustment, not on the substantive question of when or if contract law should excuse a promisor at all.⁵⁴ Although the two questions are obviously linked, I argue that Speidel may have been correct about court adjustment as a viable remedy, assuming a promisor has established a substantive right to relief (based on an unallocated risk causing a severe disruption). In this context, court adjustment should depend on whether it results in a net benefit greater than the net benefit of excusing a promisor from the contract or refusing to grant any remedy at all.⁵⁵ The discussion in Parts II and III hardly resolves this issue, but it does suggest many of the questions that must be answered before contract law can reach any conclusion:

What are the goals of contract law and, in particular, of contract remedies? At the risk of oversimplifying, the main goal of contract law is to facilitate private exchange transactions. This goal implicates many norms, including fairness, efficiency, and autonomy. These norms often point in the same direction remedially, but not always. For example, Posner asserts that court adjustment should depend on whether the court or the promisor is the cheapest cost avoider, and he suspects that ALCOA, the promisor, was that party.⁵⁶ But fairness requires courts to avoid granting windfalls at the expense of a disadvantaged party, which suggests that the court should deny Essex at least some of the gain it would have realized by enforcing the contract. Finally, autonomy requires identifying whether the parties reasonably expected their counterpart to be flexible if things went awry, in which case Essex should have agreed to an adjustment without litigation. Court adjustment under these circumstances is merely a form of specific performance. Even if contract law could identify the appropriate norm or norms to apply to court adjustment, each of the above conclusions about what the norm dictates is highly debatable, depends deeply on the context, and ultimately, may be impervious to empirical testing.⁵⁷

54. The substantive question is increasingly on everyone's mind, of course, as more and more companies seek relief from their contractual obligations on the basis of the financial meltdown. See, e.g., Michael Orey, *Should a Severe Recession Void Legal Obligations?*, BUS. WK., Feb. 23, 2009, at 32. The government bailouts illustrate that the only true issue here is whether courts should play any role in granting relief.

55. See Geis, *supra* note 8, at 582.

56. See *supra* notes 50–51 and accompanying text.

57. For a discussion of the vulnerabilities of empirical evidence, see Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. REV. 819, 840–42 (2002). Some empirical work suggests that people prefer windfalls to be shared equally. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1496 (1998).

How best to create the appropriate incentives for the parties to avoid contract breakdown? Would the availability of court adjustment create perverse incentives, namely to contest contract terms, even in the absence of legitimate substantive grounds for relief? If parties are more likely to abide by their contracts in the face of clear contract rules, the answer to this question depends on whether current excuse law is clearer than a regime that recognizes a limited role for court adjustment. In truth, current excuse law is hardly clear and requires delving into questions of risk allocation, foreseeability, and magnitude of harm. Court adjustment would require investigating all of these issues in addition to adding a layer of remedial questions, but current excuse law has remedial questions of its own: should a decision take into account the parties' reliance interest, recognize the right to restitution, or simply adopt an all-or-nothing approach?

*Even if court adjustment increased disputes to some degree, what would be the ramifications? Recall that one court said that the *ALCOA* case would signal the end of predictability and certainty for parties using indexing to determine their contract obligations: "Whichever way the variable fluctuated, the disappointed party would be free to assert frustrated expectations and seek relief via reformation."⁵⁸ This strikes me as an alarmist overreaction along the lines of Judge Kozinski's forecast that Justice Traynor's treatment of the parol evidence rule would "chip . . . away at the foundation of our legal system."⁵⁹ A party seeking court adjustment would still face the hurdles of convincing the court of the substantive merits of the excuse claim and that court adjustment, an equitable remedy, was right for the case. In short, parties may be "free to assert" the need for court adjustment, but that hardly means they would succeed or even that they would bring such a claim. And parties can contact out-of-court adjustment in the first place. Ultimately, the truth is that we simply do not know if court adjustment would lead to more disputes. I suspect that the legal regime governing*

58. *Wabash, Inc. v. Avnet, Inc.*, 516 F. Supp. 995, 999 n.5 (N.D. Ill. 1981); *see also* *Printing Indus. Ass'n of N. Ohio, Inc. v. International Printing & Graphic Communications Union Local 56*, 584 F. Supp. 990, 998 (N.D. Ohio 1984) ("This Court is respectfully at odds with the reasoning and result in *ALCOA*. . . . The willingness of courts to reform contracts on the basis of subsequent knowledge may undermine the policy of finality which is so essential and revered in contract law.").

59. *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988) (discussing *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968)).

long-term contracts may have little impact at all because, as Macaulay and others have taught us, business parties often pay little attention to contract rules.⁶⁰

Even if contractors do pay attention to court adjustment and it increases unresolvable disputes, we have already noted that other values are at stake in evaluating court adjustment. In short, fairness in resolving disputes is another important norm in this context. And “at the margin perhaps a fair resolution of disputes maximizes the benefits to society of long-term contracts by encouraging people to enter into them.”⁶¹

All of this is fun to debate. The truths are nonetheless still not apparent.

What is the best way to promote reasonable settlement of disputes once they have arisen? Even assuming that court adjustment decreases predictability, perhaps this would lead to greater settlement of disputes because parties will want to resolve them rather than face the unknown of court adjustment.⁶² Macaulay and others intimate that this is exactly what happened in the *ALCOA* case.⁶³ On the other hand, once a court has adjusted a contract, settlement might be delayed or might be too one-sided if court adjustment too heavily favors one or the other party. This leads to the next question.

Do courts have the expertise to adjust contracts? This issue questions the skill and acuity of judges. In addition to my argument above that courts are not without guidance,⁶⁴ we should not forget that judges take on hard cases all of the time. “Consider, for example, the substantive and remedial complexities of securities, patent, and antitrust cases.”⁶⁵ If critics are correct that court adjustment is too complex for courts, then the legal community should be looking for new ways to resolve those cases, too. With proof of what the parties were trying to achieve, the benefit of hindsight with respect to why they failed, and the help of “special masters, magistrates, expert witnesses, and the parties and their lawyers,” perhaps courts can establish reasonable content for a court-adjusted contract.⁶⁶

Do courts have the power to adjust private arrangements? In my view, this argument against court adjustment is a nonstarter, although we have seen that Dawson and others think otherwise. Assuming that the parties had agreed at the outset to be flexible in the face of onerous

60. See, e.g., Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467–68.

61. Hillman, *supra* note 1, at 33.

62. For more detail on this issue, see *id.* at 32.

63. See *supra* notes 43–44 and accompanying text.

64. See *supra* note 38 and accompanying text.

65. Hillman, *supra* note 1, at 25.

66. *Id.* at 26.

unanticipated circumstances and that a court can approximate the modification the parties should have made, court adjustment is either a form of specific performance or a legitimate method of filling a gap in the contract.⁶⁷ Both judicial functions are common for courts.

Should “fault” and “windfall” principles influence whether a court should adjust a contract? Some commentators single out ALCOA’s drafting and bargaining failures as grounds for criticizing the court’s decision.⁶⁸ Others discuss Essex’s potential windfall if the court had enforced the contract as written.⁶⁹ These factors raise substantive questions concerning whether ALCOA was entitled to any relief. They also impact remedial choices. If ALCOA were blameless, for example, because it was economically rational to decline to invest in allocating remote risks, and Essex engaged in reselling that was not contemplated by the parties, there seems little reason for an all-or-nothing approach.

IV. CONCLUSION

I have raised a lot of unresolved questions about court adjustment, although, as I did years ago, I have tipped my hat as to where I would come out on the issues. My main goal here was to see whether more recent judicial and secondary writing shed better light. I believe the answer to that question is no. So we can say no more than *maybe* Dick Speidel was right about court adjustment.

67. See *supra* text accompanying note 57.

68. See *supra* note 46–47 and accompanying text.

69. See *supra* note 40 and accompanying text.