

CONTRACTS IN CRISES

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EXCUSE DOCTRINE AND RETROSPECTIVE GOVERNMENT ACTS

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Dedication

To the Memory of Elizabeth West Speidel

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PREFACE

Before joining the law faculty at the University of Virginia in 1961, I was an Army Judge Advocate specializing in government contracts. For a time I continued to teach and write in that area, but in the early 1970's my teaching and research interests shifted to private contracts and commercial law.

In 1997, I learned (to my great surprise) that the Supreme Court, in *United States v. Winstar*, 518 U.S. 839 (1996), had cited a 1963 article of mine on the "sovereign acts" defense. After reading the majority opinion by Justice Souter, I realized that the Court's purported application of private contract law principles in this public contract dispute in the savings and loan industry was incorrect. The Court had ignored a body of contract doctrine that, if applied, would have produced a different result—a result that would have excused the United States, acting as a contracting party, from retrospective acts by the United States, acting as a sovereign.

That doctrine, in essence, is that a promisor's performance under a private contract is excused as impracticable when government acts with retrospective effect prevent or hinder performance or make it illegal. In these cases, a presumption favors the promisor that the law will not change and the burden is on the promisee to prove that the risk was allocated to the promisor by agreement or other circumstances. This is an exception to more general excuse doctrine where the burden of proof is on the party seeking excuse.

Intrigued, I published an article in 2001 in the *Wisconsin Law Review* critical of the *Winstar* case. More work, however, was needed and this book (more than 10 years in the writing) is the result. In essence, I have traced the development of the doctrine that should have been applied in *Winstar* over a 150 year period in a variety of contexts where retrospective government acts have collided with private and public contracts.

In tracing this development from the English common law through its acceptance in the United States, to its "restatement" twice by the American Law Institute, reformulation by Article 2 of the UCC, and application by the courts, I have tried to put the doctrine in context and to explore the compet-

ing theories about contracts that have emerged in the last 50 years. The result is a book about the doctrines of changed circumstances in general with an emphasis upon the effect of government acts that have retrospective effects on existing contracts.

It is, I believe, a timely book for an period when crises of various sorts, such as 9/11 and Hurricane Katrina, prompt strong responses by government. As for parties to existing contracts disrupted by these responses, who should bear the risk? How has private contract law responded to these very public reactions to tragedy? Are the contract rights of the promisee adequately protected against what amount to a constitutional taking by government?

These are the questions with which this book is concerned.