

## ABANDONING THE PRE-EXISTING DUTY RULE: ELIMINATING THE UNNECESSARY

*By Corneill A. Stephens\**

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\* Corneill A. Stephens (Claremont College, B.A., 1973; University of Chicago Law School, J.D., 1976) is a Professor of Law at Georgia State University College of Law, and practiced Corporate and Commercial Litigation for nine years before becoming a law professor. The author would like to thank his colleagues, Paul Milich, Marjorie Girth, Mark Budnitz, and Tanya Washington for their helpful and insightful comments on earlier drafts. The author also thanks Sherrie Brady, Chiquita Woolfolk Banks and Deniece Carrington for their research assistance.

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I. INTRODUCTION

Suppose two parties have entered into a contract, and one party, having become dissatisfied with the contract, either refuses to perform or refuses to continue to perform unless he is paid or promised to be paid more than the agreed-upon contract price. This situation may occur, for example, where a contractor contracts to do work for an agreed-upon price but subsequently determines that the work would be unprofitable at that price. The contractor then refuses to perform the contract unless the other party agrees to pay an additional amount to perform the required work under the contract. Similarly, suppose a buyer enters into a contract with a seller to buy goods at a specified price. After the contract is entered into, the seller discovers that he can sell the contract goods to another party for a price above the contract price. The seller then refuses to sell the goods to the buyer unless the buyer agrees to increase the purchase price. In both cases, in order to induce the performance already required under the existing contract, the other contracting party “agrees” to pay the increased price. In both cases, under the pre-existing duty rule, the promise to pay the additional amount is unenforceable.

The simplest statement of the pre-existing duty rule is that a promise to pay a party an additional amount to do that which he already has a prior contractual or other legal duty to do is not binding and is unenforceable for want of consideration.<sup>1</sup> As an illustration of the application of this rule, imagine if you entered into a contract with a caterer to cater your daughter’s moderately lavish wedding reception for a contract price of \$20,000. One hour before the reception is scheduled to start, the caterer threatens to remove all of the food, drinks, decorations, etc., unless you promise to pay an additional \$10,000. Because it is too late to obtain the services of another caterer, and not wanting to disappoint and embarrass your daughter and the family, you promise to pay the additional \$10,000. At the conclusion of the reception, the caterer approaches you for payment. You write

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1. See, e.g., 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.21, at 267 (4th ed. 2004); 3 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 7:36 (Richard A. Lord, 4th ed. 1992).

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him a check for the original contract price of \$20,000, but refuse to pay him the additional \$10,000. Is your promise to pay the additional \$10,000 enforceable?

Under the pre-existing duty rule, your promise would not be enforceable. Under that doctrine, all that the caterer did in return for your additional promise was to perform a duty that he already had under the existing contract. That is, the caterer neither performed nor promised to perform anything new in exchange for your new promise; he only performed a pre-existing contractual duty. Performance of a pre-existing duty is not consideration.<sup>2</sup> Consequently, your promise to pay an additional \$10,000, being unsupported by consideration, is not enforceable.

It would appear that the pre-existing duty rule effectively prevents coerced modifications that are unfair or overreaching. The application of the pre-existing duty rule, however, does not always lead to a fair result. Suppose you, as a contractor, enter into a contract with an owner to excavate a building site.<sup>3</sup> During the progress of the work, you unexpectedly encounter granite.<sup>4</sup> Suppose you could not have foreseen that granite was anywhere near the job site. That is, the existence of granite was unforeseeable and unanticipated. Even though the excavation required under the contract does not change, the unexpected and unforeseeable existence of granite doubles the cost of performing the job. You and the owner confer and the owner agrees to pay you double the contract price to perform the required excavation.<sup>5</sup> In this case, there is no coercion, unfairness, or overreaching. Yet, the pre-existing duty rule would make the owner's promise to pay more than the original contract price unenforceable. That is, the modification is unenforceable, and the contract would be enforced based on the original contract price. Suppose in the above example, the owner knew of the pre-existing duty rule and agreed to the modification, intending all the while not to pay the additional amount. Despite the bad faith on the part of the owner, his promise to pay more would still be unenforceable under the pre-existing duty rule. The fairness of the modification, the lack of coercion, and the bad faith on the part of a party do not affect the application of the rule.

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2. See 3 WILLISTON, *supra* note 1, § 7.36; *Lingenfelder v. Wainwright Brewing Co.*, 15 S.W. 844, 848 (Mo. 1891); *Nat'l Micrographics Sys., Inc. v. United States*, 38 Fed. Cl. 46, 51 (1997); *Jackson v. Water Pollution Control Auth.*, 900 A.2d 498, 509 n.13 (Conn. 2006).

3. See RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b, illus. 1 (1979).

4. See *id.*

5. See *id.*

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This article will examine the history and scope of the pre-existing duty rule, and expose the many fallacies upon which the rule is based. It will then analyze how the Uniform Commercial Code and the Restatement (Second) of Contracts handle this rule, and reveal the problems with the approach taken by each. The conclusion reached in the article is that the pre-existing duty rule, though simple, clear, and certain, is also flawed, obsolete, and unnecessary. Therefore, it should be abandoned. Several commentators have noted that the pre-existing duty rule has, more than anything else, given consideration “a bad reputation,”<sup>6</sup> and has, in fact, “put the entire doctrine [of consideration] in disrepute.”<sup>7</sup> Not only has this rule outlived its usefulness, its usefulness has been questionable since its birth. The time has come to abandon the venerable contract doctrine known as the pre-existing duty rule.

## II. COMMON LAW RULE

The origin of the pre-existing duty rule can be traced to the dicta found in *Pinnel's Case*,<sup>8</sup> an English case decided in 1602.<sup>9</sup> In *Pinnel's*, Lord Coke stated that “payment of a lesser sum . . . in satisfaction of a greater, cannot be any satisfaction for the whole.”<sup>10</sup> The rule was then firmly cemented into contract jurisprudence by *Foakes v. Beer*.<sup>11</sup> In *Foakes*, Foakes was indebted to Beer on a judgment in the amount of £2090, 19s.<sup>12</sup> Beer agreed that she would accept £500 in cash, and the balance of £1590, 19s in semi-annual payments of £150 until the sum was paid in full.<sup>13</sup> Foakes paid the installments as agreed until the balance was paid.<sup>14</sup> Upon receipt of the total amount, Beer sought payment of post-judgment interest.<sup>15</sup> Foakes argued that the entire debt had been discharged.<sup>16</sup> The court held that

6. Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 936 (1958).

7. 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 7.1, at 342 (rev. ed. 1995).

8. Joel K. Goldstein, *The Legal Duty Rule and Learning About Rules: A Case Study*, 44 ST. LOUIS. U. L.J. 1333, 1335-36 (2000).

9. *Pinnel's Case*, (1602) 77 Eng. Rep. 237 (K.B.); see also *Foakes v. Beer*, (1884) 9 App. Cas. 605, 611-12 (H.L.).

10. *Pinnel's Case*, 77 Eng. Rep at 237; see also *Foakes*, 9 App. Cas. at 612.

11. *Foakes*, 9 App. Cas. at 605; see Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47 ALA. L. REV. 387, 391 (1996).

12. *Foakes*, 9 App. Cas. at 605.

13. *Id.* at 605F-06.

14. *Id.* at 606.

15. *Id.*

16. *Id.* at 614.

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Foakes had a pre-existing duty to pay the entire judgment, including post-judgment interest.<sup>17</sup> Accordingly, Beer's agreement to accept a lesser amount was unsupported by consideration, and therefore unenforceable.<sup>18</sup> Simply stated, Foakes' duty to pay post-judgment interest was not discharged.<sup>19</sup>

A. *Purpose and Scope of the Rule*

Even though the pre-existing duty rule was initially designed to serve as a gatekeeper to ensure that the consideration requirement was met,<sup>20</sup> it evolved to serve as a gatekeeper against coercive modifications. A fundamental principle of contract law is that "promises must be given with free will and without coercion."<sup>21</sup> Consistent with that principle, the basic objective of contract modification law is to enforce freely made modifications to existing contracts and to disallow enforcement of coerced modifications to existing contracts.<sup>22</sup> "If the promisor was coerced into making the second promise, it should be unenforceable; if the second promise was freely made, however, it should be enforced."<sup>23</sup> That objective was effectuated,

17. *Id.* at 614-15, 622.

18. *See id.* at 610-11.

19. *Id.* at 614-15, 622. In Professor Grant Gilmore's book, *The Death of Contract*, he stated that these cases would not have evolved into the pre-existing duty rule "without the intervention of Holmes and Williston." Robert A. Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 852 n.14 (1979) (citing GRANT GILMORE, *THE DEATH OF CONTRACT* 22-30 (Ohio State University Press 2005)). Professor Gilmore further maintained that the pre-existing duty rule was the

product of Holmes' "bargain" theory of consideration and Williston's development of that theory in his treatise. According to Gilmore, Holmes believed that . . . the "bargain" theory of consideration was a tool for narrowing the potential range of liability under contract law, and could explain why modifications of agreements "under which A promises to pay B more than the originally agreed contract price for doing the work are not binding on A." Stated simply, A's promise was not enforceable because A did not receive anything in return for it, and thus no bargain had been struck. Gilmore's quarrel with Holmes and Williston [was] that the cases cited to support the abstraction of the rule of the pre-existing duty did not really support the rule, and that the rule as formulated by Holmes and Williston was either "deliberate deception" or "unconscious distortion."

*Id.* (citations omitted).

20. *See Teeven, supra* note 11, at 387.

21. Hazel Glen Beh, *Allocating the Risk of the Unforeseen, Subsurface and Latent Conditions in Construction Contracts: Is There Room for the Common Law?*, 46 U. KAN. L. REV. 115, 121 (1997); *see also Teeven, supra* note 11, at 387.

22. Robert A. Hillman, *Contract Modification under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680, 681 (1982).

23. Hillman, *supra* note 19, at 849.

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it was thought, by the use of the pre-existing duty rule.<sup>24</sup> It was believed that application of the pre-existing duty rule “deters the abuse of power that can result when one party, having begun to perform, extorts an increased performance from the other, where it is unlikely that the other party can obtain a completely satisfactory substitute quickly enough to avoid unrecoverable damage.”<sup>25</sup> In effect, while the pre-existing duty rule is expressed in terms of consideration, the policy behind the pre-existing duty rule is to guard against a contracting party acting opportunistically by threatening breach in order to extract a premium from the other contract party who is in a vulnerable position.<sup>26</sup>

The pre-existing duty rule has been applied to virtually all types of contracts. Perhaps the most common use of the pre-existing duty rule is the promise of an owner to a contractor to pay the contractor more than the contract price to complete a construction job pursuant to the contract.<sup>27</sup> The rule has also been applied to promises of buyers to pay sellers more than the contract price for goods,<sup>28</sup> the promise of recipients of services to pay providers of services more than the contract price,<sup>29</sup> the payment or promise to pay all or part of a liquidated debt,<sup>30</sup> the

24. Hillman, *supra* note 22, at 684.

25. Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 72 (1981); *see also* Lingenfelder v. Wainright Brewery Co., 15 S.W. 844, 848 (Mo. 1891).

26. Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 460 (1987); *see also* Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 522-25 (1981).

27. *See, e.g.*, *Frommeyer v. L. & R. Constr. Co.*, 261 F.2d 879, 882 (3d Cir. 1958); *Mobile Turnkey Hous., Inc. v. Ceafco, Inc.*, 321 So. 2d 186, 191 (Ala. 1975); *City of Miami Beach v. Fryd Constr. Corp.*, 264 So. 2d 13, 15 (Fla. Dist. Ct. App. 1972); *Shanks v. Fisher*, 130 N.E. 2d 231, 235 (Ind. Ct. App. 1956); *Evergreen Amusement Corp. v. Milstead*, 112 A.2d 901, 903 (Md. 1955).

28. *See, e.g.*, *Rexite Casting Co. v. Midwest Mower Corp.*, 267 S.W.2d 327, 328, 331 (Mo. Ct. App. 1954) (ruling that the buyers were not held to a mutually agreed upon price increase because it went against already an existing obligation of the seller).

29. *See, e.g.*, *Signs v. Bankers Life & Cas. Co.*, 340 S.W.2d 67, 72-73 (Tex. Civ. App. 1960) (holding that insurance seller was already required to sell insurance so additional bonuses for doing so, even if promised, were not enforceable).

30. *Foakes v. Beer*, (1884) 9 App. Cas. 605, 628 (H.L.) (preventing debtor from avoiding interest owed based on a promise by creditor not to seek the interest); *see also, e.g.*, *Chi., Milwaukee & St. Paul Ry. Co. v. Clark*, 178 U.S. 353, 364-65 (1900) (explaining that while “the rule only applies when the larger sum is liquidated” along with no consideration for turning over a portion of it, it is highly disfavored in this context); *McDonough v. Saunders*, 78 So. 160, 164-65 (Ala. 1917) (ruling that a person cannot be denied land entitled to him because he agreed and then failed to pay additional money for the land); *Benford v. Yockey*, 164 P. 725, 726 (Colo. 1917) (upholding debt to plaintiff owed due to no additional consideration for relief of the interest owed).

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promise of a landlord to a tenant,<sup>31</sup> and the promise of an employer to pay its employees more than the agreed upon wages.<sup>32</sup> The rule has even been applied where the pre-existing duty was one imposed not by contract, but by law.<sup>33</sup> Consequently, if a person such as a police officer, inspector, district attorney, bank director, or other public official is already bound by an official or legal duty to render a service, the promise of an additional payment or reward to induce him to perform his official duty lacks consideration and is unenforceable.<sup>34</sup> Similarly, forbearance from committing a tort or a criminal act is required by law. A promise in return for such forbearance is not consideration.<sup>35</sup>

Further, some courts have also held that the pre-existing duty rule applies where one owes a contractual duty to a third party, not the promisor.<sup>36</sup> That is, the rule applies though the existing obligation is owed to a third person and the promisor is a stranger to the contract in which the obligation arose.<sup>37</sup> For example, in *McDevitt v. Stokes*, Stokes promised to pay jockey McDevitt the sum of \$1,000 if he won the Kentucky Futurity horse race.<sup>38</sup> McDevitt won, but Stokes refused to pay.<sup>39</sup> The court held that since McDevitt was already contractually bound to the owner to win the race, Stokes's promise to pay \$1,000 if

31. *Brown v. Philadelphia Hous. Auth.*, 159 F. Supp. 2d 23, 25, 27 (E.D. Pa. 2001) (holding unenforceable the promise of a landlord to a tenant that it will refrain from evicting the tenant if the tenant paid past due rent).

32. *See, e.g., Alaska Packers' Ass'n. v. Domenico*, 117 F. 99, 100-02 (9th Cir. 1902) (disallowing additional compensation demanded by fishermen although it was agreed to by employer); *Davis & Co. v. Morgan*, 43 S.E. 732, 732-35 (Ga. 1903) (rejecting employee's claim for extra compensation promised for not breaching an employment contract).

33. *See* 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7:41 (4th ed. 1992).

34. *See id.*

35. *See, e.g., Godfrey v. Godfrey*, 258 P. 705, 705-07 (Cal. Ct. App. 1927) (holding that the act of acknowledging one's child and returning stolen bonds was not consideration); *Tolhurst v. Powers*, 31 N.E. 326, 326 (N.Y. 1892) (denying plaintiff's fees for work performed when property of another was improperly held for the debt); 2 PERILLO & BENDER, *supra* note 7, § 7.11.

36. *See* 2 PERILLO & BENDER, *supra* note 7, § 7.7.

37. *See, e.g., Havana Press-Drill Co. v. Ashurst*, 35 N.E. 873, 879 (Ill. 1893) (deciding that the continuation of corporation by shareholder when the corporation received a patent was not additional consideration as the shareholder already had an obligation to continue the corporation); *Harris v. Cassaday*, 8 N.E. 29, 30 (Ind. 1886) (holding release of levy of execution was insufficient consideration when there was no entitlement to such a levy); *Moore v. Kuster*, 37 S.W.2d 863, 865 (Ky. 1931) (holding parents not liable for promise to pay debt of son due to lack of additional consideration); *Arend v. Smith*, 45 N.E. 872, 872 (N.Y. 1897) (stating promise to third party railroad company to pay previously owed debt is not new consideration). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981) (rejecting application of the pre-existing duty rule).

38. *McDevitt v. Stokes*, 192 S.W. 681, 681 (Ky. 1917).

39. *See id.*

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McDevitt won was unsupported by consideration, and was therefore unenforceable.<sup>40</sup> Similarly, it has been held that a promise by an owner to pay a subcontractor with whom he has no contract, for work that the subcontractor is bound to perform under his contract, is unenforceable under the pre-existing duty rule.<sup>41</sup>

## III. CRITICISM OF THE RULE

Courts quickly recognized that the pre-existing duty rule was flawed in two significant ways. First, it facilitated another kind of abuse. The pre-existing duty rule could encourage a savvy party who is familiar with the rule to dissemble, or even lie, by seeming to agree to changing an existing contract knowing all the time that he can renounce the change in the contract with little or no consequences.<sup>42</sup> Second, the rule often frustrated the presumption and expectation of what the reasonable layperson believed the law to be, namely that if two legally competent parties mutually agree to modify their contract, the modification is binding on the parties.<sup>43</sup> As a result, “courts have become increasingly hostile to the pre-existing duty rule.”<sup>44</sup> Some courts, in states like Alabama, Minnesota, Mississippi, New Hampshire, and Wisconsin, have become so disenchanted with the rule that they have abandoned its application altogether.<sup>45</sup> Further, five other states, California, Michigan, New York, Oklahoma, and South Dakota, have effectively abolished by statute the pre-existing duty rule by providing that a promise or agreement modifying a contract need not be supported by consideration, so

40. *Id.* at 683.

41. *See, e.g.*, *H. C. Lindsly & Son v. Kansas City Viaduct & Terminal Ry. Co.*, 133 S.W. 389, 393 (Mo. Ct. App. 1911); *Schaefer v. Brunswick Laundry*, 183 A. 175, 178 (N.J. 1936); *Snyder v. Monroe Eckstein Brewing Co.*, 107 A.D. 328, 330 (N.Y. App. Div. 1905), *aff'd* 80 N.E. 1128 (N.Y. 1907). *But see* *Guar. Iron & Steel Co. v. Leyden*, 235 Ill. App. 191, 192 (Ill. App. Ct. 1924) (holding consideration existed for promise to pay extra compensation); *Grant v. Duluth, M & N. P. Ry. Co.*, 63 N.W. 1026 (Minn. 1895); *Joseph Lande & Son, Inc. v. Wellsco Realty, Inc.*, 34 A.2d 418, 423 (N.J. 1943) (holding that the pre-existing duty rule does not apply and the promise is enforceable where the general contractor has so materially breached the contract that the duty of the subcontractor to perform the contract has been excused); *Reisler v. Silbermintz*, 99 A.D. 131, 133 (N.Y. App. Div. 1904).

42. *Knapp, supra* note 25, at 72.

43. *Id.*

44. 1 FARNSWORTH, *supra* note 1, § 7.1, at 270.

45. *See* *Moore v. Williamson*, 104 So. 645, 648 (Ala. 1925); *Winter Wolff & Co. v. Cop Lead & Chem. Co.*, 111 N.W.2d 461, 465-67 (Minn. 1961); *Clayton v. Clark*, 21 So. 565, 568-69 (Miss. 1897); *Rye v. Phillips*, 282 N.W. 459, 460 (Minn. 1938); *Frye v. Hubbell*, 68 A. 325, 330-34 (N.H. 1907); *Everlite Mfg. Co. v. Grand Valley Mach. & Tool Co.*, 171 N.W.2d 188, 190 (Wis. 1969); *Brown v. Everhard*, 8 N.W. 725, 726 (Wis. 1881).

long as the modification is in writing.<sup>46</sup> The pre-existing duty rule has even been overturned in England, its country of origin.<sup>47</sup> Although the pre-existing duty rule, absent the exclusions and exceptions that have riddled its application, is simple, clear, and certain, it is also too restrictive and too expansive. Therefore it fails to reach its intended objective of permitting only freely made modifications and preventing coerced modifications.<sup>48</sup>

#### A. *The Prevention of Coercion Fallacy*

The pre-existing duty rule is not an effective device to prevent coercion. Parties to a contract may agree freely to modify a party's performance, in the absence of consideration, without any coercion, threat, or other improper behavior. For example, suppose a contract sets forth a June 30th completion date for a restaurant project. The contractor calls the owner on June 20th and asks the owner to extend the completion date to July 10th because of unforeseen and unanticipated site conditions. Because it is not crucial that the restaurant be completed until July 15th, the owner readily agrees to the modification. However, because of a lack of consideration, this modification is not enforceable under the pre-existing duty rule.<sup>49</sup>

Conversely, a party could coerce a modification, but provide consideration. Using the same example above, suppose the contractor requested an extension for completion of the contract from June 30th to July 10th, but had no legitimate reason for doing so. The owner then refuses because he needs the restaurant completed by the contract completion date, having scheduled a grand opening ceremony on July 1st. Sensing the owner's anxiety, the contractor responds by saying that he will complete the contract on June 30th only if the owner agrees to pay him an additional \$5,000, and that if the owner does not agree he will walk off the job. The owner, needing the restaurant completed on time, has no choice but to agree to pay the additional amount. The contractor adds that in exchange for the additional compensation, he will not only complete the job on time as per the contract, but will also patronize the restaurant on his next birthday. Since there is a token change in the

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46. See CAL. CIV. CODE §§ 1614, 1697-98 (West 1985); MICH. COMP. LAWS ANN. § 440.2209 (West 1994); N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney 2001); OKLA. STAT. ANN. tit. 15 §§ 114, 236-37 (West 1996); S.D. CODIFIED LAWS §§ 53-8-6, -7 (2004).

47. 2 PERILLO & BENDER, *supra* note 7, § 7.1.

48. Hillman, *supra* note 22, at 685.

49. *Id.*; see also, e.g., *Lingenfelder v. Wainwright Brewery Co.*, 15 S.W. 844 (Mo. 1891); *Vanderbilt v. Schreyer*, 91 N.Y. 392, 401 (1883); *Queen City Constr. Co. v. City of Seattle*, 99 P.2d 407, 412 (Wash. 1940).

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contractor's performance (patronizing the restaurant) in exchange for the increase in the contract price, there is consideration for the modification, thereby making the modification enforceable.<sup>50</sup>

In the first example, the pre-existing duty rule is over-inclusive: a modification was invalidated that was not coerced. In the second example, the pre-existing duty rule is under-inclusive: a modification was upheld that was coerced simply because of nominal consideration. In both cases, the pre-existing duty rule generated the wrong result. In neither case was coercion prevented. That is, the presence of consideration does not ensure the voluntariness of the modification; the absence of consideration does not signify coercion. Neither the presence nor absence of consideration is a trustworthy indicator of the existence *vel non* of coercion. The pre-existing duty rule does not take into account those factors that would truly indicate the existence of coercion, including "the net amount given up by the promisor, the nature of the relationship of the parties, the alternatives available to the promisor, and the means employed by the promisee in achieving the modification."<sup>51</sup> As a result, the pre-existing duty rule is not an effective device for distinguishing coerced or opportunistic modifications from justified modifications, and utterly fails to accomplish its purpose of policing coercive modification.

B. *The Lack of Consideration Fallacy*

As stated above, under the pre-existing duty rule, a promise to pay more money for someone to do that which he is already under a contractual duty to do is unsupported by consideration, and is therefore unenforceable. The rationale is that one receives nothing new for his promise; he only receives that which he was already entitled to receive. At best, this analysis (if it can be called that) is disingenuous; at worst, it is wrong. Even though one may have the duty to perform, one also has the right to breach the contract (not perform) and to risk being sued for damages.<sup>52</sup> A party to a contract typically prefers performance to a lengthy and costly lawsuit, with the attendant uncertainty, inconvenience, and possible collection problems. He would prefer to be made whole through performance than through a lawsuit. Accordingly, if he deems it to be in his interest, economic or

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50. See, e.g., JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 64, at 285 (4th ed. 2001).

51. Hillman, *supra* note 22, at 689.

52. See 2 PERILLO & BENDER, *supra* note 7, § 7.12, at 392.

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otherwise, he may be more than willing to pay more money to induce the other party not to exercise his right to breach. There is, in fact, “new” consideration: the promise to pay more money is exchanged for the other party’s relinquishing his right to breach. Put another way, when one pays more money for another to perform a pre-existing contract duty, he is bargaining for his contract to be performed rather than being compensated for non-performance.<sup>53</sup> The pre-existing duty rule “fails to take into consideration the practical importance of the difference between the right to a thing and the actual possession of it.”<sup>54</sup> One state, Massachusetts, has explicitly accepted this reasoning, stating: “In such a case, the new promise is given to secure the performance, in place of an action for damages for not performing.”<sup>55</sup>

Even if the above reasoning is not accepted, a modification to a contract also would be enforceable where an extortionist-promisee extracted a major concession from the promisor in return for an insignificant concession.<sup>56</sup> The consideration requirement therefore invites a shrewd or clever promisee to change his duty in an insignificant or meaningless way in exchange for the promise of the promisor to pay more than the original contract price. Because there then would be consideration, the pre-existing duty rule would not apply, and the modification would be enforceable.<sup>57</sup> Again, the pre-existing duty rule is not an effective device for distinguishing coerced or opportunistic modifications from justified modifications and utterly fails to accomplish its purpose of policing coercive modification.

Further, “[n]othing in the very notion of consideration . . . logically compels that modifications be treated like initial contract formation,”<sup>58</sup> or that parties who have already entered into a binding contract may not modify it without additional

53. See, e.g., 1 FARNSWORTH, *supra* note 1, § 4.21, at 267-68.

54. *Melroy v. Kemmerer*, 67 A. 699, 699 (Pa. 1907).

55. *Parrott v. Mex. Cent. Ry Co.*, 93 N.E. 590, 594 (Mass. 1911); see also *Swartz v. Lieberman*, 80 N.E.2d 5, 6 (Mass. 1948).

56. Hillman, *supra* note 22, at 684-85; Henry Mather, *Contract Modification Under Duress*, 33 S.C. L. REV. 615, 616-17 (1982); Richard Nathan, *Grappling with the Pre-Existing Duty Rule: A Proposal for a Statutory Amendment*, 23 AM. BUS. L.J. 509, 520-21 (1986).

57. Hillman, *supra* note 22, at 689.

58. Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 744 (1996); see also Karl N. Llewellyn, *What Price Contract? – An Essay in Perspective*, 40 YALE L.J. 704, 742 (1931).

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consideration if they choose.<sup>59</sup> Since consideration already was given in the original contract, the consideration requirement is not violated when the agreement is subsequently modified by the parties. Accordingly, “even advocates of the traditional gatekeeping function of the doctrine of consideration need not accept the pre-existing duty rule as a simple logical consequence.”<sup>60</sup>

## IV. AVOIDANCE OF THE PRE-EXISTING DUTY RULE

Recognizing that injustice often resulted from the application of the pre-existing duty rule, a number of doctrines have either evolved or been created that have enabled the courts to avoid the application of the pre-existing duty rule in cases where the rule worked an injustice.<sup>61</sup> Some courts have *sub silentio* rejected the rule, opining that a promise modifying a contract does not have to be supported by consideration to be enforceable.<sup>62</sup> Other courts have even found that the pre-existing rule was inapplicable by virtue of a gift or waiver by the promisor.<sup>63</sup> These “efforts of the courts to avoid the pre-existing duty rule [have] created confusion and clouded the doctrine.”<sup>64</sup>

A. *Additional Consideration*

One obvious way to avoid the rule is to find additional consideration for the promise. Accordingly, some courts have fabricated consideration, finding that the promisee did, or promised to do something more than the pre-existing duty in exchange for the additional promise, thereby avoiding the application of the rule.<sup>65</sup> Other courts have ruled that there is consideration by finding that the promisee gave up the right to

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59. Wessman, *supra* note 58, at 744; *see also* JOHN P. DAWSON, GIFTS AND PROMISES 210 (1980); K.C.T. SUTTON, CONSIDERATION RECONSIDERED 261 (1974).

60. Wessman, *supra* note 58, at 744.

61. *Id.* at 747; *see also* 2 PERILLO & BENDER, *supra* note 7, § 7.1, at 342 (“The pre-existing duty rule is undergoing a slow erosion and, as a general rule, is destined to be overturned.”).

62. *See* Indus. Dev. Bd. v. Fuqua Indus., 523 F.2d 1226, 1242 (5th Cir. 1975).

63. *See* Watkins & Sons, Inc. v. Carrig, 21 A.2d 591, 593-94 (N.H. 1941); Meech v. City of Buffalo, 29 N.Y. 198, 218-19 (N.Y. 1864) (Johnson, J., concurring).

64. Hillman, *supra* note 19, at 853.

65. *See, e.g.*, King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105, 1108 (Minn. 1895) (explaining how an owner promised to pay a contractor an additional amount if the contractor finished the job on time and waived delays caused by owner); Melotte v. Tucci, 66 N.E.2d 357 (Mass. 1946) (describing a promise to pay an additional amount if a contract was completed and an assertion of colorable claim relinquished).

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breach and pay damages under the original contract in exchange for the promisor's new promise to perform.<sup>66</sup>

B. *Unforeseen Circumstances*

The pre-existing duty rule does not distinguish between a party who, motivated by greed and opportunism, demands more money to perform a pre-existing duty, and a party who demands more money to perform a pre-existing duty because of the occurrence of unforeseen circumstances which makes performance substantially more burdensome.<sup>67</sup> Because of that perceived unfairness, another technique used to avoid the pre-existing duty rule is the finding of "unforeseen circumstances."<sup>68</sup> The "unforeseen circumstances" exception can be invoked where circumstances arise in the performance of the contract, which circumstances were not known or anticipated by the parties at the time the contract was formed.<sup>69</sup> Where such unforeseen circumstances occur, the promise to pay an additional amount if the contract is completed is binding.<sup>70</sup> Also, "[t]he consensual theory and notions of fairness" allow an excuse or modification if an unanticipated circumstance arises because the contract no longer reflects the original assumptions upon which the contract was based.<sup>71</sup> That is, parties to a contract should be permitted to modify their contract where it no longer reflects the conditions upon which their original assent was based.<sup>72</sup> As was explained in *Linz v. Schuck*:

When two parties make a contract, based on supposed facts which they afterwards ascertain to

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66. See *Swartz v. Lieberman*, 80 N.E.2d 5, 6 (Mass. 1948) (citing *Parrott v. Mex. Cent. Ry. Co.*, 93 N.E. 590, 594 (Mass. 1948)); *Munroe v. Perkins*, 26 Mass. (9 Pick.) 298, 309-10 (1830).

67. See, e.g., 1 Farnsworth, *supra* note 1, § 7.1, at 270.

68. *Id.* at 269-71.

69. See *Hillman*, *supra* note 22, at 693.

70. See, e.g., *United Steel Co. v. Casey*, 262 F. 889, 893-94 (6th Cir. 1920); *Brian Constr. & Dev. Co. v. Brighenti*, 405 A.2d 72, 76 (Conn. 1978).

71. Teeven, *supra* note 11, at 419.

72. In such a case, mutual mistake cannot be asserted as a basis to permit modification. First, although mutual mistake occurs where both parties make a mistake about a basic assumption of the contract, mistake by one party coupled with ignorance by the other party does not constitute mutual mistake. 27 WILLISTON ON CONTRACTS § 70:9, at 224-25 (Richard A. Lord, ed., 4th ed. 2003). Second, mutual mistake cannot be found where the surrounding circumstances, the contract, or custom indicate that the risk of the mistake was allocated to the party alleging mutual mistake. *Id.* § 70:10, at 226-27; RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981). Third, mutual mistake is a basis for rescinding (voiding) a contract and excusing the parties from performance, but is not the basis for enforcing a modification. 27 WILLISTON, *supra*, § 70:10, at 224-25; RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981).

be incorrect, and which would not have been entered into by the one party if he had known the actual conditions which the contract required him to meet, not only courts of justice but all right thinking people must believe the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or to pay him additional compensation. If the difficulties be unforeseen, and such as neither party contemplated, or could have from the appearance of the thing to be dealt with anticipated, it would be an extremely harsh rule of law to hold that there was no legal way of binding the owner of property to fulfill a promise made by him to pay the contractor such additional sum as such unforeseen difficulties cost him. But we do not understand the authorities to sustain such a rule. . . . [w]hen there is such a strong moral obligation as there was in this case to give the appellee relief, it would be making an exceedingly technical distinction to hold that the promise would have been binding if the original contract would have been expressly rescinded, but that it is not binding because there was no express or actual rescission, although the facts show that it was undoubtedly intended by the parties that neither should be held to the terms of the original contract.<sup>73</sup>

In addition to unforeseen construction conditions or site conditions, courts have also found war,<sup>74</sup> a shortage of willing workers,<sup>75</sup> and increased wage costs<sup>76</sup> to be “unforeseen circumstances” enabling a party to avoid the pre-existing duty rule.

While unforeseen circumstances can be asserted to avoid the pre-existing duty rule, it would be futile to attempt to determine with any degree of certainty which circumstances are foreseeable

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73. *Linz v. Schuck*, 67 A. 286, 288-89 (Md. 1907). In *Linz*, soft soil, which is not conducive to the construction of a cellar, was encountered on the job, making performance of the contract more burdensome and more expensive. *See id.* at 286-87. The existence of soft soil at that site was neither anticipated nor foreseeable by either party. *Id.* at 287.

74. *Blakeslee v. Bd. of Water Comm'rs*, 139 A. 106, 107-08 (Conn. 1927).

75. *Foley v. Storrie*, 23 S.W. 442, 442-43 (Tex. Civ. App. 1893).

76. *E.W. Bliss Co. v. United States*, 275 U.S. 509, 509 (1927).

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and which are not.<sup>77</sup> Many of the cases relating to unforeseen circumstances discuss other exceptions to the pre-existing rule, thereby making it virtually impossible to divine the grounds upon which the court reached its decision.<sup>78</sup> Moreover, even where the facts are indistinguishable in pertinent part, courts are in conflict on whether the circumstances are foreseeable.<sup>79</sup> Ultimately, modifications appear to be enforced by the courts when the facts indicate that the modification was made freely and without coercion.<sup>80</sup>

### C. *Mutual Rescission*

Another technique used to circumvent the pre-existing duty rule has been to find that there has been a mutual rescission of the original contract, that is, a mutual agreement to terminate the original contract.<sup>81</sup> Once the parties have mutually rescinded the original contract, any pre-existing duty under that contract is thereby eliminated and discharged.<sup>82</sup> Consequently, where the parties to a contract agree to rescind the original contract, they are no longer bound by the old contract and are free to enter into any new contract they wish with any new or different terms they wish.<sup>83</sup>

The difficulty with avoiding the pre-existing duty rule by invoking mutual rescission is that, because there is no express agreement rescinding the original contract, the court is required to use legal legerdemain to find a mutual rescission.<sup>84</sup> In finding a mutual rescission, however, it becomes problematic to determine *factually* whether or not an agreement between the parties to cancel the old contract has actually taken place.<sup>85</sup> Any finding of a mutual rescission is further compounded by the rescission being coupled with a new contract that is identical to the old one, except that one party is paying more for the same

77. See Hillman, *supra* note 22, at 696.

78. See, e.g., Pittsburgh Testing Lab. v. Farnsworth & Chambers Co., 251 F.2d 77, 79 (10th Cir. 1958); *Linz*, 67 A. at 287-88; *Watkins & Son v. Carrig*, 21 A.2d 591, 593-94 (N.H. 1941).

79. See Hillman, *supra* note 22, at 696.

80. See *Siebring Mfg. Co. v. Carlson Hybrid Corn Co.*, 70 N.W.2d 149, 153 (Iowa 1955).

81. See 1 FARNSWORTH, *supra* note 1, § 4.24, at 550.

82. See *id.*

83. See *Schwartzreich v. Bauman-Basch*, 131 N.E. 887, 889 (N.Y. 1921) (finding that the parties had mutually rescinded the original employment contract where employer promised to pay employee a higher salary for the same agreed upon work); *Martiniello v. Bamel*, 150 N.E. 838 (Mass. 1926).

84. See *Martiniello*, 150 N.E. at 838-40.

85. 3 WILLISTON, *supra* note 1, § 7:37, at 598.

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performance. The whole transaction raises the question of whether there has been true assent to such putative rescission, or whether such assent was a result of threat or duress. Of course, the absence of assent would vitiate any claim of rescission, assuming rescission is based on assent by both parties. Ultimately, the court finds the mutual rescission by the disingenuous reasoning that the parties must have rescinded the original contract because they entered a new agreement.<sup>86</sup> This reasoning is circular; the validity of the new agreement depends upon the rescission, while the validity of the rescission depends upon the new agreement.<sup>87</sup>

Another basis for rejecting rescission as a doctrine for avoiding the pre-existing duty rule is that it is inconsistent with the intent of the parties. It is merely a transparent ruse to free the court from applying the pre-existing duty rule. A true rescission would terminate the original contract.<sup>88</sup> That is not the intent of the parties. Rather, their intent is to continue the original contract, but to change the remuneration for its performance.<sup>89</sup>

#### D. *Reliance*

Many courts have held reliance to be a basis for enforcing a modification.<sup>90</sup> That is, where a promisee detrimentally relies on a promisor's promise to modify the contract, the modification is enforceable.<sup>91</sup> The analysis has varied, however, regarding how the reliance made the modification enforceable. Some courts have taken the position that even though consideration was required to make a modification enforceable, reliance was a substitute for consideration, thereby satisfying the consideration requirement.<sup>92</sup> Other courts have refused to adhere to the legal fiction that reliance is a substitute for consideration, and forthrightly have held that reliance can be the sole grounds for enforcing a modification without regard to consideration.<sup>93</sup>

86. See, e.g., *Schwartzreich*, 131 N.E. at 890.

87. 2 PERILLO & BENDER, *supra* note 7, § 7.15, at 408-09.

88. *Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1031 (9th Cir. 1999).

89. 2 PERILLO & BENDER, *supra* note 7, § 7.15, at 409-10.

90. See Kevin M. Teevan, *A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation*, 43 DUQ. L. REV. 11, 51, (2004).

91. *Id.*

92. See, e.g., *Wadsworth v. Thompson*, 3 Gilm. 423, 430 (Ill. 1846); *Am. Food Co. v. Halstead*, 76 N.E. 251, 253 (Ind. 1905); *Blaess v. Nichols & Shepard Co.*, 88 N.W. 829, 830 (Iowa 1902); *Maxwell v. Graves*, 13 N.W. 758 (Iowa 1882).

93. See, e.g., *Hetchler v. Am. Life Ins. Co.*, 254 N.W. 221, 223-24 (Mich. 1934); *Fried v. Fisher*, 196 A. 39, 41 (Pa. 1938).

### E. Waiver

Waiver has also been used as a method of avoiding the pre-existing duty rule. There is no consideration problem with waiver because waiver of a contract term is effective without consideration.<sup>94</sup> Consequently, where a party waives a contract right or condition, the waiver is binding.<sup>95</sup> Use of the waiver exception, however, is limited. The waiver cannot substantially change the value of the transaction to the waiving party.<sup>96</sup> For example, where an owner and contractor enter into a contract to build a house, the owner cannot waive the contractor's duty to build the house, as such waiver substantially affects the value of the transaction.<sup>97</sup> However, the owner may waive the completion date, as such waiver does not substantially affect the value of the transaction.<sup>98</sup>

## V. U.C.C. RULE

One of the primary purposes of the Uniform Commercial Code ("Code") is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties . . ."<sup>99</sup> In order to "assure contracting parties the ability to freely adapt to changing circumstances, the Code framers in section 2-209(1) rejected and displaced the restrictive common-law pre-existing duty rule . . ."<sup>100</sup> Regarding the pre-existing duty rule, White and Summers stated that "[r]eason and justice do not require this inflexible rule."<sup>101</sup>

94. 8 CATHERINE MCCAULIFF, CORBIN ON CONTRACTS § 40.2, at 520 (Joseph M. Perillo, ed. Rev. ed. 1999).

95. *See id.*

96. *Id.* at 521-22.

97. *See id.* at 522-23.

98. *See id.* at 523.

99. U.C.C. § 1-103(a)(2) (2007).

100. Hillman, *supra* note 19, at 849. To further facilitate the ability of the parties to adapt to changing circumstances, section 2-615 of the Code, "Excuse by Failure of Presupposed Conditions," excuses a party from performance if performance of the contract "has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made . . ." U.C.C. § 2-615 (2007).

101. U.C.C. § 1-653 (5th ed. 2000). Also, it should be noted that the United Nations Convention for the International Sale of Goods is in agreement with the Code, as it has rejected the rule. Article 29 of the United Nations Convention for the International Sale of Goods provides:

- (1) A contract may be modified or terminated by the mere agreement of the parties.
- (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However a party may be precluded by his

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U.C.C. § 2-209 provides:

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) An agreement in a signed record which excludes modification or rescission except by a signed record may not be otherwise modified or rescinded, but except as between merchants such a requirement in a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article [Section 2-201] must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.<sup>102</sup>

Although not in the text of section 2-209, Comment 2 to section 2-209 makes it clear that even though consideration is not required, a modification to a contract is not enforceable unless it “meet[s] the test of good faith imposed by this Act.”<sup>103</sup>

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conduct from asserting such a provision to the extent that the other party has relied on that conduct.

United Nations Convention on Contracts for the International Sale of Goods art. 29, Apr. 11, 1980, 1489 U.N.T.S. 3.

102. U.C.C. § 2-209 (2003).

103. *Id.* § 2-209 cmt. 2. Specifically, Comment 2 to section 2-209 provides:

Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding. However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and extortion of a “modification” without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

*Id.*

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“Good faith” under the Code means “honesty in fact in the conduct or transaction concerned.”<sup>104</sup> In the case of a merchant,<sup>105</sup> “good faith” includes not only honesty in fact, but also “the observance of reasonable commercial standards of fair dealing in the trade.”<sup>106</sup>

The Code’s rejection of the pre-existing duty rule—by expressly providing that a modification does not need consideration to be binding—while simultaneously requiring (in the comments) that good faith is required for the modification to be binding,<sup>107</sup> turns a clear, simple, and predictable rule into a problematic, complex, and unpredictable rule. One commentator called section 2-209 a “mess” and said that its drafting was “perhaps the worst in Article 2.”<sup>108</sup> Another stated that the Code test of section 2-209 is “substantially more difficult to enforce” than the pre-existing duty rule and “may not deter extortionate renegotiation.”<sup>109</sup>

#### A. *Two Definitions of Good Faith*

Initially, it should be noted, as stated above, that two different Code definitions of good faith may be applied to determine the existence of good faith, depending on whether or not a merchant is involved.<sup>110</sup> Generally, good faith means “honesty in fact.”<sup>111</sup> In the case of a merchant, good faith is “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”<sup>112</sup> However, neither section 2-209 nor the comments to that section indicates which definition should be applied when one of the parties is a merchant and one is not.<sup>113</sup> Perhaps both definitions should be applied, one for the merchant, and the other for the non-merchant. This is more than a matter of semantics. The section

104. *Id.* § 1-201(19).

105. A merchant is “a person that deals in goods of the kind or otherwise holds itself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction or to which the knowledge or skill may be attributed. . . .” *Id.* § 2-104.

106. *Id.* § 2-103(1)(b).

107. *See* U.C.C. § 2-209 cmt. 2 (2004).

108. Douglas K. Newell, *Cleaning Up U.C.C. Section 2-209*, 27 IDAHO L. REV. 487, 487 (1990).

109. Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 1007 n.106 (1983).

110. *See supra* text accompanying notes 105, 107.

111. U.C.C. § 1-201(19).

112. *Id.* § 2-103(1)(b).

113. *See id.* § 2-209 (2007).

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1-201(19) good faith requirement of honesty in fact is viewed as a subjective test of good faith.

Section 1-201(19) defines “good faith” as “honesty in fact,” and thus follows a number of the uniform commercial acts in making negligence irrelevant to good faith. The adoption of this “subjective” test, sometimes known as the rule of “the pure heart and the empty head,” dates back more than a hundred years in the law of negotiable instruments, to the abandonment of the “objective” standard . . . .<sup>114</sup>

In contrast to section 1-201(19), the section 2-103(1)(b) definition of good faith combines the subjective test of “honesty in fact” contained in section 1-201(19) with the objective test of “the observance of reasonable commercial standards of fair dealing in the trade.”<sup>115</sup> A contracting party who is a merchant that is extracting an increase in the contract price can be simultaneously acting honestly, but not in accordance with reasonable commercial standards of fair dealing in the trade.<sup>116</sup> In such a case, that party is acting in good faith under the subjective standard of section 1-201, thereby making the modification enforceable, but not acting in good faith under the objective standard of section 2-209, thereby making the modification unenforceable.<sup>117</sup> Since the enforceability of the modification may be contingent on which standard is applied, applying the appropriate standard is crucial. Nevertheless, it is unclear under section 2-209 which standard to apply.<sup>118</sup> It could be argued that the Comments to the Code suggest that the Article 2 definition of good faith applies throughout Article 2, even when “good faith” is not specifically cited.<sup>119</sup> However, the “text of section 2-103(1)(b) suggests that its definition should apply only when the term ‘good faith’ is specifically used in Code

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114. Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 812 (1958).

115. U.C.C. § 2-103(1)(b).

116. See Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 210-12 (1968) (generally discussing categories of bad faith, specifically category (7) that addresses bad faith behavior that does not involve dishonesty).

117. See *supra* text accompanying notes 114-17.

118. *Id.*

119. See U.C.C. § 1-201(19) cmt. 20 (2007); *id.* § 2-209 cmt. 2.

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text.”<sup>120</sup> To further compound this dilemma, the clause “unless the context otherwise requires” prefaces both section 1-201(19) and section 2-103(1)(b). The ambiguity and uncertainty surrounding the good faith component of an enforceable modification makes the Code approach to contract modification confusing and complex.<sup>121</sup> Despite this confusion, or perhaps as a result of it, “no court, as of yet, has made a major effort to unravel the meaning of good faith in the context of Code modification cases . . . [courts have] ignored, or largely ignored, the good faith issue in situations that seemed to call for an inquiry. . . .”<sup>122</sup> No court has yet to outline the scope and application of good faith in the modification context. As was observed by Professor Hillman,

Rather than wrestle with the broad good faith notion, it is much easier simply to enforce the modification. Consequently, good faith will not be very helpful, at least in the modification context, because even with the definitions supplied by the Code (or perhaps because of them), the concept is too confusing.<sup>123</sup>

### B. *Application of Good Faith Standard*

Regardless of which standard of good faith is applied, the Code’s approach to the enforceability of modifications is problematic. Suppose the section 1-201(20) subjective “honesty in fact” standard of good faith<sup>124</sup> is used. A party to a contract (promisee), for no reason other than greed, may coercively pressure the other party to the contract (promisor) to agree to an increase in the contract price, with the threat of non-performance unless the promisor agrees. The modification should be unenforceable.<sup>125</sup> However, using the subjective honesty-in-fact standard, it would seem that the modification should be enforceable unless the promisee intentionally misled, deceived, or was otherwise dishonest toward the promisor.<sup>126</sup> Simply acting unfairly, unjustly, or wrongly, or even using methods and

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120. Hillman, *supra* note 19, at 859; *see also* E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 675-76 (1963); Summers, *supra* note 116, at 212.

121. *Policing Contract Modifications under the UCC*, *supra* note 19, at 857.

122. *Id.* at 875.

123. *Id.* at 876.

124. U.C.C. § 1-201(20) (2001).

125. Hillman, *supra* note 19, at 859.

126. *Id.*

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techniques that do not comport with societal standards of fair dealing, would not seem sufficient to find bad faith (“dishonesty”).<sup>127</sup> This apparent result raises the question of whether it is sound policy to base the enforceability of a modification solely on intent to deceive, and not to take into account whether the promisee acted fairly or reasonably.<sup>128</sup>

The objective standard of good faith set forth in section 2-103(1)(b), which requires that good faith conform to “commercial standards of fair dealing in the trade,”<sup>129</sup> is also problematic. In many cases, there will not be a trade practice. In other cases, there may be a trade practice, but it might not be specific enough to determine whether the promisee crossed the line of fair dealing. Further, even if a trade practice does exist, the practice itself may be unreasonable or unfair. Section 2-209 does not address how these problems should be resolved with respect to modifications.<sup>130</sup>

Unfortunately, the Code also fails to state who has the burden of proof in an action relating to the enforceability of a modification. Do promisors have to show that promisees acted in bad faith? Do promisees have to show that they acted in good faith? The issue of burden of proof is not addressed by the Code.<sup>131</sup>

### C. *Omission of Good Faith Standard from Text*

Even more perplexing is the failure of the drafters to make the good faith standard an explicit part of the text of section 2-209. There are approximately four hundred sections of the U.C.C.<sup>132</sup> Sixty of those sections “make specific reference to the good faith standard.”<sup>133</sup> However, in section 2-209, where the good faith standard should be specific, there is no mention of it at all.<sup>134</sup> Because of its absence, many courts have ignored the good faith requirement altogether, even where the facts suggest good faith may be an issue.<sup>135</sup> Also, “[u]nless lawyers seeking to

127. *Id.*; see also Donald B. King, *New Conceptualism of the Uniform Commercial Code: Ethics, Title, and Good Faith Purchase*, 11 ST. LOUIS U. L.J. 15, 25 (1966).

128. Hillman, *supra* note 19, at 859-60; Farnsworth, *supra* note 121, at 671-72.

129. U.C.C. § 2-103(1)(b).

130. Hillman, *supra* note 19, at 859.

131. *Id.* at 861.

132. Teeven, *supra* note 11, at 450.

133. *Id.*

134. *Id.*

135. *Id.* at 451; see also *id.* at 451 n.375 (citing *Barnwell & Hays, Inc. v. Sloan*, 564 F.2d 254 (8th Cir. 1977); *Farmland Serv. Coop., Inc. v. Jack*, 242 N.W.2d 624 (Neb. 1976) (where questionable conduct was involved but the court did not discuss good faith));

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wrestle with modifications problems are made aware that section 2-209(1) is neither exclusive nor dispositive of issues of modification, the ‘good faith in performance’ requirement buried in [A]rticle 1 of the Code and in the Code Comments will not be employed to police contract modifications.”<sup>136</sup>

D. *Who Must Exercise Good Faith*

Comment 2 not only makes good faith of the parties a requirement for the enforceability of a modification,<sup>137</sup> but it appears to make good faith the entire test. However, only the good faith of the party who initiates the modification should be considered.<sup>138</sup> It makes no sense to invalidate a modification where the party who initiates a modification exercises good faith, but the party who accedes to the modification does not.<sup>139</sup> When the initiating party exercises good faith, the bad faith of the acceding party should not be the basis for the modification not being enforced.<sup>140</sup> Suppose, for example, the initiating party (promisee), for proper and justifiable reasons caused by unforeseen circumstances, using no coercion or duress, proposes that the contract price be increased by a reasonable amount.<sup>141</sup> The other party (promisor) accedes to the proposed price increase, but does not intend to pay it.<sup>142</sup> Why should the bad faith of the acceding party nullify the modification?<sup>143</sup> It should not. To do so would be to reward the party acting in bad faith by giving him free reign to renounce the modification at will.<sup>144</sup> According to Russell, “[t]he [acceding] party’s intention to perform, *vel non*, should be irrelevant to the inquiry of the enforcement [of modification] under section 2-209. Moreover, an investigation of the [acceding] party’s subjective intent is at cross purposes with the accepted standard of objective manifestation of intent.”<sup>145</sup>

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Pirrone v. Monarch Wine Co. of Ga., 497 F.2d 25 (5th Cir. 1974); Mott Equity Elevator v. Scihovec, 236 N.W.2d 900 (N.D. 1975).

136. See Hillman, *supra* note 19, at 858.

137. Irma S. Russell, *Reinventing the Deal: A Sequential Approach to Analyzing Claims for Enforcement of Modified Sales Contracts*, 53 FLA. L. REV. 49, 72 (2001); see also U.C.C. § 2-209 cmt. 2 (2001).

138. Russell, *supra* note 138, at 72.

139. *Id.*

140. *Id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *Id.* at 72-73.

145. *Id.* at 73.

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## VI. RESTATEMENT (SECOND) RULE

The Restatement (Second) of Contracts addresses the pre-existing duty rule in two sections. Section 73 retains the pre-existing duty rule because modifications without additional consideration are likely to have been “obtained by an express or implied threat to withhold performance of a legal duty.”<sup>146</sup> To avoid the problem of sham consideration making a modification enforceable, section 73 requires that the additional consideration be “more than a pretense of bargain.”<sup>147</sup> Section 89 dispenses with the consideration requirement of section 73, providing that a “promise modifying a duty . . . is binding . . . if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made.”<sup>148</sup>

The Restatement attempts to synthesize the cases and doctrines that have rejected, avoided, excepted, or circumvented the pre-existing duty rule, including such things as mutual rescission, unforeseen circumstances, duress, new consideration, and detrimental reliance.<sup>149</sup> In contrast to U.C.C. section 2-209, the Restatement provides more guidance on the standard for determining when a modification is enforceable. By making a modification enforceable under section 89(a) if it is “fair and equitable in view of circumstances not anticipated by the parties when the contract was made,” the focus is on the modification itself, rather than on the contract. Moreover, the standard of “fair and equitable” is put in the context of “circumstances not anticipated by the parties,” thereby facilitating the determination of “fair and equitable.”<sup>150</sup>

It should be emphasized that section 89(a) does not require that *unforeseen* circumstances be shown to make a promise binding, the condition required by the cases addressing this principle.<sup>151</sup> It only requires *unanticipated* circumstances—a much broader condition.<sup>152</sup> This different language was not the result of careless drafting. Comment b to the Restatement states: “The reason for modification must rest in circumstances not ‘anticipated’ as part of the context in which the contract was

146. RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. a (1979).

147. *Id.* § 73 (providing that “[p]erformance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain”).

148. *Id.* § 89.

149. See 2 PERILLO & BENDER, *supra* note 7, § 7.6, at 357.

150. See RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1979).

151. *See id.*

152. *Id.*

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made, but a frustrating event may be unanticipated for this purpose if it was not adequately covered, even though it was foreseen as a remote possibility.”<sup>153</sup>

Regrettably, the Restatement (Second) is replete with problems. Its approach to modifications “is confusing because the rules are only partially responsive to, and in some ways run counter to, the goal of contract modification law: enforcing voluntary modifications and precluding coerced ones, in order to foster the policies of freedom to adapt to change and of stability to facilitate planning.”<sup>154</sup>

A. *Section 73 vs. Section 89*

The initial problem is that the relationship between section 73 to section 89 is unclear and confusing, and the Restatement (Second) does not endeavor to resolve this ambiguity and uncertainty. Section 73 seems essentially to embrace the pre-existing duty rule by indicating that consideration is required.<sup>155</sup> On the other hand, section 89 seems to reject the pre-existing duty rule by making enforceability contingent upon whether the “modification is fair and equitable in view of circumstances not anticipated” rather than consideration.<sup>156</sup>

B. *Executory Contract*

The scope of section 89 is limited to a “contract not fully performed on either side.”<sup>157</sup> Restatement (Second) does not proffer any reason for this limitation. Nor do the comments to section 89 explain the reason for the limitation. If a modification is freely consented to after a party has fully performed because that party believes that it is to his interest to agree to the modification, there is no reason why that modification should not be enforced *solely* because the contract is “fully performed” by one of the parties.<sup>158</sup>

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153. *Id.*

154. Hillman, *supra* note 22, at 688.

155. See RESTATEMENT (SECOND) OF CONTRACTS § 73.

156. *Id.* § 89.

157. *Id.*

158. *Id.*; see also Teeven, *supra* note 11. *But see*, Russell, *supra* note 138, at 74-75 (speculating as to why the Restatement may be limited to cases where one party has not performed).

### C. Fair and Equitable

Section 89 provides that a modification is binding if it is “fair and equitable in view of circumstances not anticipated by the parties when the contract was made. . . .”<sup>159</sup> Of course, the standard of “fair and equitable” is intrinsically vague and ambiguous. Moreover, it is not clear whether “fair and equitable” is an objective standard, or whether it may be determined by the subjective states of mind of the parties to the contract. Further, if it can be subjectively determined, would the modification be “fair and equitable” where one party believes it is, but the other does not? If so, does it matter which party believes the modification to be “fair and equitable?” Those questions are not addressed by the Restatement.

Ostensibly, it would seem that the real reason for requiring that the modification be “fair and equitable” is to ensure that the modification was not coerced. If a modification is not “fair and equitable,” that may indicate coercion, the prevention of which, as stated above, is the principal objective of the pre-existing duty rule. However, comment b to section 89 states that “‘fair and equitable’ goes beyond absence of coercion and requires an objectively demonstrable reason for seeking a modification.”<sup>160</sup> If comment b is to be taken seriously, section 89 is overbroad. Not only must there be unanticipated circumstances, and not only must the modification be fair and equitable (whatever that means, and whomever determines that), and not only must the modification be devoid of any coercion, but there must also be a reason for the modification.<sup>161</sup> Comment b does not set forth why there must be a reason for the modification, nor how it relates to the fairness of the modification.<sup>162</sup> There may be a reason for the modification, yet it can still be coerced, unfair, and inequitable.

Moreover, even if a modification is found *not* to be “fair and equitable,” that should not, *ipso facto*, render the modification unenforceable. A specific contract may be only part of a continuing or extensive relationship between the parties. A party may agree to a modification that is not “fair and equitable” in a contract either for reasons of good will, because a concession was received in another transaction, or in hopes of receiving a future benefit from the other party.<sup>163</sup>

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159. RESTATEMENT (SECOND) OF CONTRACTS §89 (1979).

160. *Id.* § 89 cmt. b.

161. *Id.*

162. *See id.*

163. Hillman, *supra* note 22, at 700 & n.119.

#### D. *Unanticipated Circumstances*

When do circumstances arise that are not anticipated by the parties? Although not addressed in the text of section 89, comment b states:

The reason for modification must rest in circumstances not “anticipated” as part of the context in which the contract was made, but a frustrating event may be unanticipated for this purpose if it was not adequately covered, even though it was foreseen as a remote possibility. When such a reason is present . . . other circumstances may be relevant to show or negate imposition of unfair surprise.<sup>164</sup>

Determining what was anticipated by the parties at the time the contract was entered into is difficult enough. Comment b further compounds this burden by requiring not only an assessment of what was or was not anticipated, but also what was foreseeable only “as a remote possibility.”<sup>165</sup> Read literally, comment b would require the parties “to provide for all eventualities in their contracts in order to avoid the claimed right to modify on the basis of unanticipated eventualities.”<sup>166</sup> Such language in comment b is inconsistent with the text of section 89 and with the plain meaning of the term “unanticipated.” Can something more than a “remote possibility” be “unanticipated?” It would seem so.

If this was not confounding enough, comment b ends by changing the standard from “unanticipated circumstances” to “unfair surprise.”<sup>167</sup> Are these terms meant to be synonymous? Is an unfair surprise necessarily an “unanticipated circumstance?” As in the rest of comment b, no explanation is given for this additional bit of gratuitous confusion.

The illustrations contained in comment b also fail to dispel the confusion or illuminate a solution regarding “unanticipated circumstances.”<sup>168</sup> Illustration 1, involving an excavator who unexpectedly encounters rock, increasing the cost of performance nine-fold, is an example of impracticability.<sup>169</sup> Illustration 2,

164. RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1979).

165. *Id.*

166. Hillman, *supra* note 22, at 695.

167. RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b.

168. Hillman, *supra* note 22, at 695.

169. See generally RESTATEMENT (SECOND) OF CONTRACTS § 261; MURRAY, *supra* note 50, § 112; 1 FARNSWORTH, *supra* note 1, § 9.6. Section 261 provides:

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involving an error made by a contractor in his bid, is a case of mistake.<sup>170</sup> Illustration 3 involves an employee employed under a written contract who receives an employment offer from a third party for more money.<sup>171</sup> The current employer and employee tear up the old employment contract and enter into a new one, adding additional compensation.<sup>172</sup> Whether the third-party employment offer constitutes “unanticipated circumstances” could depend, for instance, on the nature of the work, the availability of other comparable labor, the amount of the salary, the location of the work, the skill of the employee, the reputation and notoriety of the employee, and the reputation and notoriety of the third party.<sup>173</sup> Illustration 4 involves a price increase because of the threat of a nationwide strike.<sup>174</sup> Illustration 5 involves a price increase because of an increase in the cost of materials.<sup>175</sup> Both Illustrations 4 and 5 involve price increases which “could be either anticipated or unanticipated, [so] the illustrations are not helpful in sorting out anticipated from unanticipated circumstances.”<sup>176</sup>

#### E. *Section 89(c) and Reliance*

Section 89(c) provides that a modification is enforceable “to the extent that justice requires enforcement in view of material change of position in reliance on the promise.”<sup>177</sup> Presumably, the purpose of section 89(c) is to assure that a party who relies, however, on an improperly obtained modification may not enforce it.<sup>178</sup> Once it is determined that the modification was not the result of coercion, the modification should be enforced, even in the absence of reliance. Consequently, if a promisee coerces the

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Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

RESTATEMENT *supra*, § 261. Impracticability, therefore, is based on the subjective assumptions of the parties. Although not clear, section 89 seems to consider what should be reasonably anticipated by the parties, an objective standard. Further, the defense of impracticability excuses performance; it does not render a modification enforceable.

170. RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b, illus. 2.

171. *Id.* § 89 cmt. b, illus. 3.

172. *Id.*

173. See Hillman, *supra* note 22, at 694-96.

174. RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b, illus. 4 (1981).

175. *Id.* § 89 cmt. b, illus. 5.

176. Hillman, *supra* note 22, at 695.

177. RESTATEMENT (SECOND) OF CONTRACTS § 89(c).

178. See Hillman, *supra* note 22, at 701.

promisor to agree to increase the contract price, reliance on the increased price by promisee should not make the modification enforceable. Conversely, if there is no coercion, the modification should be enforceable. Since the objective of the law of modification is to enforce only freely-made modifications, and to deny coerced modifications, “reliance” is a false issue that neither adds nor changes anything.<sup>179</sup>

Moreover, section 89(c) provides no guidance as to what kind of reliance is necessary to make a modification enforceable.<sup>180</sup> It could be argued that merely continuing to perform under the modified contract would satisfy the section 89(c) reliance requirement.<sup>181</sup> However, this would lead to the paradoxical result that performance of a pre-existing duty could be unenforceable for lack of consideration, but enforceable due to detrimental reliance.<sup>182</sup> Illustration 7 to section 89 does suggest that something more than mere performance is necessary to constitute reliance under section 89(c), but does not indicate what more is required.<sup>183</sup> Section 89(c) “[has] left us to fend for ourselves.”<sup>184</sup>

## VII. OBSOLESCENCE OF THE RULE

If the elimination of coercive modifications ever justified the pre-existing duty rule, that reason no longer exists. As shown above, the pre-existing duty rule does not effectively accomplish that. More importantly, at least three contract doctrines currently address, virtually exclusively, whether a promise has been freely and voluntarily made. Each of these doctrines does directly what the pre-existing duty rule does indirectly,

179. *Id.* at 701-02.

180. *Id.* at 702.

181. Knapp, *supra* note 25, at 75.

182. *Id.* at 75-76.

183. RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. d, illus. 7 (1981) provides:

A is the lessee of an apartment house under a 99-year lease from B at a rent of \$10,000 per year. Because of war conditions many of the apartments become vacant, and in order to enable A to stay in business B agrees to reduce the rent to \$5,000. The reduced rent is paid for five years. The war being over, the apartments are then fully rented, and B notifies A that the full rent called for by the lease must be paid. A is bound to pay the full rent only from a reasonable time after the receipt of the notification.

It should be noted that illustration 7 is expressly based on the *High Trees House* case. *See generally* Cent. London Prop. Trust, Ltd. v. High Trees House, Ltd., [1947] K.B. 130. However, in that case, the basis for the Court’s decision was not reliance, but rather that the party’s agreement to reduce the rent was intended to last only so long as the war conditions lasted. *See id.*

184. Knapp, *supra* note 25, at 76.

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rendering a modification unenforceable where it was coerced. Consequently, contract law is equipped to handle coerced modifications without being saddled with the baggage of the pre-existing duty rule.

#### A. *Duress*

Duress is one doctrine that is often employed by courts to police modifications that are not considered to be entered into freely.<sup>185</sup> It is explained by the statement that “any wrongful act or threat which overcomes the free will of a party constitutes duress.”<sup>186</sup> Such wrongful threats include a threat by a party to breach a contract unless the contract is modified, where the breach, if carried out, would result in irreparable or substantial injury.<sup>187</sup> Further, duress also has been found where a party threatens to breach a contract unless the other side agrees to a modification, where such threat constitutes bad faith.<sup>188</sup>

#### B. *Economic Duress*

A separate doctrine related to duress that courts use to invalidate coerced promises in a modification is economic duress. Economic duress requires: “(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party.”<sup>189</sup> In essence, economic duress can be asserted where a party demands that a contract be modified under such circumstances that the other party has little economic choice but to accede.<sup>190</sup>

185. JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 316 (5th ed. 2003).

186. *Id.* (citing *Kaplan v. Kaplan*, 182 N.E.2d 706, 709 (Ill. 1962); *Austin Instrument v. Loral*, 272 N.E.2d 533, 535 (N.Y. 1971)).

187. PERILLO, *supra* note 186, at 325; 2 PERILLO & BENDER, *supra* note 7, § 7.21, at 464-65 (citing *Thompson Crane & Trucking Co. v. Eyman*, 267 P.2d 1043 (Cal. Dist. Ct. App. 1954); *Austin Instrument*, 272 N.E.2d at 535; *Ross Sys. v. Linden Dari-Delite Inc.*, 173 A.2d 258 (N.J. 1961)).

188. MURRAY ON CONTRACTS, *supra* note 50, § 93, at 529; *see also* *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 103 (9th Cir 1902).

189. *Urban Plumbing & Heating Co. v. United States*, 408 F.2d 382, 389 (Ct. Cl. 1969) (quoting *Fruhauf Sw. Garment Co. v. United States*, 111 F. Supp. 945, 951 (Ct. Cl. 1953)); 28 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 71:7 (4th ed. 2003).

190. *See* LORD, *supra* note 190, § 71:7 (citing *Stephens v. Ala. State Docks Terminal Ry.*, 723 So. 2d 83, 85 (Ala. Civ. App. 1998)).

### C. *Unconscionability*

A modification is unenforceable where it is found to be unconscionable.<sup>191</sup> It has been stated that an unconscionable agreement is one “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>192</sup> Unconscionability, however, requires more than simply unfair terms. “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”<sup>193</sup>

Unconscionability also typically operates against one who has superior bargaining power. Accordingly, three elements of unconscionability emerge as it relates to a modification of a contract: first, the modification of a term therein is grossly unfair; second, there is an inequity in bargaining power; and third, the party alleging unconscionability has no reasonable choice but to accept.<sup>194</sup>

The Uniform Commercial Code has embraced the doctrine of unconscionability. In section 2-302(1), the Code states:

If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.<sup>195</sup>

Although the Code does not define “unconscionability,” comment 1 to section 2-302 provides:

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract [or modification].<sup>196</sup>

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191. See *Hume v. United States*, 132 U.S. 406, 413-14 (1889).

192. *Id.* at 411.

193. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

194. See PERILLO, *supra* note 186, §9.40, at 388-90.

195. U.C.C. § 2-302(1) (2005).

196. *Id.* § 2-302, cmt. 1.

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In making the determination of unconscionability under the Code, section 2-302(2) requires the court to consider the “commercial setting, purpose, and effect” of the allegedly unconscionable terms.<sup>197</sup> The effect of the text of the Code and of comment 1 is to prevent coercion, by making a modification unenforceable when there are unfair terms and one party has no meaningful choice but to accept the modification.<sup>198</sup>

## VIII. CONCLUSION

A. *The Pre-Existing Duty Rule is Fatally Flawed*

As shown above, the very foundation of the pre-existing duty rule is fatally flawed. It is based on the specious reasoning that there is no consideration where one modifies an existing contract and promises to pay more for the other contracting party to do that which he is already obligated to do.<sup>199</sup> First, since there is already consideration for the contract, the parties should be free to modify the contract as they see fit, without needing additional consideration. Second, there is, in fact, consideration for the modification. At the very least, when a promisor agrees to pay an additional amount to the promisee for the promisee to perform a pre-existing duty, the promisor is bargaining for the promisee to perform and relinquish its right to breach.<sup>200</sup> In other words, the promisor is bargaining to be made whole by performance, rather than by litigation.<sup>201</sup>

Further, although the goal of the pre-existing duty rule is to prevent coercive modifications,<sup>202</sup> it utterly fails to accomplish that goal. A knowledgeable party may still “coerce” a modification, but change his duty slightly, thereby providing consideration for the modification.<sup>203</sup> Moreover, the fact that a party agrees to modify its contract without consideration does not mean that the modification was coerced.<sup>204</sup> Where unforeseen circumstances arise during the performance of a contract, a party may agree to a modification because he thinks the modification is

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197. *Id.* § 2-302(2).

198. *Urban Plumbing & Heating Co. v. United States*, 408 F.2d 382, 389 (Ct. Cl. 1969).

199. 3 WILLISTON, *supra* note 1, § 7:36.

200. *See supra* Part III.B; *Parrott v. Mexican Cent. Ry. Co.*, 93 N.E. 590, 594 (Mass. 1911).

201. *Parrott*, 93 N.E. at 594.

202. Hillman, *supra* note 19, at 854.

203. *Id.* at 853.

204. MURRAY, *supra* note 50, § 64, at 284-85.

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fair, not because he is coerced.<sup>205</sup> A party may also agree to a modification without consideration for a number of other reasons, e.g., good will, generosity, receipt of a concession or favor in another transaction, or hope of a continued relationship with the other party.

Recognizing that the pre-existing duty rule does not prevent unfair or coerced modifications, and in fact often leads to unfair results, courts have used a number of doctrines to avoid the rule where the modification was not coerced or where the court believed that the modification was fair.<sup>206</sup> Some courts have found consideration where there was none.<sup>207</sup> Other courts have found that where unforeseen circumstances occurred during the performance of the contract that caused performance of a party's contract to be substantially more burdensome, a promise to pay an additional amount for the performance was binding.<sup>208</sup>

Mutual rescission has also been used to avoid the operation of the pre-existing duty rule.<sup>209</sup> In mutual rescission cases, courts have found that when parties modify a contract, they in effect mutually rescind the old contract and enter into a new contract.<sup>210</sup> All the terms are the same under the new contract, except for the price.

Lastly, many courts use detrimental reliance or waiver to avoid the pre-existing duty rule.<sup>211</sup> Using detrimental reliance, courts have found that reliance upon a modification renders the modification enforceable.<sup>212</sup> Using waiver, courts have found that a waiver resulting in a change of a contract duty makes the modification enforceable.<sup>213</sup>

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205. *Id.* § 64, at 284.

206. 2 PERILLO & BENDER, *supra* note 7, §7.6.

207. *See, e.g.*, King v. Duluth, 63 N.W. 1105 (Minn. 1895) (owner promised to pay contractor additional amount if contractor finished job on time and waived delays caused by owner); Melotte v. Tucci, 66 N.E.2d 357 (Mass. 1946) (promise to pay additional amount if contract completed and assertion colorable claim relinquished).

208. *See, e.g.*, United Steel Co. v. Casey, 262 F. 889 (6th Cir. 1920); Brian Constr. & Dev. Co. v. Brighenti, 405 A.2d 72, 76 (Conn. 1978).

209. *See* 1 FARNSWORTH, *supra* note 1, § 4.24.

210. *See* Schwartzreich v. Bauman-Basch Inc., 131 N.E. 887, 890 (N.Y. 1921).

211. *See* Kevin M. Teevan, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47 ALA. L. REV. 387, 412-18 (1996) (discussing the development of the reliance exception to the pre-existing duty law); Castrucci v. Young, 515 N.E.2d 658, 664 (Ohio C.P. 1986) (stating that a waiver can be agreed upon and is sufficient to modify a contract).

212. *See* Teevan, *supra* note 212, at 412-18.

213. *See* Castrucci, 515 N.E.2d at 664.

388 *HOUSTON BUSINESS AND TAX LAW JOURNAL* [Vol. VIII]B. *Failure of the Code and the Restatement*

The Uniform Commercial Code and the Restatement (Second) have also joined the pre-existing duty rule fray. Unfortunately, both are fraught with inconsistencies and problems, and only contribute confusion and ambiguity to an already uncertain application of the rule.

The Code rejects the pre-existing duty rule by providing that a modification does not need consideration to be binding.<sup>214</sup> Although not in the text of the Code, the comments to the Code indicate that a modification must be made in “good faith” to be binding.<sup>215</sup> The Code fails to set forth, however, whether “good faith” in section 2-209 is to be determined by an objective or subjective standard. The Code also fails to state whether both parties, or only one party, must exercise “good faith,” and, if one party, which party. Lastly, the Code fails to specify which party has the burden of proof regarding “good faith.”

The Restatement addresses the pre-existing duty rule in two sections: section 73 and section 89. The first problem with the Restatement is that section 73 seems to embrace the rule, while section 89 seems to reject the rule.<sup>216</sup> The Restatement does not resolve, or even address, this inconsistency. Moreover, section 89, while rejecting the pre-existing duty rule by making a modification binding without consideration, limits its application to executory contracts.<sup>217</sup> This limitation does not make sense, and no reason is proffered for the limitation.

Section 89 requires that the modification be “fair and equitable” in order to be binding.<sup>218</sup> Although the term “fair and equitable” is intrinsically ambiguous, the comments and illustrations following section 89 in the Restatement make no effort to provide any method for determining “fair and equitable,” nor do they even indicate whether an objective or subjective standard should be used. Comment b to section 89 does state that “‘fair and equitable’ goes beyond coercion and requires an objectively demonstrable reason for seeking a modification.”<sup>219</sup>

214. See U.C.C. § 2-209(1) (2007).

215. *Id.* cmt. 2 (referencing § 2-103).

216. Section 73 states, “Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . .” RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981). Section 89 states, “A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made . . .” *Id.* § 89.

217. *Id.*

218. *Id.*

219. *Id.* § 89, cmt. b.

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However, that does not assist in the determination of “fair and equitable.” Rather, it turns a puzzle into a conundrum. There would seem to be no relationship between “fair and equitable” and “an objectively demonstrable reason for seeking a modification.” There may be an objectively demonstrable reason for seeking a modification, whether or not the modification is fair and equitable.

Comment b to section 89 further compounds the “circumstances not anticipated” criterion of section 89 by using interchangeably such terms as “remote possibility” and “unfair surprise.”<sup>220</sup> Are these terms meant to be synonymous? Can an occurrence be more than a “remote possibility,” yet be “unanticipated?” Is an “unfair surprise” necessarily an “unanticipated circumstance?” Again, no effort is made to address these ambiguities in the Restatement.

Section 89(c) provides that a modification is enforceable “to the extent that justice requires enforcement in view of a material change of position in reliance on the promise.”<sup>221</sup> Given that the objective of the law of modification is to enforce only freely-made modifications and to deny coerced modifications, “reliance” is a false issue. If in fact, a modification is coerced, it should not be enforced whether or not there is reliance.

C. *Eliminating the Unnecessary*

The pre-existing duty rule is flawed beyond repair. It does not effectively prevent coercion, its principal objective, and it is based on a legal fiction—failure of consideration. The responses of both the Code and the Restatement to the pre-existing duty rule are incoherent and fail to articulate rules that are internally consistent. The rules that emanate from the Code and the Restatement are problematic to apply and do not lead to consistent and predictable results.

There is a solution, however: eliminate the pre-existing duty rule. Adhering to the pre-existing duty rule, with its concomitant problems and legal fictions, is no longer necessary to prevent coerced modifications. With the growth and development of the legal doctrines of duress, economic duress, and unconscionability, no longer will a coerced modification be enforced. The objective of guarding against coerced modifications can, therefore, be achieved without the rule. Further, without the rule, a freely agreed-to modification would be enforced, without regard to

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220. *Id.*

221. *Id.* § 89(c).

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consideration, thereby satisfying the reasonable presumptions and expectations of the contracting parties. In short, the pre-existing duty rule is unnecessary, and there is no reason for its continued existence:

In sum, the pre-existing duty rule has little to commend it as a device for policing modifications of ongoing contractual arrangements. In the vast majority of the instances of its use for that purpose, it is simply redundant. In other cases, however, the rule causes the kinds of harm that its critics attribute to it. In no single transactional context are the harmful cases particularly numerous, but they recur consistently in virtually every transactional context and collectively provide some impetus to abandon the pre-existing duty rule.<sup>222</sup>

It is “one of the relics of antique law which should have been discarded long ago.”<sup>223</sup> Eliminating the pre-existing duty rule would be eliminating the unnecessary.

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222. Wessman, *supra* note 58, at 771.

223. *Rye v. Phillips*, 282 N.W. 459, 460 (Minn. 1938).