Volume 34
Number 1 *Fall 1999*

*pp.*43-120

Fall 1999

Consensual Path to Abolition of Preexisting Duty Rule

Kevin M. Teeven

CONSENSUAL PATH TO ABOLITION OF PREEXISTING DUTY RULE

Kevin M. Teeven*

I. INTRODUCTION

Despite the myriad of attempts to end the preexisting duty rule, the common law of contract continues to demand that consideration support a promise to modify a contract. Thus, a creditor's promise to accept less than the full debt is unenforceable under the Rule in *Pinnel's Case*[1] and, likewise, a promise to pay more than originally agreed for services to be performed is unenforceable, unless fresh consideration is provided in exchange for either of these modification promises. European civil law and international commercial law generally recognize as binding a promise modifying a contractual relationship. The intellectual legal construct known as the consensual theory provides the theoretical underpinning for the civil law approach, and the consensual theory supplies a logical ground for common law courts to employ or enforce voluntary modification promises unsupported by consideration. The present study begins with the emergence of the consensual theory in nineteenth century America and, then, turns to the reasoning behind the preexisting duty rule and how the consensual theory has been used to partially reform the rule. Finally, there will be an analysis of how these consensual notions, already recognized in the American common law, could be applied to completely abolish the four hundred year old common law preexisting duty rule for all categories of contracts.

II. EMERGENCE OF AMERICAN CONSENSUAL THEORY

The consensual theory has been a guiding principle in determining promissory liability in the United States and in England for over two centuries.[2] The consensual, or at-will, theory ultimately had a greater impact in the United States because of enlightened natural law notions in

---

* J.D., University of Illinois (1971); Professor, Bradley University.

1 77 Eng. Rep. 237 (K.B. 1602).

2 *See* Philip Hamburger, *The Development of the Nineteenth-Century Consensus Theory of Contract*, 7 LAW & HIST. REV. 241, 246-52, 264 (1989) (stating that the consensual theory was emerging by the early eighteenth century); A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L.Q. REV. 247, 258-59, 261-62, 265-66 (1975) [hereinafter Simpson, *Innovation*].

this young Republic that willed to govern itself.[3] The advent of what today is known as the consensual theory appeared in Europe by the seventeenth century as natural law writers like Grotius, among others, resuscitated consensual ideas found in Roman law and Renaissance thought.[4] Emphasis on actionability grounded upon consent was advanced in the eighteenth century by civilian commercial law writers like Pothier.[5] Pothier wrote: "An agreement is the consent of two or more persons to form an engagement."[6] Pothier's ideas became so influential in common law decisions that an English justice declared in 1822 that Pothier's authority was "[a]s high as can be had, next to a decision of a court of justice in this country."[7]

Lord Mansfield introduced the continental ideas of Grotius, Pothier and others into the English common law during the second half of the eighteenth century.[8] Mansfield tried to reconcile consideration with his assumption that the function of the common law of contract was to implement the joint intention of the parties.[9] Mansfield stated in

---

[3] *See* G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 24-27 (1978); Robert Stevens, *Basic Concepts and Current Differences in English and American Law*, 6 J. LEGAL HIST. 336, 338-39 (1985). Although Jefferson was a great proponent of natural law, he was fearful of potential abuse of Mansfieldian civilian prerogative in common law courts and equity. *See* J. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 642-46 (1933). Jefferson's opposition to Mansfield and Blackstone was, of course, influenced by their objections to American colonial indepencence. *See id.* at 644-46. Mansfield and, in turn, Blackstone were heavily influenced by continental natural law ideas of enlightenment thinkers.

[4] 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 328-30 (Francis W. Kelsey trans., Oceana 1964) (1625) (writing that contract arose from the "act of will" of the parties and that natural law would enforce expressed common "intention concerning something in the future"). According to the law of nature and the law of nations, "Nothing is so in harmony with the good faith of mankind as that persons should keep the agreements which they have made with one another." *Id.* at 329.

[5] Pothier, who was more directly influential upon the common law, cited Grotius as a source for Pothier's influential statement: "A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise." M. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS 4 (William David Evans, Esq. trans., Philadelphia, Small 1826).

[6] POTHIER, *supra* note 5, at 3.

[7] Cox v. Troy, 106 Eng. Rep. 1264, 1266 (K.B. 1822) (per Best, J.).

[8] Lord Mansfield (C.J.K.B. 1756-1789) was a product of the Enlightenment. He had been raised in Scotland, a civilian jurisdiction, and educated at Oxford University in Roman law rather than the common law. He readily cited Roman law and writers like Grotius and Pothier in his judicial opinions.

[9] *See* John Baker, *Origins of Consideration*, *in* ON THE LAWS AND CUSTOMS OF ENGLAND 336, 351 (M. Arnold ed., 1981) (stating that Mansfield attempted to revive Justice Plowden's sixteenth century notion of "deliberation" or intention to be bound as an aspect of consideration).

Kingston v. Preston that "[t]he dependance, or independance, of covenants, was to be collected from the evident sense and meaning of the parties" and from "the intent of the transaction."[10] In *Tyrie v. Fletcher*,[11] Mansfield held that "[i]f the parties do not choose to contract according to the established rule, they are at liberty, as between themselves, to vary it." In *Barclay v. Lucas*,[12] he declared that "[t]he question turns on the meaning of the parties."

The introduction of the civilian ideas of Mansfield and of continental writers into American jurisprudence was bolstered by the impact of Blackstone's *Commentaries*.[13] Blackstone, the first university professor of the common law, borrowed civilian commentators' technique of isolating general principles of law from the scattered case law as a means of devising his Oxford University lecture series. This series was effectively an undergraduate general education course providing an overview of the common law for sons of the gentry, most of whom did not intend a career in law. Blackstone was more influential in America than in England because of the accessibility of his overview of the legal system in a legal environment lacking the training advantages of the centralized English bar and courts. In the United States, the legal writings of the first half of the nineteenth century exhibited an openness to the consensual theory notwithstanding the lingering consideration-based dogmatism. In an 1804 appendix to his United States Supreme Court reports, Circuit Judge Cranch wrote: "Every man has a natural right to make such contracts as he pleases . . . and all contracts entered into without fraud or force, are legally and morally obligatory according to their spirit and intent."[14] Evans wrote in his 1806 appendix to his English translation of Pothier's work on obligations: "As every contract derives its effect from the intention of the parties, that intention, as expressed or inferred, must be the ground and principle of every decision respecting its operation and extent, and the grand object of

---

[10] *See* Jones v. Barkley, 99 Eng. Rep. 434, 438 (K.B. 1781) (quoting *Kingston v. Preston*).

[11] 98 Eng. Rep. 1297, 1298 (K.B. 1777). *See also* Robinson v. Bland, 97 Eng. Rep. 717, 718 (K.B. 1760) (finding that a bill of exchange drawn in France has English law applied because "[t]he parties had a view to the laws of England").

[12] 99 Eng. Rep. 676, 678 (K.B. 1783).

[13] *See generally* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (A.W. Simpson ed., Univ. of Chicago Press 1979) (1766). The first common law contract treatise was written in 1790 by John Powell; like Blackstone, he borrowed both technique and content from civil law. *See* JOHN POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS (1790).

[14] 5 U.S. (1 Cranch, Appendix) 367, 423 (1804).

consideration in every question with regard to its construction."[15] William Wetmore Story, son of Justice Joseph Story, wrote in his popular 1844 contracts treatise: "Every contract is founded upon the mutual agreement of the parties."[16] Story stated that contract law enforces "[t]he agreement intended by the parties."[17]

By the first quarter of the nineteenth century, American judicial reasoning was also expressing consensual notions. In an 1810 New York decision, the Court opined "[c]ovenants are to be construed according to the spirit and intent."[18] In an 1822 Pennsylvania opinion, the Court stated "[b]e the common law what it may, the parties have a right to alter and modify it by special contract, and when they have done so, the question is, what is the construction of the contract."[19] In 1832, a Massachusetts court stated "[t]he intent of the parties is to govern."[20] Thus, recognition of the doctrine of offer and acceptance earlier in the nineteenth century signaled a shift from the unilateral notion of a promise supported by consideration to the bilateral concept of whether, under the consensual theory, the parties exhibited a concurrence of intention.[21]

The second half of the nineteenth century presented a checkered story of support for the consensual theory, not only as applied in civil, law but also as an instrument to further the slogan of freedom of contract. Concomitantly, this instrumental perspective opposed consensual ideas when vested contractual property rights were challenged. It was during this period that the major modern challenge to the preexisting rule was debated in the well-known English decision *Foakes v. Beer*,[22] and, predictably, the application of the consensual theory failed to dilute vested contractual rights. In the less precedent-driven

---

[15] POTHIER, *supra* note 5, at 31.

[16] WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL 4 (Boston, Little & Brown 1844).

[17] *Id.* In the next important contract treatise written a decade after Story's, Parsons wrote that "[c]onsent is the essence of a contract." 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 429 (Boston, Little & Brown 1853).

[18] Quackenboss v. Lansing, 6 Johns. 49, 50 (N.Y. Sup. Ct. 1810).

[19] Gordon v. Little, 8 Serg. & Rawle 533 (Pa. 1822).

[20] Kane v. Hood, 30 Mass. (13 Pick.) 281, 283 (1832). *See also* Haynes v. Haynes, 62 Eng. Rep. 442, 445 (1861) ("[I]n order to constitute an agreement or contract, two things are requisite–1stly, the will; and 2dly, some act . . . whereby that will is communicated to the other party.").

[21] Adams v. Lindsell, 106 Eng. Rep. 250 (1818); *see also* Simpson, *Innovation*, *supra* note 2, at 258-59, 265-66.

[22] 9 App. Cas. 605, 609, 615 (H.L. 1884).

American legal system, however, greater experimentation was possible. As a result, consensual ideas did upend the traditional application of the preexisting duty rule in a few American jurisdictions starting around the turn of the twentieth century as these few courts began to enforce consensual modifications that were free of coercion.[23] Complementing this emerging minority position, consensual notions also contributed to the contemporaneous development of nascent forms of policing mechanisms needed to assure the absence of coercion.[24] By the latter part of the nineteenth century, consensual ideas had so infiltrated American legal thought about the consideration contract that the importance of consent was no longer considered novel or even questioned, and American courts ceased making reference to its continental and Mansfieldian origins.[25] This article explores the actual and potential reforming influence of consent on the doctrine of consideration's preexisting duty rule after a look at the reasoning behind the traditional rule requiring fresh consideration to support a modification promise.

III. REASONS FOR PREEXISTING DUTY RULE AND ITS CONTINUED RETENTION

A. Rationale in Support of the Rule

Arguments in support of the rule included more than simply the antiquity of the Rule in *Pinnel's Case,* acknowledged by an obeisant House of Lords in *Foakes.*[26] One justification for Reporter Coke's 1602 dictum does, however, flow naturally from the ancient doctrine because the consistent application of this static rule afforded certainty for business planners when modifications were proposed and discussed.[27] In justifying the rule from the perspective of the doctrine of

---

[23] *See* Rye v. Phillips, 282 N.W. 459, 460 (Minn. 1938); Moore v. Williamson, 104 So. 645, 646-47 (Ala. 1925); Clayton v. Clark, 21 So. 565, 568-69 (Miss. 1896); Frye v. Hubbell, 68 A. 325, 334 (N.H. 1907); *see also* Williams v. Roffey Bros. & Nicholls (Contractors) Ltd., 1 Q.B. 1 (C.A. 1991).

[24] Good faith, economic duress and unconscionability will be discussed in detail later in this article. *See supra* notes 228-302 and accompanying text.

[25] This pattern is repeated over and over in the nineteenth century of American decisions subsequent to an originating American precedent making no reference to the English or continental sources invoked in the originating precedent.

[26] *See Foakes,* 9 App. Cas. at 609, 615; Pinnel's Case, 77 Eng. Rep. 237 (K.B. 1602).

[27] Janet O'Sullivan, *In Defence of* Foakes v. Beer, 1996 CAMBRIDGE L.J. 219, 226. O'Sullivan also defended the preexisting duty rule on grounds that sound a lot like *Pinnel's Case's* debt logic of *quid pro quo. Id.* at 224-25 (stating that, because money differs from services and other assets because it is a universal measure of value, full debt must be paid).

consideration, the application of the principles bundled in that doctrine to an accord fact situation generates the conclusion that the promisor received no benefit, since he would receive nothing that he did not already have a right to, and that the promisee suffered no detriment because he was already obligated. In the early assumpsit case *Richards v. Bartlett*,[28] decided prior to *Pinnel's Case*, essentially the same analysis was made; this was still the doctrinal view in cases contemporaneous with *Foakes*.[29] The vested property rights acquired in the original bargain could not be taken away by a latter promise adjusting that bargain.

Advocates of the application of the preexisting duty rule to an accord to pay less than the original bargain required could point to abuses averted, such as unconscionability, coercion, bad faith, undue influence, and deception employed to threaten cessation of performance unless a modification agreement was reached.[30] Proponents of the rule also argued that the party with bargaining leverage to abuse was not always the creditor because creditors could likewise find themselves in the weaker economic position; they further agreed that the rule afforded no incentive to stronger parties, like public utilities, insurance companies or banks, to attempt unfair settlements because all modifications, including a pressured reduction, would be unenforceable.[31] In addition, looking at any incentive afforded by the preexisting duty rule from other perspectives, a sharecropper or a manager promised a bonus based on performance will exert more effort if he or she knows that the contract terms can not be modified.[32] Furthermore, if an enforceable modification is easy to make, it could encourage underbidding in order to secure the contract, knowing that dickering can occur later.[33]

A special area of concern over coercion involved existing duties of employees and contractors, both public and private, where advantage

---

[28] 74 Eng. Rep. 17 (K.B. 1584).

[29] *See, e.g.*, Vanderbilt v. Schreyer, 91 N.Y. 392 (1883) (holding that performance of preexisting duty is neither a benefit to promisor nor a detriment to promisee); Warren v. Hodge, 121 Mass. 106 (1876).

[30] *See* Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 937 (1958).

[31] *See* Harold C. Havighurst, *Consideration, Ethics and Administration*, 42 COLUM. L. REV. 1, 27-31 (1942).

[32] *See* Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203, 214, 216 (1997).

[33] *See* Antony Dnes, *The Law and Economics of Contract Modification: The Case of* Williams v. Roffey, 15 INT'L REV. L. & ECON. 225, 231 (1995). Barring modifications keeps down transaction costs. *Id.* at 230; *see also* O'Sullivan, *supra* note 27, at 225.

might otherwise be taken when the employer was vulnerable.[34] The decisions vacillated between policy and lack of consideration as the ground for rejecting the employees' claims. The early cases involved seamen promised additional wages to perform extra work during a storm or after desertions. These cases have a close parallel to accord agreements; in an accord, the modified agreement is for the debtor to pay less, and, in a wage case, the modified agreement is for the employer to pay more. By the late nineteenth century, the analysis of these employment and contractor cases would be subsumed under the consideration-based rule in *Pinnel's Case*.[35] In *Harris v. Watson*,[36] Lord Kenyon refused the additional seamen's wages for extra work done while a ship was in danger "on a principle of policy, for if sailors were in times of danger entitled to insist on an extra charge," it would "materially affect the navigation of this kingdom." In *Stilk v. Myrick*,[37] Lord Ellenborough doubted Lord Kenyon's policy ground, saying that

---

[34] Many of these cases involve law enforcement officers bargaining to obtain private advantage for performing their duties and are usually refused on public policy grounds. *E.g.*, Somerset Bank v. Edmund, 81 N.E. 641 (Ohio 1907) (holding that defendant is not entitled to a reward); *but cf.* Board of Comm'rs v. Johnson, 266 P. 749 (Kan. 1928) (holding that the reward was allowed because constables had no duty to arrest fugitive from another state). There are constitutional bars to agreeing to pay extra money for government contractors. *See* Kizior v. City of St. Joseph, 329 S.W.2d 605 (Mo. 1959); McGovern v. City of New York, 138 N.E. 26 (N.Y. 1923).

[35] The law lords in *Foakes* casually cited precedents regarding accords to pay less and the seamen's wage increase cases as fitting under the rule in *Pinnel's Case*. *See* Foakes v. Beer, 9 App. Cas. 605, 609, 615 (H.L. 1884). This influenced consolidation of modifications for increased and decreased duties under *Pinnel's* preexisting duty rule. *Id.*

[36] 170 Eng. Rep. 94 (1791). From an equitable perspective, this plaintiff is in a weaker position than the plaintiffs in the next two seamen's cases because he was holding up the captain when in dire straits. It could be harmful to the morale of the remainder of the crew were the court to hold otherwise here.

[37] 170 Eng. Rep. 1168, 1169 (1809) (two deserters). *Accord* Alaska Packers' Ass'n. v. Domenico, 117 F. 99, 102 (9th Cir. 1902) (finding no consideration in similar promise in remote place to pay seamen and workers more). *But cf.* GRANT GILMORE, THE DEATH OF CONTRACT 23-28 (1974) (criticizing the use of consideration logic in this case). In *Yates v. Hall*, 99 Eng. Rep. 979 (K.B. 1785), a British sailor was induced by promise of payment by the captain to become a hostage for nearly four years as security for ransom in an incident during the American Revolutionary War. Lord Mansfield granted the plaintiff his extra wages, which were in excess of the value of the ship's cargo, because the agreement was a benefit to the owner, was a "just contract" and he added, "I should be very loth to say, that this sailor, who has been the means of obtaining the liberty of the rest of the crew, should not receive his wages; and I have not been able to bring myself to say that upon principle he shall not recover." *Yates*, 99 Eng. Rep. at 984. Policy seems a better way of handling these cases. *See* ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 57 (1979) (stating that, if modifications of seamen's wages were enforced by courts, seamen could not expect to be paid a high wage thereafter because the employer would know that seamen need not honor the contract and could extort).

"[t]he agreement is void for want of consideration" because they had a duty under the original contract to do all they could to assist after others deserted. A parallel American seamen's wage suit involving renegotiations on the high seas also ruled against the seamen.[38]

The pendulum then briefly swung back to policy logic in *Harris v. Carter*,[39] a seaman's wages case, when Lord Campbell declared: "I cannot . . . agree with Lord Ellenborough . . . in discarding the ground of public policy on which Lord Kenyon relied . . . for I think it could be most mischievous to commerce . . . ." The seaman's counsel stated that there was consideration for the agreement for extra wages because of his extra labor as a result of the desertions; but Campbell asserted that, had the plaintiff been discharged and then entered into a "fresh contract," only then would there be consideration.[40] It may have been preferable for these employment cases to be administered under the public policy ground of averting economic duress; however, after consideration, logic entered the bargaining, the duress issue was ignored, and these cases were eventually placed under the absolute rule in *Pinnel's Case*. Despite the fact that only one of the holdings in the above three seamen's cases was based primarily on consideration, none of the three cited the *Pinnel's Case*, and all three were cited in *Foakes* as supportive of the rule in *Pinnel's Case*.[41] Thus, both increases and decreases in original contract obligations were becoming viewed as governed by the single doctrine now referred to as the preexisting duty rule. The English decision in *Foakes* inadvertently had the effect of pulling a variety of contractual modifications, accords, releases, rescissions, and substitutions under a unifying and, as a result, stronger doctrine applicable to attempted increases, decreases, and discharges of contractual obligations both to pay money and to perform services. The demands of the monistic

---

[38] *See* Alaska Packers' Ass'n v. Domenico, 117 F. 99, 102 (9th Cir. 1902) (denying recovery to fishermen and sailors who demanded more money in an isolated location during a short fishing season).

[39] 118 Eng. Rep. 1251, 1253 (1854). The accepted practice was that seamen were expected to perform whatever duties were necessary during a voyage.

[40] *Id.* This dictum would be exploited in American cases under the fiction of a rescission of the original contract and a later substitution of a new contract, thus averting the preexisting duty rule.

[41] *See* James B. Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515, 527-28 (1899). Given the rule in *Pinnel's Case*, it follows that a promise in consideration of a duty owed would be invalid, but Ames could only find the seamen's cases on point. *Id.* The attorney for the debtor in *Foakes* argued that the seamen's wages cases were decided on public policy rather than consideration. Foakes v. Beer, 9 App. Cas. 605, 609 (H.L. 1884). This was true of two of the three seamen's wages cases.

doctrine of bargain consideration was maintained by, or upheld by, most twentieth century common law judges. This unitary principle corralling these various modification agreements fulfilled the modern codifying urge to formulate uniform and predictable standardized rules.[42]

B. Restatement (Second) of Contracts *Retains Rule*

Because only a handful of state supreme courts and legislatures had completely abrogated the preexisting duty rule when the *First Restatement of Contracts* was being prepared in the 1920s, it is hardly surprising that the drafters elected to reaffirm the old rule.[43] They might have led by adopting the impulse in the scattered reforms to modernize the common law, as they did in converting nineteenth century cases of justifiable reliance on gratuitous promises into the broad, and ultimately successful, principle of promissory estoppel; but, they resisted by departing from the entrenched defense. When a second effort at restating contract law was undertaken in the 1960s and 70s, the restaters incorporated the expanding equitable exceptions for reliance and unanticipated circumstances, which were present in the case law in greater proportions than at the time of the *First Restatement*; but, they still did not see change justifying abrogation of Coke's enduring dictum. This section considers the reasoning for the retention of the preexisting duty rule in the *Second Restatement of Contracts*. The exceptions recognized by the restaters in instances of statutory reforms and of judicial reforms, in cases of unanticipated circumstances and reliance, will be analyzed later in this study.

The rationale the restaters gave for reaffirming the preexisting duty rule was that contract modifications raised suspicions of duress, unconscionability and mistake, and the best way to render "unnecessary any inquiry into the existence of such an invalidating cause" was to refuse enforcement without fresh consideration.[44] The restaters saw averting duress as a goal higher than realization of contractors' adjusted consent; therefore, they were more strict than traditional law in denying

---

[42] *See, e.g.*, CHRISTOPHER LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Boston, Little & Brown 1871); JOHN SMITH, A SELECTION ON LEADING CASES (8th ed. 1879). *See also* KERMIT L. HATT ET AL., AMERICAN LEGAL HISTORY 316-25 (1991) (discussing the 19th century codification movement).

[43] *See* RESTATEMENT OF CONTRACTS §§ 76 cmt. a, 84 cmts. c-d (1932).

[44] RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. a (1979).

the existence of consideration when there was a pretense of consideration in the form of a novelty or a peppercorn.[45]

A different perception of the role of consideration in relation to coercion, suggested recently in judicial dictum, might encourage the finding of consideration in the absence of coercion: "The modern cases tend to depend more on the defence of duress in a commercial context rather than lack of consideration for the second agreement."[46] *Rexite Casting Co. v. Midwest Mower Corp.*[47] provides an example of how consideration can be employed as a tool to avert suspected duress. In this case, a manufacturer of aluminum casting gave the buyer a take-it-or-leave-it offer to modify their contract by raising the price fifty percent, due to a false claim of an increase in the cost of metal.[48] The buyer protested but acquiesced because it was in the middle of production and did not have time to find the castings elsewhere.[49] The modification implied coercion, but instead of struggling with whether the facts fell under the abstraction of economic duress, the court simply declared that consideration was absent.[50] In this way, a modern court can act as a chancellor in equity and find consideration lacking if the factual pattern raises a strong suspicion of coercion; but if the modification seems fair, the court can either find a benefit or a detriment, or find an exceptional ground applicable.[51] For example, had the *Rexite Casting* modification been free of coercion and the claim of a price increase legitimate,[52] the

---

[45] When the novelty exception was announced in *Pinnel's Case*, the court did not expect the resulting benefit of averting duress through this accord rule. Modern consensual theory views of the rule justify Coke's rule from the standpoint of avoiding duress; under this view, to allow a novelty to support a modification and thus permit the coercion would be absurd.

[46] Williams v. Roffey Bros. & Nicholls (Contractors) Ltd., 1 Q.B. 1, 21 (C.A. 1991) (per Purchas, L.J.).

[47] 267 S.W.2d 327 (Mo. 1954).

[48] *Id.* at 329.

[49] *Id.*

[50] *Id.* at 331 (reasoning that defendant received nothing additional but instead had to pay more for same castings). There had been an attempt to establish economic duress at the trial level, but the trial court refused it. *Id.* at 330.

[51] An analogy to the treatment of adequacy of consideration at-law and in equity seems appropriate. At-law, adequacy of consideration is irrelevant (e.g., a novelty); but, if specific performance is requested in equity, the court will look to the relationship between the price and the property value in passing on questions of fraud, unfairness, duress, etc. *See* George v. Schuman, 168 N.W. 486, 488 (Mich. 1918).

[52] Given enough time, the buyer later found castings from another supplier at near the original contract price, which raised questions about the legitimacy of the claim that the price increase modification in *Rexite Casting* was necessary or reasonable. *Rexite Casting*, 267 S.W. at 329.

court could have pointed to the increase in the price of metal as an instance of the now recognized exception of an unanticipated change in circumstances.[53]

A more straightforward way would, of course, be to analyze whether a voluntary consensual transaction was made in good faith, as is done under section 2-209(1) of the *Uniform Commercial Code* ("UCC").[54] By starting with section 73 of the *Second Restatement* general bar on modifications and its presumption of duress, the parties' common intention is obviously going to be dashed more often than if the common law starts with the presumption that a consented-to modification is binding, subject to countervailing proof of coercion or bad faith.[55] The drafters of section 73 were torn between a presumption of coercion and the acknowledged merit of enforcing the parties' "equitable adjustment in the course of performance of a continuing contract . . . ."[56] The recent opinion of an English justice on the subject of the preexisting duty rule might provide a guidepost for judges to work their way through this issue:

> Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect the true intention of the parties.[57]

The drafters of section 73 confessed in their schizophrenic comment (c) that there were criticisms in retaining the preexisting duty rule because it was based on "scholastic logic"; it did not admit the benefit of modifying an agreement by offering a "bonus to a recalcitrant promisor to induce performance without legal proceedings."[58] But then the

---

[53] *See* RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1979). The court said, however, that there was no such exception to the requirement of consideration recognized in Missouri. *Rexite Casting*, 267 S.W.2d at 331.

[54] *See* U.C.C. § 2-209(1) (1999).

[55] *See* RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979).

[56] *Id.* at § 73 cmt. c (expressing frustrated solicitude "where an impecunious debtor has paid part of his debt in satisfaction of the whole").

[57] Williams v. Roffey Bros. & Nicholls (Contractors) Ltd., 1 Q.B. 1, 18 (C.A. 1991) (per Russell, L.J.).

[58] RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. c (1979).

comment quickly retreated by adding that "an unscrupulous promisor may threaten breach in order to obtain such a bonus."[59]

IV. CRITICISMS OF THE RULE

Foakes, the English case that infused the rule in *Pinnel's Case* with increased vitality, also generated judicial musings regarding well-founded criticisms.[60] Lord Fitzgerald lamented that "some of the distinctions which have been engrafted on [the rule in *Pinnel's Case*], make the rule itself absurd."[61] Lord Blackburn, the leading scholar on the court, initially thought there was consideration in the business benefit of prompt part payment of a debt.[62] Lord Blackburn found solace in the support given to the *Pinnel's Case* rule in the note to *Cumber v. Wane*[63] in John Smith's influential nineteenth century *A Selection Of Leading Cases*.[64]

In *Cumber*, Chief Justice Pratt rendered a muddled opinion where he began by saying that a later modified agreement could be enforced; but then, he became hung up on an inappropriate analysis of adequacy stating that "as the plaintiff had a good cause of action, it can only be extinguished by a satisfaction he agrees to accept; and it is not his agreement alone that is sufficient, but it must appear to the Court to be a reasonable satisfaction . . . ."[65] One cannot help but wonder if Pratt's clumsy reliance on inadequate consideration might not be the misguided sub-text in decisions that keeps the preexisting duty rule alive. In *Sibree v. Tripp*,[66] Exchequer Court Barons Parke and Pollock rejected Pratt's adequacy analysis. Parke stated that "[i]t may be of equal value, but that we cannot enter into: it is sufficient that the parties have so agreed."[67] Although Chief Baron Pollock distinguished *Sibree* because it was not clear that the promissory note was negotiable in *Cumber*, he doubted

---

[59] *Id.*
[60] Foakes v. Beer, 9 App. Cas. 605 (H.L. 1884).
[61] *Id.* at 628.
[62] *Id.* at 622 (finding consideration lacking only to avoid dissension with Blackburn's more traditional brethren).
[63] 93 Eng. Rep. 613 (K.B. 1721).
[64] *See Foakes*, 9 App. Cas. at 622; SMITH, *supra* note 42, at 357, 359.
[65] *Cumber*, 93 Eng. Rep. at 613-14.
[66] 153 Eng. Rep. 745, 749, 751 (Ex. 1846).
[67] *Id.* at 750.

whether *Cumber* was good law.[68] This was a feeble distinction because, negotiable or not, the note was for a lesser amount.

In *Foakes*, Blackburn acknowledged Pollock's severe reservations by stating that "*Cumber v. Wane* . . . certainly was denied to be law in *Sibree v. Tripp*," and he recognized that *Cumber* was the only case, of the two he found,[69] clearly following *Pinnel's Case*.[70] Nevertheless, Blackburn was groping for support to justify joining his brethren in ruling in favor of *Pinnel's Case*, and he fell upon the gloss in Smith's note on *Cumber*, which claimed that *Sibree* merely stood for the proposition that part payment in the form of a negotiable instrument was an exception to the rule.[71] Thus, despite the fact that the rule in *Pinnel's Case* was mere dictum, *Cumber*, the case championed as a reiteration of the rule, was nearly distinguished to death. Just as Lord Mansfield could not tame the central contract liability test of consideration earlier, the preexisting duty rule offshoot of that fundamental theory would not be easily suffocated.[72]

It must be pointed out that the editor of Smith's treatise was not without his misgivings over the denial of contractors' consent. For example, consider his barbed criticism of *Cumber*, which the debtor's attorney in *Foakes* raised,[73] but the law lords made no reference to:

> [*Cumber's*] doctrine is founded upon vicious reasoning and false views of the office of a court of law, which should rather strive to give effect to the engagements

---

[68] *Id.* at 749. Well before *Cumber*, the court did not require consideration for promissory notes. Meredith v. Chute, 92 Eng. Rep. 7, 7 (K.B. 1702). Commercial paper was a widely used mercantile method of transferring the equivalent of cash and had been recognized by Parliament. 3 & 4 ANNE, ch. 9 (Eng. 1705).

[69] *Fitch v. Sutton* was the other. *See* Fitch v. Sutton, 102 Eng. Rep. 1058 (K.B. 1804). *Fitch* was one of three relevant composition of creditor's cases that Lord Ellenborough participated in, either as a lawyer or a judge. Earlier as an attorney in *Heathcote*, Lord Ellenborough argued, with Justice Buller's support, that "[*Cumber v. Wane*] was denied to be law." *See* Heathcote v. Crookshanks, 100 Eng. Rep. 14, 16 (K.B. 1787). As a judge in *Fitch*, he supported *Pinnel's Case* and *Cumber*. *Id.* But then Ellenborough, Chief Justice, seemed to hedge his support for *Cumber* in *Steinman v. Magnus*, 103 Eng. Rep. 1055, 1056 (K.B. 1809) ("[I]f the evidence had gone but a very little further, it would have altered our decision.").

[70] Foakes v. Beer, 9 App. Cas. 605, 621-22 (H.L. 1884).

[71] *Id.* at 622. *See also* SMITH, *supra* note 42, at 357, 363.

[72] Mansfield's attempt to reform consideration in *Pillans v. Van Mierop*, 97 Eng. Rep. 1035 (K.B. 1765), was rejected by the House of Lords in 1778. *See* Rann v. Hughes, 101 Eng. Rep. 1014 (K.B. 1778).

[73] *Foakes*, 9 App. Cas. at 607.

> which persons have thought proper to enter into, than cast about for subtle reasons to defeat them upon the grounds of being unreasonable.[74]

Had there not been the atavistic clinging to Coke's dictum in *Pinnel's Case*, Professor Ames stated that he could deduce from the case law a definition of consideration that would overcome overly technical distinctions and fulfill Smith's stated goal of courts giving effect to accord bargains. He wrote that consideration could be defined as "any act or forbearance given in exchange for a promise".[75] A modification agreement is often described to be a bargain stimulating the promise to complete performance. An alternative approach to jettisoning this oft reviled rule would be, putting it in Mansfieldian civilian terms, to enforce commercial parties' freely consented-to accords.[76]

The proposition that consensual bargained-for accords should be enforced was also hindered by the plethora of judicially-sanctioned exceptions to the troublesome preexisting duty rule.[77] For example, examine the tortured exception that a novelty ought to take it out of the rule; how did this make it any more of a bargain?[78] As Jessel, Master of

---

[74] SMITH, *supra* note 42, at 367. J.W. Smith's note seems to have been retained by his subsequent editors.

[75] Ames, *supra* note 41, at 531. This definition supports freedom of contract and business practices. *Id.* at 518, 520-21, 530-31.

[76] Lord Mansfield (C.J.K.B. 1756-1788) urged enforcement of promises generally based on moral obligation, especially if commercial. Pillans v. Van Mierop, 97 Eng. Rep. 1035 (K.B. 1765); Atkins v. Hill, 98 Eng. Rep. 1088 (K.B. 1775); Hawkes v. Saunders, 98 Eng. Rep. 1091 (K.B. 1782). The promises in these three cases were based on past consideration. *Cf.* Ames, *supra* note 41, at 531 (arguing that any act given in exchange for a promise should be a basis for enforcement and stating that the rule "is repugnant alike to judges and men of business"); Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 818 (1941) (stating that the channeling function of expression of intent is satisfied by agreed-to contract modification). *See also* Lord Wright, *Ought the Doctrine of Consideration Be Abolished from the Common Law?*, 49 HARV. L. REV. 1225, 1229 (1936) (revealing that the doctrine of consideration defeats legitimate interests of parties in ordinary business transactions). Lord Selboune, in *Foakes* said: "The courts might very well have held the contrary and left the matter to the agreement of the parties." *See also* Langdon v. Langdon, 70 Mass. (4 Gray) 186, 189 (1855) (stating that the rule is "somewhat harsh, contrary to the apparent intention of the parties in making a compromise settlement, and not in harmony with the dictates of natural justice"); Milliken v. Brown, 1 Rawle 391, 397 (Pa. 1829) ("Universally the law is, or ought to be, that the meaning or intention of the parties is, if it can be distinctly known, to have effect . . . .").

[77] *E.g.*, Harper v. Graham, 20 Ohio 106 (1851) (revealing no rational difference between the rule and exceptions).

[78] *See* Herman v. Schesinger, 90 N.W. 460, 466 (Wis. 1902) (holding that any little benefit to creditor is enough).

the Rolls, declaimed in 1881: "[a creditor] might take a horse or a canary or a tomtit... but by a most extraordinary peculiarity of the English common law, he could not take [less than the original price]."[79] This exception, among others, was not only odd, but it also contributed to uncertainty that the preexisting duty rule was supposed to avert and, consequently, was anathema to commerce.

Critics of the way most courts applied the doctrine of consideration argued that benefits and detriments could be found in accords, not only in logic, but also in case law. From the perspective of benefit, in *Reynolds v. Pinhowe,* the court stated that the avoidance of trouble for the creditor in enforcement was good consideration "for it is a benefit unto him to have his debt without suit or charge."[80] A 1639 decision acknowledged that if the creditor had part payment "in his hands without suit," this was "a good consideration to maintain this action upon the promise."[81] In *Foakes,* Blackburn believed Coke made a mistake of fact in denying the benefit of prompt part payment to merchants rather than needing to enforce the original debt; in addition, he stated that this was all the more true if the debtor's credit was doubtful.[82] Other examples of this logic include: when a financially beleaguered debtor pays more under an accord than he would after insolvency,[83] when a struggling debtor finds a third party to aid in coming up with part payment,[84] and when the debtor's reluctance to perform is overcome by the accord. After all, the creditor must have seen value in the part payment or he would not have consented to the accord.

As to detriment consideration, critics argued that this likewise could be found in an accord. In *Bagge v. Slade,*[85] Coke revealed that an accord

---

[79] Couldery v. Bartrum, 19 Ch. D. 394, 399 (1881). *See* Ebert v. Johns, 55 A. 1064, 1065 (Pa. 1903) (questioning "scholastic logic" that agreement to pay less on debt not due is enforceable but agreement for part after due date is unenforceable).

[80] Reynolds v. Pinhowe, 78 Eng. Rep. 669, 669 (K.B. 1594) (noting that the fact that payment was made early was probably relevant). *See* A. W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 474-75 (1987) [hereinafter SIMPSON, HISTORY].

[81] Ames, *supra* note 41, at 523 (citing and quoting Rawlins v. Lockey, 1 Vin. Abr. 308, pl. 24 (1639)). *See also* Johnson v. Astell, 83 Eng. Rep. 367, 367 (1667) ("[P]ayment without suit, or trouble... is good consideration.").

[82] Foakes v. Beer, 9 App. Cas. 605, 622 (H.L. 1884); *see also* Melroy v. Kemmerer, 67 A. 699, 700 (Pa. 1907) (stating that there is a beneficial "practical importance of the difference between the [creditor's] right to a thing and the actual possession of it").

[83] *See* Curtiss v. Martin, 20 Ill. 557, 576 (1858); Brown v. Kern, 57 P. 798 (Wash. 1899).

[84] *See Brown,* 57 P. at 800. (noting that there was no concern about whether the paper was negotiable).

[85] 81 Eng. Rep. 137 (K.B. 1616).

to pay 500 pounds in satisfaction of a 1,000 pound debt was "upon a good consideration because he has paid money."[86] In an 1846 Illinois case, consideration for a modification agreement was found because of the debtor's reliance on the extension of time.[87] Detriment can be found when consenting to the modification rather than using the money or providing a service, to greater advantage, by directing it to another creditor.[88] These are detriments in fact, and it is reasonable that overly technical arguments should not bar them from being detriments in law. Corbin urged that the application of the preexisting duty rule ought to move in the direction of modern contract law generally in finding sufficient consideration for an enforceable promise without becoming bogged down in intricate benefit and detriment tests.[89]

Finally, three concluding reasons for opposition to the preexisting duty rule, each suggesting that dwelling on consideration misses the point: (1) that the rule can be argued in bad faith,[90] (2) that the focus should be on whether the contract modification was coerced, and (3) that consideration should be irrelevant to contract discharge. As to bad faith use of the preexisting duty rule, a promisor ought not to be able to invoke the rule after promising to pay more in order to lure the promisee into completing a losing contract. If the preexisting duty rule applies, the performing promisee is further harmed, and, should the promisee be forced into insolvency, it would give a preference to the promisor over other creditors. As to coerced modifications, it is argued that judicial analysis prior to the twentieth century was so preoccupied with the doctrine of consideration that it overlooked what should be of paramount concern, whether the accord was the result of coercion.[91] The opinion in *Foakes* does not even allude to the issue of voluntariness, let alone address it; for that matter, none of the cases decided before the twentieth century cited in this article, with the possible exception of one

---

[86] *Id.*

[87] *See* Wadsworth v. Thompson, 8 Ill. (3 Gilm.) 423 (1846) (noting that the debtor did not make the original deadline because of reliance on a promise made before the deadline that gave the debtor more time). In the 20th century, this dispute might be resolved under promissory estoppel rather than by manipulation of the doctrine of consideration.

[88] *See* Frye v. Hubbell, 68 A. 325, 334 (N.H. 1907).

[89] 1A ARTHUR CORBIN, CORBIN ON CONTRACTS § 172 (1950).

[90] *See* Brooks v. White, 43 Mass. (2 Met.) 283, 285 (1841) ("A creditor may violate, with legal impunity, his promise to his debtor, however freely and understandably made. This rule . . . obviously may be urged in violation of good faith.").

[91] *See* Patterson, *supra* note 30, at 936-38 (stating that coercion would seem to be the most common ground for avoiding the second bargain). *See also* Alaska Packers Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902).

or two of the seamen's cases,[92] concern themselves with whether there was a modification coerced by an ill-intentioned threat of refusing to perform.

As to the requirement of consideration for a contract modification or discharge, the opposing argument is that consideration is irrelevant to a modification or discharge because a modification does not create a new claim. Consideration's raison d'être from its inception was to act as the actionability test for assumpsit brought to enforce rights created under the original contracts. Instead of creating a right, a consensual modification agreement acts as a bar or a defense to the enforcement of the original obligation.[93] This is the most fundamental doctrinal objection to the preexisting duty rule. Furthermore, unlike the creation of contract rights, the release of a right does not require the degree of formality and caution as that bestowed by consideration.[94] Nonetheless, courts have traditionally misperceived the bargain features of contract modifications to be the equivalent of the creation of a right and hence have lumped both under the doctrine of consideration in order to maintain consistency.[95]

V. POSSIBLE APPROACHES TO EXTINGUISHING PREEXISTING DUTY RULE

Legislatures, common law courts, and commentators on the law have provided the consensual signposts for total abolition of the preexisting duty rule. Modern courts can draw from these partial reforms, grounded in consent, a roadmap for total abolition of the preexisting duty rule.

---

[92] *See, e.g.*, Harris v. Watson, 170 Eng. Rep. 94 (1791) (exacting the captain's promise of higher wages in the midst of a storm).

[93] *See* C. H. S. FIFOOT M.A., HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 414 (1949) ("An element essential to the formation is irrelevant to the discharge of a contract."); Rt. Hon. Lord Justice Denning, *Recent Developments in the Doctrine of Consideration*, 15 MOD. L. REV. 1 (1952); *cf.* S. J. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW 120-21 (1975). U.C.C. § 2-209(1) (1999) follows from this.

[94] *See* Fuller, *supra* note 76, at 805-06, 818. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 74 (1979).

[95] *See* Merton Ferson, *The Rule in* Foakes v. Beer, 31 YALE L.J. 15, 23 (1921). *See also* STOLJAR, *supra* note 93, at 120-21 (stating that a bargain is the essential basis of accord, though it might have been the preferred policy to enforce a freely consented-to agreement).

A. Legislative Reforms Point the Way

Before the end of the nineteenth century, ten state legislatures became restive with the failure of the common law to cure itself; they adopted Benthamite solutions by breaching the legislative tradition of not intruding upon the common law of contract, with the major exception of the *Statute of Frauds*,[96] by partially or totally repealing the preexisting duty rule.[97] During the economic shifts of the 1930s,[98] the continuing debate over the need for the law to accommodate necessary consensual adjustments of contracts stimulated legislative law revision commissions in the United States and England to reconsider the issue. In 1936 the New York Law Revision Commission recommended reform of the rule to permit binding written contract modifications without consideration in order to avoid hardship and to realize the parties' consensual expectations when they entered into the modification agreement.[99] The next year, the English Law Revision Committee recommended abrogation of the rule in *Pinnel's Case* and *Foakes* because of its injustice and inconvenience and because the Committee agreed with Blackburn's criticism in *Foakes* that prompt payment could be more beneficial than insisting upon the whole.[100] By the early 1940s, the drafters of the UCC were also considering abandoning the preexisting duty rule for sales of goods.

1. Scattered Legislative Reforms

Various legislatures chose between two modes of reforming the preexisting duty rule: total abrogation of the rule or enforcement of a voluntary contract modification if it was in writing. Beginning with

---

[96] STATUTE OF FRAUDS, 29 Car. II, c. 3 (1667). The *Statute of Frauds* actually aggravated the dilemma of how to modify a contract since some types of contracts not seen as falling under *Pinnel's Case* until the nineteenth century could not be modified orally after 1677 if they fell under the Statute of Frauds.

[97] *See* ALA. CODE § 2774 (1898); CAL. CIV. CODE § 1524 (1872); DAK. COMP. LAWS § 3486 (1888); GA. CODE ANN. § 3735 (1890); ME. REV. STAT. tit. 82, § 45 (1895); N.C. GEN. STAT. § 574 (1898); N.D. CENT. CODE § 3827 (1895); ANN. LAWS OF OREGON § 755 (1890); TENN. CODE § 4539 (1884); VA. CODE ANN. § 2858 (1887).

[98] The shifts generated by the Great Depression increased the incidence of contract modifications as ongoing contracts needed to be adjusted to the dislocations created.

[99] STATE OF NEW YORK, SECOND ANNUAL REPORT OF THE LAW REVISION COMMISSION 67, 172 (1936) (Documents 65 C & D). The Commission thought a signed writing was adequate to fulfill the cautionary function, as well as the evidentiary function of consideration that Mansfield had promoted in *Pillans v. Van Mierop*, 97 Eng. Rep. 1035 (K.B. 1765).

[100] ENGLISH LAW REVISION COMMITTEE, SIXTH INTERIM REPORT 1937, Cmd. 5449, at pp. 19-21. The Committee also recommended abolishing the *Statute of Frauds* as well as consideration *when* there was a written contract. *Id.* at 19.

those jurisdictions totally abandoning the rule, the first common law jurisdiction to reject the rule completely was neither in the United States nor in England, but in India in 1872 with the Indian Contract Act.[101] The Indian Contract Act and the California Field Code, which were passed the same year, represented the first major codifications of common law contract principles since the thirteenth century.[102] Major excerpts of both were borrowed from Field's proposed substantive law code for New York.[103] Virginia also passed legislation in 1887 abolishing the preexisting duty rule: "Part performance of an obligation... when expressly accepted by the creditor in satisfaction... though without any new consideration, shall extinguish such obligation...."[104] Georgia, Maine, and North Carolina achieved the same result as Virginia, each with its own verbiage.[105]

The second major category of legislative reforms provided for a binding modification of a contract with consideration so long as the consensual modification was evidenced by a signed writing. The cautionary function of a writing averted the concern that loose negotiations about possible adjustments during the performance phase

---

[101] *See* Indian Contract Act § 63 (1872) ("Every promisee may dispense with... the performance of the promise made to him... or may accept instead of it any satisfaction which he thinks fit."). *See* 1 A.C. PATRA, THE INDIAN CONTRACT ACT 1872, 834-37 (1966). The Indian Contract Act influenced the development of contract law in the legal systems of other developing countries of the British Commonwealth. *Id.* at 834-36.

[102] *See* Statutes of Wales, 12 Edw. I (1284). This Statute covered more than contracts since it was an attempted restatement of the common law for use in administering Wales; a similar purpose was achieved in India. *Id.* A similar phenomenon can be found in the U.S. Virgin Islands where the American Law Institute's restatements of the law have been adopted as statutes, assuming no prior inconsistent rules made. *See* V.I. CODE ANN. tit. 1, § 4 (1957).

[103] *See* M.P. JAIN, OUTLINES OF INDIAN LEGAL HISTORY 675 (2d ed. 1966). Henry Maine drafted the first proposal and James Stephen revised it. *Id.* Although David Dudley Field's procedural code was passed in New York in 1848, he failed in convincing New York to adopt his substantive codes in 1885, in part due to the opposition of the commercial bar. *See* Mathias Reimann, *The Historical School Against Codification: Savigny, Carter and the Defeat of the New York Civil Code*, 37 AM. J. COMP. LAW 95, 98-101, 103-16 (1989). Field's substantive codes fared better in California, Georgia, Montana, Idaho, the Dakota Territory and in India. *Id.*

[104] VA. CODE § 2828 (1887). The modern Virginia code reads verbatim. VA. CODE ANN. § 11-12 (Michie 1999). Because the Virginia Code addresses part performance accepted by the creditor in satisfaction, it would appear to not cover the seamen's wage-type agreement for the debtor to pay more; however, the New York and Michigan exceptions for written modifications would cover either increases or decreases in the amount owed.

[105] *See* GA. CODE ANN. § 13-4-103 (1999) (originally enacted in 1863); ME. REV. STAT. ANN. tit. 14, § 155 (West 1980); N.C. GEN. STAT. § 1-540 (1998) (originally enacted in 1874). Government contractors are often barred by state statute or constitution from receiving extra compensation. *See* McGovern v. New York, 138 N.E. 26 (N.Y. 1923).

could be misunderstood as modifications. Four types of writings were recognized as a substitute for consideration in the various statutes. First, five jurisdictions resuscitated the seal by treating sealed and unsealed instruments the same.[106] Second, the Uniform Written Obligations Act, drafted by Williston,[107] was approved by the Commissioners on Uniform State Laws in 1925 and provided: "A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement in any form of language that the signer intends to be legally bound."[108] Only Pennsylvania in 1927 and Utah in 1929 ever passed the Act, and Utah subsequently repealed it.[109] Also, in 1936, New York adopted its Law Revision Commission's recommendation[110] by declaring binding a written modification or discharge of an obligation "signed by the party against whom it is sought to enforce the change" without the need to show consideration.[111] Unlike the California accord-type statutory reform,[112] this New York language would cover both accords for decreased amounts due (as in *Pinnel's Case*) and modifications for increased amounts (as in the seamen's wage increase cases). The final type of writing statute was a nineteenth century variety that did not specifically exempt a written release or discharge from the consideration requirement but could

---

[106] *See* ARIZ. REV. STAT. § 44-121 (1999) (originally enacted in 1901); IND. STAT ANN. §§ 2-1601 [492], 2-1602 [493], 2-1603 [494] (Burns 1933); MISS. CODE ANN. §§ 75-19-1 to 17-19-5 (1999) (originally enacted in 1930); N.M. STAT. ANN. § 38-7-2 (Michie 1999) (originally enacted in 1901); WYO. STAT. ANN. § 34-2-126 (Michie 1999) (originally enacted in 1890). *Cf.* U.C.C. § 2-203 (1999) (stating that the affixing of a seal to a writing does not make the writing a sealed instrument and the law does not apply to such a writing).

[107] Samuel Williston's successful draft of the Uniform Sales Act in 1906 had not tinkered with the preexisting duty rule, but the Written Obligations Act tried to set the clock back to when the seal was in regular usage.

[108] UNIFORM WRITTEN OBLIGATIONS ACT § 1, 9C U.L.A. (1962). *See also* Charles B. Blackmar, Comment, *Contracts–Proposals for Legislation Abrogating the Requirement of Consideration in Whole or in Part*, 46 MICH. L. REV. 58, 67-68 (1947).

[109] *See* PENN. STAT. ANN. tit. 33, §§ 6-8 (Purdon 1927); UTAH LAWS c. 62 (1929). *See also* Central Penn Nat'l Bank v. Tinkler, 40 A.2d 389 (Pa. 1945); Blackmar, *supra* note 108, at 68.

[110] *See* STATE OF NEW YORK, SECOND ANNUAL REPORT OF THE LAW REVISION COMMISSION 67-172 (1936) (documents 65 c-d).

[111] *See* N.Y. GEN OBLIG. LAW § 5-1103 (McKinney 1989) (originally enacted in 1936) ("[A]greement . . . to . . . modify or to discharge . . . any contract . . . ."). Michigan followed New York verbatim. *See* MICH. COMP. LAWS ANN. § 566.1 (West 1996).

[112] *See* CAL. CIV. CODE § 1524 (1982) (originally enacted in 1872). Three Northern Plains states followed California's verbiage. *See* MONT. CODE ANN. § 28-1-1403 (1997); N.D. CENT. CODE § 9-13-07 (1987); S.D. CODIFIED LAWS § 20-7-4 (Michie 1995). California passed Field's Civil Code in 1872 and was followed by the Dakota Territory, Georgia, Idaho, and Montana.

arguably be construed to do so by an agreement "according to the intentions of the parties."[113] This odd approach naturally led to litigation because it did not clearly exempt the changed agreement from consideration.[114]

2. The *Uniform Commercial Code* Abolishes Rule for Consensual Modifications

UCC reporter Karl Llewellyn successfully urged a realistic reflection of reasonable commercial usage by abolishing the preexisting duty rule for sales contracts.[115] Section 2-209(1) of the UCC provides: "An agreement modifying a contract within this Article needs no consideration to be binding." The UCC adopted the consensual theory view that formation of an enforceable modification depends only upon intent[116] and any possible written formality that might be required "without regard to the technicalities which at present hamper such adjustments."[117] This realization of a uniform, nation-wide rejection of the preexisting duty rule for sales contract modifications, and, since 1987, for leases of goods, will be analyzed in this section in terms of consensual requirements for formation. Later, in the policing mechanisms' section of this study, there will be a discussion of the UCC requirement of a good faith motive in modifying a contract.

---

[113] *See* ALA. CODE § 12-21-109 (1999) (originally enacted in 1852); TENN. CODE ANN. § 24-7-106 (1999) (originally enacted in 1858).

[114] *See* Grand Lodge Knights of Pythias v. Williams, 16 So. 2d 497, 499 (1944) (stating that consideration was required under the old statute unlike the new one). *Cf.* Note, *The Present Statutory Law of Consideration*, 47 COLUM. L. REV. 431, 443 (1947).

[115] Under the law, merchant consideration was not required to support a contract modification. Consideration is not required for formation of a commercial contract or any modification thereof under any legal system other than the common law; mercantile capitalism assumes by its very nature that obligations are expected to be kept. In the 18th century, Mansfield had tried to drop consideration as a requirement for commercial contracts, but the force of precedent surrounding this keystone common law doctrine was too much to overcome.

[116] *See* Fuller, *supra* note 76, at 806 (stating that the requirement that parties' intention be expressed is in essence a requirement of form). Without clear evidence of a modification agreement, a modification under section 2-209 fails. *See, e.g.*, Amerdyne Indus., Inc. v. POM, Inc., 760 F.2d 875 (8th Cir. 1985); United States *ex rel.* Mobile Premix Concrete, Inc. v. Santa Fe Eng'rs, Inc., 515 F. Supp. 512 (D. Colo. 1981); Hughes v. Jones, 476 P.2d 588 (Kan. 1970).

[117] U.C.C. § 2-209 cmt. 1 (1999). Several cases illustrate the common law doctrinal genesis of the UCC. *See, e.g.*, Rye v. Phillips, 282 N.W. 459, 460 (Minn. 1938); Frye v. Hubbell, 68 A. 325, 334 (N.H. 1907) ("purpose and intent" should determine). The statutory influence of Williston's Uniform Written Obligation Act was acknowledged in the official comment to section 2-209 of the UCC. *See* U.C.C. § 2-209 cmt. 1 (1999).

Section 2-209 of the UCC and the writing requirement genre of state statutes grappled with the loss of the protective formal functions performed by the doctrine of consideration, each in its own way.[118] The UCC drafters did give special attention to the cautionary function for consumers signing standardized contracts to assure they did not unknowingly lose the right of a later informal method of changing the relationship due to the fine print.[119] Section 2-209 of the UCC does acknowledge the place of written formality in modifications as required by the *Statute of Frauds* and by any private statute of frauds.[120] The UCC comments state that these writing rules "are intended to protect against false allegations of oral modifications," and assist in establishing "mutual consent"[121] to the modifications. However, informality in making waivers was assured by providing that any writing requirements for modification or rescission could not limit the effect of the parties later conduct.[122] The distinctions made in section 2-209 of the UCC between

---

[118] *See* Fuller, *supra* note 76, at 800-01. The channelling function may be fulfilled by the expression of common intention in a modification related to an existing contract, as distinguished from mere exploratory discussions. *See id.* at 818. The evidentiary function can be fulfilled by clear proof of an agreement, supplemented by a writing when necessary.

[119] A consumer must sign separately a clause barring an oral modification. U.C.C. § 2-209(2) (1999). *See also id.* at § 2-209 cmt. 3. (addressing the situation where a merchant might orally assure a modification, which is, unbeknownst to the consumer, barred by the standardized language).

[120] *See* U.C.C. § 2-209(2)-(3). Subsection 2 permits the addition of the formality of a private statute of frauds contrary to the Code's stated policy here of removing "technicalities which . . . hamper such adjustments." *See id.* at § 2-209 cmt. 1. The *Statute of Frauds* provides the added safeguards of limits based on the part "received and accepted" and "the quantity of goods shown in such writing." *Id.* at § 2-201(1), (3)(c). But, there are problems regarding when the *Statute of Frauds* applies to a modification: If the original contract was under the Statute, must the modification be? Is a writing required only when the modification causes the original contract to exceed $500? Is a writing necessary only when the modification itself falls under the Statute? *See* JAMES WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 44-45 (2d ed. 1980); Robert Hillman, *A Study of Uniform Commercial Code Methodology: Contract Modification Under Article Two*, 59 N.C. L. REV. 335, 356-63 (1981). Section 148 of the *Second Restatement of Contracts* does not recognize the contractual right to bar an oral modification. Section 149 of the *Second Restatement* provides that the *Statute of Frauds* applies to the modification if the Statute applied to the original contract, but an oral recession is possible under section 148.

[121] U.C.C. § 2-209 cmt. 3. The Code follows the dissent in *Green v. Doniger*, 90 N.E.2d 56, 60-61 (1949) (arguing that a written modification required under original contract, as allowed by N.Y. statute, and a contract provision could not be orally abandoned unilaterally).

[122] U.C.C. § 2-209(4). *See* Hillman, *supra* note 120, at 359-70 (arguing that waiver and writing rules of 2-209 are defective and that lack of clear definitions raises risk that a modification intended to be barred without a writing can slip in as a waiver). *See* U.C.C. § 1-107 (allowing a claim arising out of an alleged breach to be discharged without consideration by a written waiver; this provision is intended to fill a void left by the end of the seal).

modification, rescission, and waiver indicate that the rules for each vary in terms of the formalities of consideration and writing.[123]

The UCC accomplished for sales contracts what Blackburn would have liked to have done in *Foakes* for all contracts by allowing the parties to form voluntary consensual contract modifications free of the fetters of consideration. This brought American sales law in line with the approach in civil law countries. Unlike most of the earlier state statutes reforming the preexisting duty rule, section 2-209(1) of the UCC allows informal modifications because the cautionary concern is not so great when a right is being surrendered rather than created.[124] The ground for enforcement of sales modifications was now the parties' manifestation of consent. But was that outward consent to a change in the original contract free of overreaching or duress? The removal of the consideration bar on contract modifications left the courts with the burden of policing to assure that modifications were not coerced or exacted in bad faith. The detailed application of the UCC good faith

---

[123] The Code provides that no consideration is required for a modification and for some waivers. *See* U.C.C. §§ 1-107, 2-209(1) (1999). Rescission of a contract shall not be construed to discharge any damages claim for an antecedent breach. U.C.C. § 2-720. The requirement of consideration for mutual rescission depends upon whether the contract is executory or not. *Id.* The writing requirements for a modification depend on the *Statute of Frauds* or the parties' original agreement. *See* U.C.C. §§ 2-209(2)-(3), 2-201, 2-316. The parties' original agreement can also dictate writing requirements for rescission. U.C.C. § 2-209(2). The writing requirements for waiver vary. *See* U.C.C. §§ 1-107, 2-209(4), 2-605.

Terminology *not* used in section 2-209 of the UCC in describing subsequent changes in the original contract relationship include the widely used terms "accord" and "discharge." Discharge is a term used in parallel reform statutes, such as the New York-type statute; and, the term accord is employed in California-type statutes. These two changes in the contract relationship are covered by the UCC term "modification" because an accord is a type of modification and the satisfaction of the accord constitutes a discharge. *See* RESTATEMENT (SECOND) OF CONTRACTS § 273 (1979) (stating that assent to discharge requires consideration). However, assent to the discharge of the duty of return performance needs no consideration, nor does cancellation of a written obligation; an agreement of "partial rescission", that discharges less than all the parties remaining duties, is treated as a modification; if each party agrees to discharge all the other parties duties, called an "agreement of rescission," consideration is provided by each party's discharge of the duties of the other. *See id.* at §§ 274, 275, 283 cmt. a.

[124] *See* Fuller, *supra* note 76, at 820-21 (stating that a release of a claim is made with deliberation rather than casually); *see also* CORBIN, *supra* note 89, at § 1289 (stating that creditor's express assent to modification or discharge should be enforced without consideration because no new rights are created.); FIFOOT, *supra* note 93, at 414 (stating an element essential to formation is irrelevant to contract discharge). However, if the modification increases the obligation, as in the seamen's wage increase cases, the cautionary concern is as great as at original contract formation. *See* Stilk v. Myrick, 170 Eng. Rep. 1168 (1809).

standard to sales contract modifications will be discussed later under policing mechanisms.

3. Comparison of *Uniform Commercial Code* and the *Second Restatement of Contracts*

The UCC and the *Second Restatement* positions on the binding nature of contract modifications differ in two fundamental respects. First, the UCC requires consent but does not require consideration. Second, the good reasons the UCC recognizes for the parties seeking a modification are not limited to unanticipated circumstances and reliance. As to unanticipated circumstances, the text of section 89(a) of the *Second Restatement* states that the modifications must be "fair and equitable," and comment b "requires an objectively demonstrable reason for seeking a modification." The text of section 2-209 of the UCC, however, makes no reference to good faith, comment 2 states that there is a good faith requirement to give a "legitimate commercial reason" and further that, between merchants, the observance of fair dealing in the trade is needed, which "may" require giving "an objectively demonstrable reason for seeking a modification."[125] Unanticipated circumstances would be a good reason, but any other legitimate commercial reason could also be a basis for a modification under the UCC. Under section 89(a) of the *Second Restatement*, the judicial analysis invariably includes a focus on the affirmative duty of the plaintiff to establish that the modification was fair and equitable.[126] Under section 2-209 of the UCC, however, unless the issue of bad faith is raised, it is not uncommon for the court to make no reference to good faith,[127] even though the facts in some of these cases

---

[125] *See* U.C.C. § 2-209, cmt.2 (1999).

[126] *See, e.g.*, Angel v. Murray, 322 A.2d 630, 636-37 (R.I. 1974); Quigley v. Wilson, 474 N.W.2d 277, 280-81 (Iowa Ct. App. 1991).

[127] *See* Barnwell & Hays, Inc. v. Sloan, 564 F.2d 254 (8th Cir. 1977); Skinner v. Tober Foreign Motors, Inc., 187 N.E.2d 669 (Mass. 1963); Farmland Servs. Coop., Inc. v. Jack, 242 N.W.2d 624 (Neb. 1976). Some courts do require the proponent of the modification to establish good faith as a part of his burden of proof, though the suggestion of abuse in the surrounding circumstances may be the cause for this position in a given case. *See* Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 146 (6th Cir. 1983). The affirmative duty of the plaintiff in *Roth* and under section 89(a) of the *Second Restatement of Contracts* requires the plaintiff to go past proving the agreement and to also establish good faith before the burden shifts to the defendant; this is unique from the common law of contracts which normally places the burden on the defendant to raise the issues of bad faith or coercion as a part of rebutting the plaintiff's prima facie case.

do not particularly appear to suggest a very good motive for seeking the modification.[128]

Sales law has an advantage here over contract law generally because of two centuries of development of a tight body of legal doctrine bolstered by the regularity of trade usage, which includes the self policing mechanism of fair dealing in the trade.[129] Mercantile good faith and fair dealing, along with the modern economic duress and unconscionability doctrines, provided control mechanisms to supplant those functions performed by consideration.[130] Given that there is no such developed standard of fair dealing for the sprawling field of general contract law, courts and restaters have been more reticent to abandon the preexisting duty rule.

One way for the common law of contract to come in line with the UCC would be for courts to use the common law reform technique of drawing an analogy to section 2-209(1) of the UCC as a vehicle for rationalizing abandonment of the preexisting duty rule. In fact, starting in the 1950s, many changes in principles from the *First Restatement* to the *Second Restatement* were stimulated by judicial reform based on analogy to UCC reforms.[131] In order for a court to adopt the principle in section

---

[128] *See, e.g.*, Barnwell & Hays Inc. v. Sloan, 564 F.2d 254 (8th Cir. 1977) (stating that the farmer's claim, that he could not complete the contract because of a fire, appeared shaky because he was later found selling cotton to another buyer but not mentioning the good faith issue); *Farmland Coop.*, 242 N.W.2d at 625 (revealing that the farmer changed his mind about selling to the elevator both because the price was too cheap and because he received bad advice from the elevator agent but not discussing the good faith issue). The status of a farmer when he only sells his crop at harvest is usually deemed that of a non-merchant. The leniency of these decisions may be explainable on the basis of the courts treating them as an economic underdog in their dealings with grain elevator over price.

[129] *See generally* CHRISTOPHER LANGDELL, A SELECTION OF CASES OF SALES OF PERSONAL PROPERTY (1872); SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT (1909); *see also* Karl Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 740-45 (1939); Lawrence Friedman, *Formative Elements in the Law of Sales: The Eighteenth Century*, 44 MINN. L. REV. 411, 435-50 (1960). Lord Holt's ruling that consideration could be presumed present to support a promissory note, at a time when transfer of notes was still considered a contract assignment, was a progenitor of using trade practices to determine whether a commercial promise was binding. *See* Meredith v. Chute, 92 Eng. Rep. 7, 7-8 (1702) ("It was not necessary for the plaintiff to prove, upon what consideration the note of [the maker] was given, the defendant having admitted it to have been given upon good consideration by his promise.").

[130] *Cf.* CORBIN, *supra* note 89, at § 183 (stating that the preexisting duty rule makes sense when coercion, but if no coercion, the finding of consideration ought to mean it is in conformity with mores and practices).

[131] *See* E. Allan Farnsworth, *Ingredients in the Redaction of the* Restatement (Second) of Contracts, 81 COLUM. L. REV. 1, 10-12 (1981) (highlighting the Restatement Second Reporter

2-209(1) of the UCC, however, it must reject the sacred liability test of consideration for contract modifications, something only one common law court has ever had the courage to do over the past four centuries.[132] With the exception of promissory estoppel, section 2-209(1) of the UCC is perhaps the boldest nationwide rejection of consideration. Take the service contract modification case *Angel v. Murray*[133] as an example of judicial reluctance to deviate from consideration-based precedent. In this case, the Rhode Island court approvingly made reference to the binding nature of consensual contract modifications generally under section 2-209(1), but, in the end, the court did not leave the domain of consideration, nor has that jurisdiction done so since.[134] Instead, the court in *Angel* relied on a tentative draft of the *Second Restatement* to rationalize its holding under the unanticipated circumstances exception to the requirement of consideration.[135]

Despite all the judicial and legislative reforms, the preexisting duty rule can still present a formidable barrier for a party to enforce a non-coerced modification if it fails to fall under a statutory or common law exception or reform. There are a significant array of exceptions and reforms, it is true, but one does not have to search hard in the reporter systems to find modern courts refusing to enforce modifications as they pay obeisance to the preexisting duty rule.[136] The *Second Restatement's*

Code's treatment of good faith, trade usage and written waiver without consideration); Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 COLUM. L. REV. 13, 15-17 (1981).

[132] Excluding states employing a fiction or rationalizing the presence of consideration, only Minnesota has flatly rejected the requirement of consideration for modifications. *See* Winter Wolff & Co. v. Co-Op Lead & Chem. Co., 111 N.W.2d 461 (Minn. 1961); Rye v. Phillips, 282 N.W. 459 (Minn. 1938) (dictum). *Watkins v. Carrig*, 21 A.2d 591, 593-94 (N.H. 1941) dropped the consideration requirement for modifications made because of unanticipated circumstances.

[133] 322 A.2d 630 (R.I. 1974) (regarding an unexpected growth in the number of units from which garbage had to be collected).

[134] *Id.* at 636. The *Angel* decision stated a view in line with the philosophy of section 2-209(1): It "fulfills society's expectations that agreements (entered) into voluntarily will be enforced by the courts." *Id.* But, ultimately, the court latched onto the section 89 exception to the requirement of consideration. *Id.*

[135] *See id.* at 636 n.1.

[136] *See* Sambo's Restaurants, Inc. v. City of Ann Arbor, 633 F.2d 686, 690 (6th Cir. 1981) (noting that performance of existing obligation does not constitute consideration); DeCecchis v. Evers, 174 A.2d 463 (Del. Super. Ct. 1961) (highlighting that consideration is needed for bailment); Block v. Drucker, 212 So. 2d 890 (Fla. Dist. Ct. App. 1968) (regarding a brokerage account); Massey-Ferguson Credit Corp. v. Peterson, 626 P.2d 767, 775-76 (Idaho 1981); Sergeant v. Leonard, 312 N.W.2d 541, 545 (Iowa 1981) (finding again that consideration removes the issue from the bounds of the preexisting duty rule); Recker v.

doctrinal clarification of the preexisting duty rule has actually broadened the rule's applicability in at least one jurisdiction.[137]

Briefly, when does the preexisting duty rule apply today? A reply to this question entails an overview summary of the gaps left by the reform attempts. In order to answer the question, the response has to be divided into contract subject matter and the exceptions to the rule. As to subject matter, non-sales transactions are generally subject to the rule. When one contemplates the burgeoning service sector of the economy, it represents an enormous volume and range of contracts, but it is more than just services. It encompasses contracts for transfers of interests in real property, security interests, licenses, franchises, transfers of intellectual property, royalties, sales of securities and the remaining black hole of residual contract subject matter. Unlike the tight field of sales law developed by merchants over the centuries, a uniform statutory vehicle is not available for the whole of common law contract. Perhaps a third restatement of contract law could follow the lead of the

---

Gustafson, 279 N.W.2d 744, 758-59 (Iowa 1979) (noting that modification is unenforceable when consideration is lacking); Quigley v. Wilson, 474 N.W.2d 277, 281 (Iowa Ct. App. 1991) (finding unanticipated circumstances); Tri-City Concrete Co. v. A.L.A. Constr. Co., 179 N.E.2d 319, 320-21 (Mass. 1962) (exemplifying a construction contract); Bucker v. National Mgt. Corp., 448 N.E.2d 1299, 1303 (Mass. App. Ct. 1983); *In re* Estate of Easterbrook, 319 N.W.2d 655, 659 (Mich. Ct. App. 1982); Green v. Millman Bros., Inc., 151 N.W.2d 860, 865 (Mich. Ct. App. 1967) (discussing a lease); Rexite Casting Co. v. Midwest Mower Corp., 267 S.W.2d 327 (Mo. Ct. App. 1954) (requiring consideration to support a modification); Rickett v. Doze, 603 P.2d 679, 680-81 (Mont. 1979) (finding that consideration removes the issue from the bounds of the preexisting duty rule); Heckman & Shell v. Wilson, 487 P.2d 1141, 1147 (Mont. 1971) (finding no consideration); Mountain Shadows of Incline v. Kopsho, 555 P.2d 841, 842 (Nev. 1977) (stressing the need for a meeting of the minds and consideration for accord); Mainland v. Alfred Brown Co., 461 P.2d 862, 864 (Nev. 1969) (asserting that consideration is still needed to support a modification despite assurances); Walden v. Backus, 408 P.2d 712 (Nev. 1965) (finding no consideration for accord); Fondedile v. Maguire Inc., 610 A.2d 87, 92 (R.I. 1992) (requiring consideration for modification).

[137]*See* Recker v. Gustafson, 279 N.W.2d 744, 757-59 (Iowa 1979) (revealing that rescission fiction may no longer be used to avoid consideration requirement for modification) (citing RESTATEMENT (SECOND) OF CONTRACTS § 89d (1973)); *see also* Robert Hillman, *Contract Modification in Iowa*–Recker v. Gustafson *and the Resurrection of the Preexisting Duty Doctrine*, 65 IOWA L. REV. 343, 353 (1980) (stating that *Recker* bars voluntary modifications that were formerly allowed under improper rescission theory in averting harm). *Recker* is a good example of why automatic judicial allowance of the rescission fiction can result in enforcement of a coerced modification. Although coercion was not established in *Recker*, the court expressed concern over pressure put on the young buyer by the experienced seller and his lawyer. *Recker*, 279 N.W.2d at 747, 758. A contrary view is that when parties deliberately go through the formality of actual rescission and substitution that they are manifesting their seriousness and consent.

UCC and urge courts to end the preexisting duty rule, as did the *First Restatement of Contract,* in encouraging broader recognition of promissory estoppel. In the end, it will be necessary for the change to occur in the decisions of one state supreme court at a time.

A contract fitting within one of the above types of contracts is not, however, subject to the preexisting duty rule if it falls under one of the statutory or common law exceptions to the rule. Seven general categories of exceptions come to mind. First, there are a myriad of traditional exceptions to the rule, like a novelty or a bona fide dispute. Second, there are the legal fictions, recognized in some states, like rescission and importing consideration, which facilitate enforcement of voluntary modifications but also run the risk of enforcing coerced modifications. Third, there are four or five state supreme courts that have largely abolished the common law rule for all types of contracts, though in all but one jurisdiction, consideration must still be rationalized. Fourth, some state legislatures have tried to abolish the rule for all types of contracts, but one must read the wrinkles in a particular statute carefully since, for example, it may apply to decreases in obligations but not to increases and may cover duties to pay money but not other types of obligations. Fifth, some state legislatures have provided that the preexisting duty rule does not apply if the modification agreement is in writing. These requirements of formality provide no solace for one claiming under the typical modification in the form of an oral assurance made to induce continuation of performance by a disheartened performer in a losing contract, e.g., "I'll make sure you do not lose if you finish the work" or "Keep on with the work and I'll cover for your extra time and materials." These special state statutes notwithstanding, the *Statute of Frauds* will usually apply to a modification if the original contract must comply with the Statute. Also, section 2-209(2) of the UCC allows the parties to exclude oral modifications in the original contract. Sixth, modern courts will enforce a modification if there has been detrimental reliance on the promise. Even if the reliance facts do not qualify for promissory estoppel, they may help establish equitable estoppel or detriment consideration. Seventh, if the modification was made on account of circumstances not anticipated by the parties when the contract was made, a growing number of courts will enforce the modification without demanding consideration.

All of these exceptions to the common law preexisting duty rule may cause one to think that the rule has been excepted to death, but the case law reports indicate the contrary. The sheer volume of contract

modifications agreed to in a dynamic economy makes it one of the most frequently litigated consideration-related issues reaching the appellate courts. The result of the continuation of the rule is that many non-coerced consensual modification agreements still fall through the cracks and are found unenforceable, and, even when a court finds that a modification fits under an exception, the process of proving it causes delay, cost and inefficiency.

B. Judicial Exceptions Provide Authority for Jettisoning Rule

Judicial criticisms of and varied judicial exceptions to the preexisting duty rule eventually opened the way for a handful of state supreme courts to abolish or at least tame the rule around the turn of the twentieth century. In facilitating the fair result of enforcement of voluntary consensual contract modification promises, the courts had to rationalize a way around the demands of the doctrine of consideration. The justifications and rationalizations used in these modern decisions in the United States, and later England, provide a roadmap for a national judicial consensus on ending this inefficient, archaic impediment to realizing contractors' consent. While this section will look at judicial exceptions to the rule, a study of the few jurisdictions effectively abolishing the rule will be discussed later herein under the topic of an overall common law solution.

So many exceptions to the preexisting duty rule were recognized by the turn of the twentieth century that one would have thought that the rule was moribund, yet many contract modifications continued to fail in the courts as the century progressed.[138] In addition to the many traditional exceptions[139] to the rule, over the past century a majority of courts have crafted doctrine based on broader factual parameters that set the stage for the next logical step of judicial abolition of the preexisting duty rule. These significant doctrinal inroads to the preexisting duty rule include: (1) reliance relief, (2) relief for unanticipated circumstances

---

[138] *See* Havighurst, *supra* note 31, at n.25 (surveying West's N.E. and N.W. reporter systems).

[139] *Pinnel's Case* suggested the first three exceptions: 1) early part-payment; 2) payment at a different place; and 3) payment of a novelty. *See* Pinnel's Case, 77 Eng. Rep. 237 (K.B. 1602). A stream of other exceptions followed: 4) other variations in debtor's performance; 5) part-payment in form of negotiable instrument; 6) addition of a third party's aid, as providing security; 7) settlement of disputed claims and unliquidated sums; 8) various legal fictions, such as rescission and substitution, waiver and gift; 9) statutory exceptions for written accords; 10) creditors' compositions; and 11) accounts stated.

and (3) development of policing mechanisms to replace consideration's policing role.

1. Exception for Reliance on Modification Promise

The nineteenth century genesis of promissory estoppel in cases of justifiable reliance upon gratuitous promises is quite well known.[140] The spread of this ground for liability to bargain-based promises encountered some initial resistance,[141] but it became a widely accepted commercial law theory by the middle of the twentieth century.[142] Its use in support of contract modification promises would become an important reform ameliorating some of the harshness of the preexisting duty rule; reliance relief here sometimes performs the role of averting unconscionability. Reliance will often exist in modified contracts because reliance on the modification promise comes in the form of continuation of performance of the now modified agreement.[143]

During the nineteenth century, reliance-based relief in support of modifications began to appear in American case law disguised as a modification contract supported by consideration. In *Wadsworth v. Thompson*,[144] an Illinois court ruled that a debtor's reliance on a time extension, by not rushing to make the original deadline, constituted consideration for the extension. In the Iowa case *Maxwell v. Graves*,[145] a three year lease of cows, for breeding purposes, was modified by providing that the lessor-defendant would replace any barren cows in the spring. The plaintiff-lessee delivered ten barren cows the next May, which the defendant took possession of, but the defendant refused to provide replacement cows. In a later suit, the Iowa court found the

---

[140] *See* Benjamin Boyer, *Promissory Estoppel: Principle from Precedents*, 50 MICH. L. REV. 639, 644 (1952); *see also* 1 SAMUEL WILLISTON, TREATISE ON THE LAW OF CONTRACTS 307-08 (1921).

[141] *E.g.*, James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344, 346 (2d Cir. 1933) (per Learned Hand, J.).

[142] *See* Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958) (per Roger Traynor, J.); Northwestern Eng'g Co. v. Ellerman, 10 N.W.2d 879 (S.D. 1943).

[143] *See* O'Sullivan, *supra* note 27, at 227-28.

[144] 8 Ill. (3 Gilm.) 423 (1846). *See also* Munroe v. Perkins, 26 Mass. (9 Pick.) 298, 305 (1830). In *Munroe*, the plaintiff made a losing bargain and was unwilling and unable to finish the work under the contract. *Id.* at 303. The defendants assured the plaintiff that, if he continued, he would be compensated and would not suffer a loss. *Id.* The court found that there was sufficient consideration in this promise. *Id.* at 305. While the decision in *Munroe* employed logic akin to a rescission fiction to answer the call for consideration for the modification, the court also emphasized that once the promise of more pay was given, "he afterward went upon the faith of the new promise, and finished the work." *Id.*

[145] 13 N.W. 758 (Iowa 1882).

modification to replace barren cows binding because the plaintiff's care and delivery of the barren cows constituted consideration in the form of reliance: "[e]ven if there was no original consideration for the parol modification of the contract, the defendant cannot raise the question after the plaintiff has performed his part of it, and defendant has accepted such performance."[146] In an 1899 Washington accord case, the court intoned: "Pleas of want of consideration are not favored by the law, especially where the relative positions of the parties have been changed by the transaction."[147] The court stated that it did not need to overturn the rule, however, because it found consideration for the accord in the partial payment scraped together by the near insolvent debtor for what would have otherwise been, as a practical matter, a worthless claim.[148]

By the turn of the century, reliance logic was also used to find consideration in cases of contract modifications made to pay more money for performance because of unanticipated circumstances increasing the burden of the performer, e.g., declaration of war making labor scarce or an excavator of earth running into granite. Performance had stopped in these cases when the unforeseen event occurred, and work was induced to resume in reliance on the promise of the increased price.[149]

---

[146] *Id.* at 759. The delivery of the cows to the defendant seemed a very modest reliance. *Id. See also* McKenzie v. Harrison, 24 N.E. 458, 459 (N.Y. 1890) (articulating reliance relief as an executed gift).

[147] Brown v. Kern, 57 P. 798, 799 (Wash. 1899); *but cf.* King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105, 1107 (Minn. 1895) (holding that modification in violation of preexisting duty rule is unenforceable even if reliance).

[148] *Kern*, 57 P. at 799. *See also* Arbogast v. Mylius, 46 S.E. 809 (W. Va. 1904). The court used a two pronged rationale of estoppel and consideration. *Id.* "The contract having been rescinded by mutual consent, and [seller] having in good faith" resold, the buyer is "estopped" from objecting. *Id. See also* American Food Co. v. Halstead, 76 N.E. 251 (Ind. 1905); Blaess v. Nichols & Shepard Co., 88 N.W. 829 (Iowa 1902) (restating that where one party under modification has performed, the other cannot object that there was no consideration).

[149] *See* Blakeslee v. Board of Water Comm'rs, 139 A. 106, 110, 112 (Conn. 1927) (inducing promisee to perform was indicator of consideration); King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105 (Minn. 1895) (reasoning that construction work done in reliance on promise); Michaud v. McGregor, 63 N.W. 479 (Minn. 1895) (holding that promisee did work in reliance on waiver); Schwartzreich v. Bauman-Basch, Inc., 131 N.E. 887 (N.Y. 1921) (stating that employee relied on employer's promise of more salary and did not change jobs); Meech v. City of Buffalo, 29 N.Y. 198 (1864) (holding that the contract proceeded with work on the faith of the promise of extra compensation). *See also* RESTATEMENT (SECOND) CONTRACTS §89(c) (1979).

After the publication of section 90 of the *Restatement of Contracts* in 1932, courts began to forthrightly state reliance as the sole basis for enforcement of modification agreements.[150] A 1933 Massachusetts decision stated in dictum that promissory estoppel could be the basis for enforcement of a modification, but the plaintiff failed because he did not show actual reliance.[151] The next year, the Michigan Supreme Court applied estoppel to bar a life insurance company from denying inaccurate statements made about the remaining period of contract coverage; the court inferred that since the insured did not apply for another policy that he had relied on the misstatement.[152] Then, in *Fried v. Fisher*,[153] promissory estoppel was applied directly when enforcing a discharge of a partner from liability on a partnership's lease obligation. In this case, the partner of a law firm told the lessor that he wanted to leave the firm and start a restaurant but only if he had no further liability on the lease; the lessor assured him that he would be released if he left. The lawyer then resigned. The Pennsylvania Supreme Court found justifiable reliance on the oral release of the three year written contract.

Nine years after *Fried*, the British House of Lords announced their decision in *Central London Property Trust Ltd. v. High Trees House Ltd.*;[154] the decision has become the best known English common law decision recognizing reliance as ground for enforcement of a contract modification.[155] The decision was widely discussed for several reasons: first, it was the first significant reform of the preexisting duty rule in England since the conservatism of *Foakes*;[156] second, it is the fountainhead case for what minimal recognition there is of promissory estoppel in English law; and, third, the decision was rendered by Judge

---

[150] RESTATEMENT OF CONTRACTS §§ 88(2), 90 (1932) (stating that retraction of waiver of condition was permitted but only before reliance).

[151] Sheehan v. Commercial Traveler's Mut. Accident Ass'n, 186 N.E. 627, 630 (Mass. 1933).

[152] *See* Hetchler v. American Life Ins. Co., 254 N.W. 221 (Mich. 1934). This case could be viewed as applying equitable estoppel because the company was estopped from proving a fact contrary to their misrepresentation relied upon. But it can also be rationalized as promissory estoppel because the misstatement constituted an implied promise about how long the insurance contract would run in the future before it lapsed.

[153] 196 A. 39 (Pa. 1938).

[154] K.B. 130 (1947). Judge Denning extended the rule in *Hughes v. Metropolitan Ry.*, 2 App. Cas. 439 (1877), where a promise by a contracting party (but not a creditor) to not enforce his legal rights had a limited effect in equity without consideration. K.B. 130 (1947).

[155] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 89(c), cmt. d, illus. 7 (1979) (referencing *High Trees* in reporter's note to comment d).

[156] Ironically, the rule in *Pinnel's Case* was not assumed to prevent rent reductions until the *High Trees* case. *See* STOLJAR, *supra* note 93, at 132. In this respect, Judge Denning actually extended the impact of the preexisting duty rule.

Denning, probably the best known English jurist of this century.[157] In the *High Trees* case, a landlord and tenant had agreed to a rent reduction on a lease during the war, but after the war the landlord sued for the full amount of future payments, and he also sued for the agreed deductions from past payments because the preexisting duty rule barred enforcement of the modification. Denning acknowledged the absence of consideration to support the landlord's promise[158] to reduce the rent, but held that the promise was enforceable, for the wartime period anyway, because the landlord's "promise to accept a smaller sum in discharge of a larger sum, if acted upon,[159] is binding notwithstanding the absence of consideration; and if the fusion of law and equity leads to that result, so much the better." That aspect was not considered in *Foakes*.[160] The decision created the most significant English exception to date to *Pinnel's Case* and *Foakes*.

Denning's dictum in *High Trees* went further by suggesting that a broader application of promissory estoppel might be possible.[161] Several years later, an English lower court took Denning literally by employing reliance as a basis for creation of an obligation rather than merely for discharge or modification of an existing contract. Perhaps due to conservative rumblings in the legal community against what extensions of *High Trees* might do to the doctrine of consideration,[162] however,

---

[157] Alfred T. Denning (b. 1899). Subsequent to serving as a law lord in the House of Lords, he served from 1962 to 1982 as Master of the Rolls, the judicial position affording the greatest opportunity to influence the common law.

[158] Denning's rationale was based on promissory estoppel logic rather than equitable estoppel logic because it was based on the landlord's promise about future rent obligations. Denning made it clear he was not basing his decision on equitable estoppel because of *Jorden v. Money*, 5 H.L.C. 185 (1854), which ruled that a representation as to the future had to be in a contract or it was unenforceable.

[159] The reliance found in *High Trees* has been questioned since it is difficult to see how the tenant's act of simply paying less rent constituted detrimental reliance. *See* E. ALLAN FARNSWORTH, CONTRACTS 280 n.5 (1982). Denning effectively held in *High Trees* that the preexisting duty rule is no bar once the terms of the modification are performed. An alternative solution would have been to rationalize the ruling enforcing the modification under the doctrine of consideration, by pointing to the bargained-for detriment of the obligor actually applying his funds, to satisfy the modification agreement rather than using the funds for some other purpose. There is compliance with the consideration requirement that consideration must move from the promisee in reliance on the promisor's request.

[160] *See High Trees*, K.B. at 135.

[161] Denning said, "I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on is binding so far as its terms properly apply." *Id.* at 136.

[162] In *Combe v. Combe*, 2 K.B. 215, 219-20 (C.A. 1951), Denning said: "Much as I am inclined to favour the principle stated in the *High Trees* case, it is important that it should not be

Denning himself reversed the lower court, saying the principle stated in the *High Trees* case "does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to . . . enforce them."[163]

Promissory reliance logic is available in England as a defense to suspend a preexisting obligation but not as a basis for a new cause of action when consideration is lacking. In its narrowest sense, *High Trees* could be read to merely provide a reliance defense in support of a suspensory release from, or reduction of, a preexisting contractual obligation. It did lend support to the proposition, argued in accord cases generally, that a contract discharge was not necessarily governed by the same rules applicable to the formation of a contract.[164] This anemic English version of promissory reliance has not been able to move past the welcomed reform of *Foakes* because first, the continued presence of the seal in England provides a mechanism for modifications and discharges without the need to show consideration; second, consideration is easier to establish in English law today than it is in the United States;[165] and third, the reverence for precedent is stronger in the single jurisdiction of England and Wales than in the multiplicity of American common law jurisdictions. It has been suggested that England

---

stretched too far, lest it should be endangered." This fear about pushing conservative elements of the judiciary too far is a paraphrase of Mansfield's expression of concern about pushing the doctrine of quasi-contract too much. *See* Weston v. Downes, 99 Eng. Rep. 19 (K.B. 1778). *Cf.* Brikom Invs. Ltd. v. Carr, Q.B. 467, 486 (C.A. 1979) ("[I]t would be wrong to extend the doctrine of promissory estoppel, whatever its precise limits at the present day, to the extent of abolishing in any backhanded way the doctrine of consideration.").

[163] *Combe*, 2 K.B. at 219; *Cf.* ENGLISH LAW REVISION COMMITTEE, SIXTH INTERIM REPORT, 1937, Cmd. 5449, at 24-25 (stating that a promise should be enforced without consideration if there is detrimental reliance). The spin on *High Trees* in *Combe* is analogous to the approach taken in the moral obligation cases of waivers of bankruptcy and statute of limitations in that enforcement of the traditional strict contract rule of the bankruptcy discharge or the statute of limitations does not achieve a just and moral result, but the moral obligation principle is not a general ground for creating a contract obligation. *See* JOHN CARTER & DAVID HARLAND, CONTRACT LAW IN AUSTRALIA 372-76 (2d ed. 1991) (applying promissory estoppel to a preexisting duty case in Australia in 1983 and since 1988 has recognized that the doctrine can be the ground for creating liability where none existed before).

[164] *Cf.* FIFOOT, *supra* note 93, at 414. This comment harks back to the earlier comment that consideration applies to contract formation but not to discharge or modification.

[165] *See* GUENTER TREITEL, THE LAW OF CONTRACT 67 (1991). Consideration may be "invented" in England, as finding a prejudice to promisee to be a detriment even though not in fact suffered. *Id.* England's detriment side of consideration, not necessarily bargained-for, provides greater flexibility in treating reliance as consideration than is possible under American bargain consideration; to a degree, this may explain why there has been greater pressure in the U.S. to reform the preexisting duty rule. *Id.*

needs a restatement of the law in order to accomplish what section 90 of the *Second Restatement of Contracts* did in the United States in facilitating a broader usage of promissory estoppel in England past its narrow application to modifications and discharges.[166]

Now returning to the American use of promissory estoppel in enforcement of contract modifications, a study of the case law indicates that its usage had grown by the 1960s. This expanded coverage occurred both because of the influence of the broader application of promissory estoppel generally and because section 89(c) of the *Second Restatement*, separate from section 90, expressly recognized reliance as a ground that made a contract modification binding.[167] A myriad of types of relied-upon modifications could qualify for this exceptional relief. One of the most common categories of cases where reliance relief has been granted involves reliance on an informal waiver of a formal, often technical, contract condition, such as requirements concerning a restriction on renewal,[168] a notice of termination[169] or an extension.[170] These tend to be long term contracts, such as leases, employment and financing, where an informality develops and those modified practices are detrimentally relied upon. Courts are reluctant to allow a later demand for technical compliance with the letter of the original contract to wreak an unfair result.[171]

---

[166] *See* Stroud Milsom, *A Pageant in Modern Dress*, 84 YALE L.J. 1585, 1587-88 (1975). However, in the single legal jurisdiction of England and Wales, the lack of uniform legal rules may not be used as an excuse to restate the law in order to reform it. *Id.*

[167] RESTATEMENT (SECOND) OF CONTRACTS § 89(c) (1979). Section 89 adapted reliance ideas found in section 90 of the *Second Restatement* and section 2-209(5) of the UCC. *See id.* at § 90; U.C.C. § 2-209(5) (1999).

[168] *See, e.g.*, Billman v. V.I. Equities Corp., 743 F.2d 1021, 1024 (3rd Cir. 1984) (stating that waiver is more akin to promissory estoppel than to equitable estoppel).

[169] *See* Canada v. Allstate Ins. Co., 411 F.2d 517, 519 (5th Cir. 1969) (citing RESTATEMENT (SECOND) OF CONTRACTS § 224 (Tentative Draft No. 4, 1968)); Loper v. O'Rourke, 382 N.Y.S.2d 663, 665 (1976) (citing RESTATEMENT OF CONTRACTS §88(2)).

[170] *See* Wachovia Bank & Trust Co. v. Rubish, 293 S.E.2d 749, 757 (N.C. 1982) (finding a promise implied from informal waiver of the written notice requirement).

[171] Reliance relief for actions subsequent to the signing of the original contract is in line with the modern tendency in the law toward less reverence for written contracts in order to realize intent, for example, liberalization of the parol evidence rule and modern exceptions to the *Statute of Frauds* found in the UCC and the *Restatements*. *See* U.C.C. § 2-209(4) (1999) (stating that failure to rescind or modify due to a writing requirement may still act as waiver); U.C.C. § 2-209(5) (stating that a retraction of waiver is permitted unless relied on); RESTATEMENT (SECOND) OF CONTRACTS § 89(c), cmt. d (1979). Reliance performs a function of form in replacement of the technical written requirements.

Today, there is a broad acceptance of this reform of the preexisting duty rule when there is justifiable reliance on a modification promise. The result is that, although a contract modification may not be enforceable when made because of the preexisting duty rule, it may become enforceable if there is reliance on the voluntary modification. The promisor effectively consents to pay for the reliance cost by his failure to object as the promisee engages in foreseeable and reasonable reliance.

2. Exception for Unanticipated Circumstances

While section 73 of the *Second Restatement* reflects the continuing majority common law position when adopting the preexisting duty rule, section 89(a) reflects an emerging minority position that consensual modifications made on account of unanticipated circumstances should be enforceable without consideration.[172] The judicial reasoning behind granting exceptional relief for a contract modification precipitated by unanticipated circumstances rests on the notion that a contract includes fundamental assumptions about surrounding circumstances impacting the parties' rights and duties. A bargain involves shouldering risks based on certain jointly anticipated facts, and, if there is a foreseeable change, that is a risk to be borne; but, if it is unanticipated, fairness and the consensual theory support allowing either an excuse or a modification,[173] especially if enforcement of the letter of the contract in unanticipated conditions causes a substantial loss.

Modern contracts are more susceptible to unexpected circumstances because these contracts tend to be long term and market swings can be more dramatic than during the pre-industrial period. These longer term modern contracts are exposed to substantial, unanticipated circumstances, like strikes, shortages, depressions, war, changed

---

[172] The paradigmatic modification falling under section 89(2) involves a promise to pay more for construction work due to unanticipated circumstances, such as an excavator unexpectedly running into granite. These cases present a challenge to the precedents denying increases under the ruling in the earlier seamen's wage increase cases. There was no equivalent to section 89 in the *First Restatement*. The separation of the preexisting duty rule into two separate sections (73 and 89) is yet another modern example of a general rule breaking down into a number of separate sub-rules, thus taking into account new factors, on account of the fact that the general rule has not been enforced uniformly. *Cf.* CORBIN, *supra* note 89, at § 171.

[173] *See* Linz v. Schuck, 67 A. 286, 288 (Md. 1907). A contract was made upon supposed facts that turned out incorrect when it was discovered that a cellar being dug was in swampy conditions over buried a creek bed. *Id.* The court stated that it would be a harsh rule if law did not allow modification. *Id.*

construction conditions, and a myriad of other unanticipated circumstances not as likely to have arisen in Coke's day. Comment (a) to section 89 recognized the "utility" in "adjustments to on-going transactions." An efficient and equitable continuation of a contract may only be possible with a modification.

The inefficiency, loss and unfairness caused by an unanticipated shift in conditions provides a good motive for the modification; unanticipated circumstances provide the *causa* or reason for seeking the modification.[174] These circumstances establish a justification for the modification and, consequently, help overcome the usual suspicion of coercion a modification engenders.[175] Following this logic, the nineteenth century seamen's wage increase promises might have been binding if it had been established that an unanticipated risk, rather than coercion, had precipitated the requests for wage increases.[176]

The origins of the exceptional treatment, given contract modifications made on account of unanticipated circumstances, are found in decisions rendered during the second half of the nineteenth century based on notions of: the consensual theory, actual or near impossibility, settlement of bona fide contract disputes, and fundamental fairness. These grounds for exceptions to the preexisting duty rule were usually rationalized within the parameters of the doctrine of consideration.

The civilian-influenced consensual theory spawned several contract doctrines that impacted each other.[177] Modern emphasis on free consent inspired such rules as remoteness of damages and impossibility, and these rules, along with general support for consent-based obligations, contributed to the recognition of the unanticipated circumstances exception to the preexisting duty rule. Before the middle of the nineteenth century, proponents of the consensual theory argued that

---

[174] *See* Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 147 (6th Cir. 1983) ("[T]he single most important consideration in determining whether the decision to seek a modification is justified in this context is whether, because of changes in the market or other unforeseeable conditions, performance of the contract has come to involve a loss.").

[175] *See* Pittsburgh Testing Lab. v. Farnsworth & Chambers Co., 251 F.2d 77, 79 (10th Cir. 1958) (holding that extra compensation based on unforeseen difficulties provides protection against coercion); Linz v. Schuck, 67 A. 286, 288-89 (Md. 1907); King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105, 1106 (Minn. 1895) (holding that "exceptional circumstances" help overcome inference of coercion).

[176] *Accord Linz*, 67 A. at 290.

[177] *See* POTHIER, *supra* note 5, at 4, 81; Simpson, *Innovation*, *supra* note 2, at 265-77.

parties to a contract should not be liable for consequences not "foreseen" and not "contemplated at the time of the contract."[178] An early implementation of this idea appeared in 1854 in the rule governing remoteness of damages, which stated that damages were not recoverable unless they were the consequence of what was in the "contemplation of both parties, at the time they made the contract."[179] If it was not within their contemplation, then it was not consented-to, and therefore it was not a part of the deal. This logic, and accompanying verbiage, was translated into American decisions enforcing contract modifications made because of unanticipated circumstances; the reasoning was that the parties should be permitted to consent to an alteration of the terms of their original contract if it no longer reflected the conditions upon which their original consent was based.

In *King v. Duluth, M. & N. Ry. Co.*,[180] the Minnesota Supreme Court declared that a modification increasing the payment due to a contractor should be enforced because of the "additional burden not contemplated by the parties."[181] In the 1907 Maryland decision, *Linz v. Schuck*,[182] a construction contract involving unforeseen soil conditions, found a modification binding on the same basis: that the difficulties were substantial, unforeseen and not within the contemplation of the parties when the original contract was made.[183] By enforcing these modification agreements, these decisions were effectively accomplishing what the remoteness of damages rule did in limiting or mitigating the damages

---

[178] *See* POTHIER, *supra* note 5, at 81. *See also* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 64, 67 (New York, Voorhies 1847).

[179] Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (1854). Baron Parke cited the American writer Sedgwick's adoption of the French rule that "[t]he debtor is only liable for the damages foreseen, or which might have been foreseen." *Id.* at 147. *See also* SEDGWICK, *supra* note 178, at 64, 67. In searching for theories to accommodate unprecedented change formed by an industrial economy, common law judges were turning like never before to treatise writers for inspiration, a practice commonplace in civil law countries.

[180] 63 N.W. 1105 (Minn. 1895).

[181] *Id.* at 1107 (holding the existence of an exception but did not apply it because other consideration found in extra work done due to railway's changing the route of the line). *Accord* Blakeslee v. Board of Water Comm'rs, 139 A. 106, 112 (Conn. 1927) (holding that circumstances not contemplated by parties); Curry v. Boeckeler, 27 S.W.2d 473, 475 (Mo. Ct. App. 1930) ("[D]ifficulty which was not known or anticipated by the parties when the contract was entered into...."). *Cf.* Goebel v. Linn, 11 N.W. 284, 286 (Mich. 1882) (enforcing the modification, without mentioning the preexisting duty rule, because buyer "freely" and "independently" agreed to higher price due to unanticipated failure of ice crop).

[182] 67 A. 286 (Md. 1907).

[183] *Id.* at 288.

and loss otherwise sufferable, due to the unforeseen circumstances, under the original contract.[184]

Despite the fact that *King* and *Linz* rationalized consideration present, section 89(a) of the *Second Restatement* does not require consideration to enforce a modification made on account of circumstances not anticipated when the original contract was formed.[185] Of the many cases cited in the reporter's note to section 89, only two decisions enforced modifications without requiring consideration, one partially,[186] and the other totally,[187] rationalized under the rescission fiction rejected by section 89.[188] The remainder of the decisions cited were rationalized under the doctrine of consideration. In *King*, the fountainhead unanticipated circumstances case stating that consideration could be found to support a modification, Minnesota Supreme Court Chief Justice Start opined that when "unforeseen and substantial difficulties in the performance... cast upon him an additional burden not contemplated by the parties, and the opposite side promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration."[189] Justice Start added: "Cases of this character form an exception to the general rule that a promise to do that which a party is

---

[184] *Cf.* Richard Danzig, Hadley v. Baxendale: *A Study in the Industrialization of the Law*, 4 J. LEGAL STUDIES 249, 282 (1975) (stating potential breachor could calculate whether breach would be an efficient move). Another consensual theory approach rationalized an excuse from performance due to physical impossibility. Blackburn cited Pothier's consensual ideas in *Taylor v. Caldwell*, 122 Eng. Rep. 309, 312-13 (1863), to overcome *Paradine v. Jane*, 82 Eng. Rep. 897 (1647), which was touted in the 19th Century to have declared the strict contract liability rule.

[185] RESTATEMENT (SECOND) OF CONTRACTS § 89 (1979).

[186] Watkins & Son v. Carrig, 21 A.2d 591, 592 (N.H. 1941).

[187] Siebring Mfg. Co. v. Carlson Hybrid Corn Co., 70 N.W.2d 149, 152 (Iowa 1955) (upholding modification to pay more for steel corn crib due to steel strike). The court said it could be rescinded while executory. *Id.* Illustration number 4 to section 89 is based on this case. RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b, illus. 4 (1979). But the principle in *Siebring* has been overruled in Iowa as it relates to modification. *See* Recker v. Gustafson, 279 N.W.2d 744 (Iowa 1979) (holding that consideration is required for a modification in Iowa, though not for a true rescission).

[188] RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1979) (opposing rescission fiction on doctrinal and fairness grounds).

[189] King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105, 1107 (Minn. 1895). This influential detriment consideration rule was dictum because the modified agreement required the contractor to perform something extra so that consideration was found. *Id.* Nevertheless, the case's dictum became influential because of its thorough and logical airing of the relevant ingredients of the emerging exception. *Id.* Thus, the dictum in *King* partially toppled the dictum in *Pinnel's case.*

already bound to do" is not consideration to support the promise to pay more.[190] Justice Start effectively rejected the position of the Minnesota court taken in 1876[191] that a modification to pay more for excavation, due to the discovery of unexpected rocks, was unenforceable under the strict contract liability view that he was obligated to excavate at the original price no matter what difficulties arose subsequently.[192] Justice Start cited with approval the 1864 New York case *Meech v. City of Buffalo*,[193] which had enforced a promise to pay more to install a sewer after quicksand was discovered, thereby making it twice as expensive to complete the project. The New York court ruled that the promise was binding because the contractor proceeded with the work on the faith of the additional compensation, and that work constituted consideration for the promise to pay more. Justice Start realized the nineteenth century concern over the "additional burden not contemplated by the parties."[194]

The logic and language of *King* was adopted by some courts verbatim.[195] Other courts found consideration to support modifications using different analyses. In *Goebel v. Linn*,[196] Michigan Supreme Court Justice Cooley isolated a mutual benefit in both the ice company and the brewery saving their interests by raising the original price of the ice after the failure of the ice crop.[197] In the wartime labor shortage case *Blakeslee v. Board of Water Commissioners*,[198] the Connecticut court found a detriment to the promisee in both doing the unanticipated extra work and the risk that the cost of work could increase and a benefit to the promisor in completion of the contract, thus avoiding delay and

---

[190] *Id.*

[191] *See* Nash v. City of St. Paul, 23 Minn. 132 (1876). This traditional view is in agreement with the strict contract liability principle in *Paradine v. Jane*, 82 Eng. Rep. 897 (1647).

[192] The 20th century view agrees with the assertion that a changed circumstance short of excuse leaves the risk with the contractor; however, once the owner elects to waive a breach action because he finds more value in a modification, he is bound by that modification. *See Watkins*, 21 A.2d at 592.

[193] 29 N.Y. 198, 218-19 (1864) (per concurrence) (creating "a new agreement on a more just and equitable basis"). *But cf.* N. Y. CONST., art. III, § 28 (rendering invalid a promise to pay a contractor extra compensation on a state project). These state constitutional bars on enforcement of modified contracts with government employees are usually narrowly construed so that many of these contracts made for a good reason are enforceable.

[194] *King*, 63 N.W. at 1107. The consensual theory facilitated excuse due to impossibility in Blackburn's opinion in *Taylor v. Caldwell*, 122 Eng. Rep. 310, 312-14 (1863) (citing Pothier's consensual ideas).

[195] *See, e.g.*, Linz v. Schuck, 67 A. 286, 289 (Md. 1907); Curry v. Boeckeler Lumber Co., 27 S.W.2d 473, 475 (Mo. Ct. App. 1930).

[196] 11 N.W. 284 (Mich. 1882).

[197] *Id.* at 284-86.

[198] 139 A. 106, 112-13 (Conn. 1927).

attendant cost.[199] And in *Pittsburgh Testing Laboratory v. Farnsworth & Chambers Co.*,[200] the court simply stated that the extra and unforeseen difficulties constituted consideration for the promise to pay more.[201]

The drafters of section 89(a) found comfort in the broader stroke of section 2-209(1) of the UCC, and other state statutes, which did not require consideration to support a consensual modification;[202] but, a search of the case law unearths a paucity of support in the common law for section 89's position. The only case directly on point is *Watkins v. Carrig*,[203] and it is partially rationalized on the bases of a gift and the fiction of a rescission;[204] moreover, this New Hampshire decision emanated from a jurisdiction following a minority common law position, announced early in the century, that had rationalized the presence of consideration to support any contract modification, changed circumstances or not.[205] The modification promise was made to pay more in *Watkins* on account of unanticipated solid rock encountered in excavating a cellar. Putting the alternative gift and rescission reasons in the rationale to the side, the New Hampshire court enforced the modification without consideration on the grounds of common intent,

---

[199] The "Massachusetts rule" found the benefit to the promisor in the promisee forbearing from exercising his "right" to breach. *See* Parrot v. Mexican Cent. Ry. Co., 93 N.E. 590, 594 (Mass. 1911); Munroe v. Perkins, 26 Mass. (9 Pick.) 298 (1830). Several cases included in the reporter's note to section 89 cited this analysis with approval. *See, e.g.*, Michaud v. McGregor, 63 N.W. 479, 480 (Minn. 1895); Curry v. Boeckeler Lumber Co., 27 S.W.2d 473, 475 (Mo. Ct. App. 1930). *Cf.* King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105, 1106 (Minn. 1895).

[200] 251 F.2d 77, 79 (10th Cir. 1958) (based on fairness).

[201] *Id.*

[202] RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. c (1979) (acknowledging written evidence sometimes required by statutes).

[203] 21 A.2d 591 (N.H. 1941).

[204] *Id.* at 592-93. Although comment (b) to section 89 rejects the fiction, other cases cited in the reporter's note to section 89 also employ the fiction. *See* RESTATEMENT (SECOND) OF CONTRACTS §89 cmt. b (1979). *See also* Siebring Mfg. Co. v. Carlson Hybrid Corn Co., 70 N.W.2d 149, 152 (Iowa 1955); Schwartzreich v. Bauman-Basch, Inc., 131 N.E. 887 (N.Y. 1921). Massachusetts' cases employing that rule often utilize the rescission technique. *See* Swartz v. Lieberman, 80 N.E.2d 5, 6 (Mass. 1948); Parrot v. Mexican Cent. Ry. Co., 93 N.E. 590, 594 (Mass. 1911); Munroe v. Perkins, 26 Mass. (9 Pick.) 298 (1830). The above cited case, *Schwartzreich*, is the basis for Illustration number 3 to section 89, which seems more to do with reliance than with an unanticipated circumstance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b, illus. 3 (1979).

[205] Frye v. Hubbell, 68 A. 325 (N.H. 1907). *Frye* was discussed in *Watkins*, the latter noting the ready means to find consideration for a modification in New Hampshire but doubting whether consideration should even be required in that type of case. Watkins & Son v. Carrig, 21 A.2d 591, 594 (N.H. 1941).

business practices and fairness.[206] The court found the higher price to be based on the "intention of the parties" and their "mutual understanding . . . that the contract price was not to control."[207] The court writes: "The defendant intentionally and voluntarily yielded to a demand for a special price for excavating rock."[208] The defendant did not protest but agreed, and so, "fairly," he should be held to the new arrangement under principles of "fundamental justice and reasonableness."[209] The court emphasized that this approach is "considered to meet the reasonable needs of standard and ethical practices of men in their business dealings with each other."[210] The enforcement of contract "changes to meet changes in circumstances and conditions should be valid if the law is to carry out its function and service by rules conformable with reasonable practices and understandings in matters of business . . . ."[211]

The reasons given in *Watkins* for not requiring consideration are sound not only for modifications made due to unanticipated circumstances but also for modifications generally. There are other reasons for concluding that the traditional functions of consideration are adequately fulfilled here. One of the functions of consideration is to determine if the promise is motivated by a good reason, for example, unanticipated circumstances evidence such a reason, or *causa*, for a modification.[212] The cautionary and channeling functions of consideration are supplied by the fact that the modification itself is a bargain, and one regularly made as a matter of business practice; indeed,

---

[206] *Watkins*, 21 A.2d at 594.

[207] *Id.* at 593-94.

[208] *Id.* at 594. The court revealed that the owner did not have to agree to the modification because there was no basis for excuse and thus the risk under the original contract was with the contractor. *Id.* at 592.

[209] *Id.* at 594 (quoting Cavanaugh v. Boston & M.R.R., 79 A. 694, 696 (1911)). An analogy was drawn to moral obligation found in past consideration cases of waivers in bankruptcy of statute of limitations. *Id.* This analogy was not proper because the facts were found to not afford the contractor an excuse defense in *Watkins;* thus, absent the modification, the defendant had the right to demand performance under the original contract, which would not be available to the creditors in the past consideration cases. *Id.*

[210] *Id.* at 594.

[211] *Watkins*, 21 A.2d at 593.

[212] *See* Pittsburgh Testing Lab. v. Farnsworth & Chambers Co., 251 F.2d 77, 79 (10th Cir. 1958) (stating that unforeseen difficulties constituted consideration and provided protection against coercion); Liebreich v. Tyler State Bank & Trust Co., 100 S.W.2d 152 (Tex. 1936) (deciding that economic depression was a sufficient consideration). *See also* Commercial Car Line v. Anderson, 224 Ill. App. 187 (1922); CORBIN, *supra* note 89, at § 184. The occurrence of the unexpected event provides evidence of the need for an adjustment in the contractual relationship.

the comments to section 89(a) are themselves rationalized within the parameters of the bargain construct.[213] Furthermore, the protective function of consideration safeguarding against coercion can be fulfilled by the now developed doctrine of economic duress.[214]

The evidentiary and cautionary functions performed by the reliance element are also often present in a modified relationship made on account of unanticipated circumstances, whether the modification is justified on the basis of consideration, estoppel, or some other theory.[215] The consideration-based rationales often allude to how reliance by the promisee contributed to the finding of consideration[216] for the modification promise in much the same way that later courts were comfortable with invoking the maturing ground of promissory estoppel.[217] In fact, very few of these changed circumstances modifications enter the courts until after the promisee has relied on the voluntary promise of extra compensation by resuming performance

---

[213] *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. a (1979). *See also* Fuller, *supra* note 76, at 805 (discussing that the need for formality may be rendered superfluous by "forces native to the situation, including the habits of the parties").

[214] The court in *Watkins* assured itself that the promise to pay more was voluntary, without protest and perceived by the promisor to be beneficial. *Watkins*, 21 A.2d at 594. The absence of economic duress must not be automatically assumed, however, as exemplified by *Recker v. Gustafson*, 279 N.W.2d 744, 757-58 (Iowa 1979). For example, the judicial comments allude to pressure put on the young buyer by the experienced seller and his attorney. *See generally Recker*, 279 N.W.2d at 744. The Iowa court neither recognized the exception nor found duress but, instead, declared consideration was lacking. *Id.* The court also rejected the rescission fiction, which if blindly applied could likewise overlook the duress issue. *Id.*

[215] *See* Fuller, *supra* note 76, at 810-12, 814, 817 (channelling function decreases). The form functions performed by a writing is also deemed relevant in comments (b) and (c) to section 89. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 cmts. a-b (1979). Under section 74(2) of the *Second Restatement*, a written surrender of a claim or defense, by one who does not believe it is valid, constitutes consideration, but if a similar surrender is oral, it fails as consideration under section 74(1)(b). *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 74(1)(b), (2) (1979).

[216] *See* Blakeslee v. Board of Water Comm'rs, 139 A. 106, 110, 112 (Conn. 1927) (inducing promisee's performance was indicator of consideration); King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105 (Minn. 1895) (involving construction work done in reliance on promise); Michaud v. McGregor, 63 N.W. 479 (Minn. 1895) (stating that promisee did work in reliance on waiver); Schwartzreich v. Bauman-Basch, Inc., 131 N.E. 887 (N.Y. 1921) (reasoning that employee relied on employer's promise of more salary by not changing jobs); Meech v. City of Buffalo, 29 N.Y. 198 (1864) (stating that contractor proceeded with work on the faith of the additional compensation). *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 89 cmts. a-b (1979).

[217] *See* Sheehan v. Commercial Traveler's Mut. Accident Ass'n., 186 N.E. 627, 630 (Mass. 1933); Hetchler v. American Life Ins. Co., 254 N.W. 221 (Mich. 1934); Fried v. Fisher, 196 A. 39 (Pa. 1938); Central London Property Trust Ltd. v. High Trees House Ltd., K.B. 130 (1947).

under the more burdensome conditions.[218] In *Watkins*, neither an estoppel nor a consideration-based decision exemplified this when the court emphasized that "[t]he plaintiff on the strength of the promise proceeded with the work."[219]

Section 89(a) of the *Second Restatement* requires that a promise made on account of unanticipated circumstances must be "fair and equitable." An inquiry into whether a modification is "fair and equitable in view of the circumstances not anticipated" scrutinizes the motivation for, and the process of, negotiating and forming the agreement.[220] In *Linz*, the court said the refusal to perform under the original contract unless the price was increased must be "equitable and fair" in light of the unanticipated circumstances.[221] The unanticipated circumstances help rebut suspicion of abuse and suggest a good motive for seeking the modification.[222] Because this is a higher standard than the arm's length negotiation of the original contract, it is relevant and permissible to determine whether a party in a stronger financial or market position than the other abused that advantage to extort an unfair modification.[223]

The modification is equitable if the unanticipated circumstances evidence an absence of coercion or a bad faith attempt to escape the original performance obligation.[224] Fairness means more than

---

[218] If the modification is not performed, the promisee may fail to recover because the terms of the modification may well require satisfaction. *See* RESTATEMENT (SECOND) OF CONTRACTS § 281 (1979).

[219] *Watkins*, 21 A.2d at 592.

[220] RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1979).

[221] Linz v. Schuck, 67 A. 286, 289 (Md. 1907).

[222] *See id.* at 286-89 (allowing a "just and equitable" principle for exception to the preexisting duty rule; when changed circumstances, the fair course is to either let the party out of the deal or pay more); King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105, 1107 (Minn. 1895) (reasoning that changed circumstances can show whether demand for more money is "manifestly fair").

[223] *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1979) (stating that if it does not involve an unanticipated circumstance, the formation process and terms of the modification cannot involve coercion and must demonstrate an objective reason for modification).

[224] From an equitable perspective, courts over the last century have characterized a modification as "inequitable" if the presence of coercion would be grounds for equity granting a rescission. *See King*, 63 N.W. at 1107. In addition, unforeseen substantial difficulties could be the reason or basis for an equitable refusal to comply with the original contract terms. *Id.*; *see also Linz*, 67 A. at 289 (stating that refusal to perform could be "equitable and fair"); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1979) ("[F]air and equitable goes beyond absence of coercion and requires an objectively demonstrable reason for seeking a modification.").

maneuvering for a modification without being guilty of coercion since, as the court declared in *Watkins*, the basis for a modification needs "to meet the reasonable needs of standard and ethical practices of men in their business dealings with each other."[225] Comment (b) to section 89 states that the standard "requires an objectively demonstrable reason for seeking the modification";[226] *that could include either a good commercial reason or that it be consistent with fair dealing;* however, for contracts not between merchants, general contract law does not have the benefit of the tightly developed principles and usages available as safeguards in commercial sales law.[227]

3. Emergence of Policing Mechanisms Justify Abolition of Rule

Comment b to section 89 of the *Second Restatement* states that *the preexisting duty rule was justified in cases of mistake and coercion, but instead of narrowing the rule to situations of lack of consent, the restaters retained the rule and exceptions were recognized only for reliance, unanticipated circumstances, and statutory reforms.*[228] It is the contention of this writer that the emergence of workable policing mechanisms to test whether consent was coerced undercuts the lingering concerns over voluntariness underpinning retention of the old rule. Furthermore, it is submitted that it was no mere coincidence that the growing availability of policing mechanisms by the latter part of the nineteenth century was logically followed in time by the statutory and judicial reforms attempting to abolish the preexisting duty rule. These policing mechanisms were now available to supplant consideration's policing role. This section focuses on the principal policing mechanisms emerging over the past century: economic duress, unconscionability, and good faith and fair dealing. In sales contracts and in the few jurisdictions where consideration is not required for modifications of other types of contracts, unconscionability, economic duress, and good faith complement each other in policing

---

[225] *Watkins*, 21 A.2d at 594 (stating that if promisor agrees to pay a debt barred by bankruptcy without protest, then in fairness he should honor the debt); *see also* Pittsburgh Testing Lab. v. Farnsworth & Chambers Co., 251 F.2d 77, 79 (10th Cir. 1958) ("[T]he courts generally sustain the consideration for the new promise, based upon standards of honesty and fair dealing and affording adequate protection against unjust or coercive exactions.").

[226] RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1979).

[227] Comment b to section 89 of the *Second Restatement* draws from and roughly parallels comment 2 to section 2-209 of the UCC; but, the *Restatement* comments make no mention of fair dealing, and the UCC comments only state that the showing of an objectively demonstrable reason "may" be required. *See* U.C.C. § 2-209 cmt. 2 (1999); RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1979).

[228] *Id.*

overreaching and sharp practices during the bargaining phase leading up to formation of a modification. Rather than absolutely barring contract modifications as the preexisting duty rule would, fair consensual modifications are enforceable. While economic duress provides relief for lack of free will, and unconscionability protects against unfairness resulting from lack of choice, the good faith standard scrutinizes whether a good motive existed for seeking the modification. Therefore, the three principles police the motive for instigating the modification, the process of negotiating the modification, and any unfair result.

a. Economic Duress

When an agreed-to modification or discharge of a preexisting duty is alleged, the potential that the concession was obtained by coercion is always a possibility if it appears that agreement was the only viable alternative. When the preexisting duty rule was firmly in place, it averted the possibility of enforcing coerced or unconscionable modifications; however, the protection was by no means complete, due to all the exceptions and fictions related to the preexisting duty rule. Courts focused on whether consideration was present, with little or no heed to coercion. Judicial equivocation regarding the possibility of coercion is reflected in the handling of the nineteenth century seamen's wage cases. Lords Kenyon and Ellenborough could not agree over whether the refusal to enforce these modified agreements should be based on policy (impliedly to avert suspected coercion by the seamen)[229] or on lack of consideration.[230] Unfortunately, the latter approach of ignoring the possibility of coercion prevailed, under the sway of *Foakes*.[231]

Massachusetts courts then proceeded to aggravate the consequences of judicial inattention to the issue of coercion by enforcing a modification made because a contractor refused to proceed unless he was paid more. In the precedent-setting case *Munroe v. Perkins*,[232] the extra amount

---

[229] Harris v. Watson, 170 Eng. Rep. 94 (1791) (per Lord Kenyon).

[230] Stilk v. Myrick, 170 Eng. Rep. 1168, 1169 (1809) (per Lord Ellenborough).

[231] *Foakes* promoted the uniting of a variety of preexisting duties categories under the head of the rule in *Pinnel's Case*. Foakes v. Beer, 9 App. Cas. 605 (H.L. 1884). The seamen's wage increase cases were cited as precedent, though the *Foakes* case involved a *Pinnel*-like accord to pay less than originally agreed. *Id.* Thus, the *Pinnel* rule prevailed despite the support Judge Campbell gave for Kenyon's policy logic in *Harris v. Carter*, 118 Eng. Rep. 1251, 1253 (P.C. 1854).

[232] 26 Mass. (9 Pick.) 298 (1830).

promised did not come from a request by the contractor; but, later Massachusetts cases applied the precedent to cases expressly because the contractor indicated he would not proceed unless he was paid more.[233] These decisions did not indicate the slightest hint of anxiety about a possible coerced concession in a category of cases that seemed ripe for it. Some jurisdictions criticized the Massachusetts rule because it invites coercion.[234] The Massachusetts courts found consideration for the promise to pay more in the surrender of the right of the contractor to elect to refuse to perform the first contract and pay damages, thus accomplishing continuation of the contractor's performance.[235] This application of the rules of consideration was criticized because it was morally unjustifiable[236] and because the contractor has no right to breach but rather has a duty to perform.[237]

Despite the failure of the courts in *Munroe* and *Foakes* to concern themselves with the issue of coercion, the contemporaneous nineteenth century intellectual construct known as the consensual theory encouraged enforcement of freely consented-to original agreements and their modifications. The civilian consensual theory opposed assumpsit's actionability test of consideration, which could bar enforcement of

---

[233] Swartz v. Lieberman, 80 N.E.2d 5, 6 (Mass. 1948) (finding that the plaintiff refused to do more work unless paid more.); Parrot v. Mexican Cent. Ry. Co., 93 N.E. 590, 594 (Mass. 1911) (stating that if the defendant desires to secure the work rather than damages, his promise to pay more is enforceable); *see also* Wescott v. Mitchell, 50 A. 21 (Me. 1901) (following "Massachusetts rule").

[234] *E.g.*, King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105, 1105-06 (Minn. 1895).

[235] *See* Munroe v. Perkins, 26 Mass. (9 Pick.) 298 (1830) (finding that the plaintiff waived the first contract by breaching and subjecting self to damages; that defendant accepted waiver and promised higher pay for new contract to keep job going; and that plaintiff continued in reliance on the contract). The technique of rescission and substitution is sometimes used in Massachusetts cases. Some courts have applied the Massachusetts consideration logic when there was an unanticipated circumstance prompting a modification. *See* Michaud v. McGregor, 63 N.W. 479, 480 (Minn. 1895) (distinguishing the facts as "materially" different because of the circumstances and the fact that the contractor agreed to do more work for more money); Curry v. Boeckeler Lumber Co., 27 S.W.2d 473, 475 (Mo. Ct. App. 1930) (finding that the parties breached the contract by mutual understanding based on changed circumstances rather than coercion).

[236] *See* Blakeslee v. Board of Water Comm'rs, 139 A. 106, 110 (Conn. 1927).

[237] *See* Willard Barbour, *The "Right" to Break a Contract*, 16 MICH. L. REV. 106, 109 (1917) (stating that the promisor has a duty to perform since time of Bracton); Corbin, *supra* note 89, at §182 (stating that there is no right to breach but rather a primary duty to perform and a secondary duty to pay damages). Holmes also promoted the Massachusetts view. *See* Oliver Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract .... The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,–and nothing else.").

proven voluntary modifications along with coerced ones. The development of the doctrine of economic duress aided in making the determination that the consent was voluntary or extorted, whether or not consideration was present. Indeed, the role of consideration in barring coerced modifications had to be replaced as some jurisdictions, under the sway of the consensual theory, began rejecting the preexisting duty rule. The majority of jurisdictions, which retained the old rule, began to use economic duress to augment consideration's protective function; and, as economic duress became refined, some courts would rationalize the presence of consideration if it was obvious the modification was not extorted. Once economic duress evolved enough, it paved the way for other jurisdictions to either apply the preexisting duty rule more flexibly or entirely jettison it. As a means of depicting the role of economic duress in contract modification cases, attention will now be turned to the evolution of economic duress and its impact on contract modification cases.

The origin of economic duress is found in common law duress. In the medieval period, Bracton said the focus was on the means of the duress, and only fear of life or limb or imprisonment were sufficient; fear of damage to property, and even fear of battery, were insufficient because an individual may have satisfaction in damages.[238] Coke and Blackstone followed Bracton's lead.[239] The first clear departure from the strict rule toward a common law doctrine of economic duress came in the well known "duress of goods" case *Astley v. Reynolds*,[240] where the plaintiff was compelled to pay interest in excess of the legal limit in order to recover pawned goods. The King's Bench held that the plaintiff paid under compulsion of wrongful detention of his property.

---

[238] HENRY DE BRACTON, DE LEGIBUS, fol. 16b–17 (1268); *but cf.* Y.B. 20 Edw. III (Lib. Ass.) 72, pl. 14 (1346) (stating that the release was ineffective since made under pressure of seizure of signer's lifestock).

[239] EDWARD COKE, SECOND INSTITUTES 482-83 (London, Flesher & Young 1642); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (A.W. Simpson ed., Univ. of Chicago Press 1979) (1765) ("[B]ut no suitable atonement can be made for loss of life, or limb.").

[240] 93 Eng. Rep. 939 (K.B. 1732). *See also* Summer v. Ferry, 88 Eng. Rep. 989 (K.B. 1709) (rejecting argument of duress of goods that was upheld in earlier case); John Dawson, *Economic Duress–An Essay in Perspective*, 45 MICH. L. REV. 253, 268-82 (1947). By the 1840s, restitution was being granted when public utilities forced excess overcharges by threatening to refuse service. *See generally* Ashmole v. Wainwright, 114 Eng. Rep. 325 (1842); Parker v. Great Western Ry., 135 Eng. Rep. 107 (C.P. 1844); Newland v. Buncombe Turnpike Co., 26 N.C. 372 (1844).

Despite these early glimmerings, nineteenth century notions of economic individualism and freedom of contract caused the focus in contract formation and modification cases to be on whether objective consent was present and not on the equivalency of the exchange in the modification.[241] So, in *Skeate v. Beale*,[242] it was seemingly irrelevant that an excessive distraint of goods caused the defendant to agree to pay rent in excess of the amount originally due because duress of goods did not destroy the free will of an individual of ordinary firmness and, further, that *Astley* should be narrowed to its facts of a wrongful detention of goods forcing an agreement in excess of the lawful limit.[243] With some exceptions,[244] this restrictive emphasis on presumed voluntary consent in duress of goods genre cases slowed the emergence of economic duress in the United States and halted it for much longer in England.[245] Nineteenth century obeisance to freedom of contract and individualism caused an American resistance to using economic duress when there was merely a threat to breach an existing contract, as exhibited in two Michigan decisions authored by Justice Cooley in the early 1880s. Still, some progress had been made, as Cooley focused on the voluntariness of the modification rather than dismissing them out-of-hand under the preexisting duty rule.

---

[241] *See* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1780-1860) 261-63 (1977); *cf.* Dawson, *supra* note 240, at 277-78, 287-88 (explaining that equitable concern for equivalency sometimes made analysis of free will incidental).

[242] 113 Eng. Rep. 688 (1840). There was an alternative remedy here of suing on the excessive distraint. It is also arguable that *Skeate* differs from cases of duress of goods and utilities exacting overcharges because they were restitutional actions but *Skeate* involved a defense to a common law damages action.

[243] Restitution was available under *Astley* for any unlawful payment, but *Skeate* held that the modification agreement itself was valid. *Id.* The *Skeate* court did not seem to consider the effect of the preexisting duty rule since the agreement at issue involved removal of the creditor's possessory lien. *Id.*

[244] *See* Brumagin v. Tillinghast, 18 Cal. 265, 272 (1861) (per Field, J.) (stating in dictum that it was duress to exert power over person or property to exact payment when no alternative for victim); Cobb v. Charter, 32 Conn. 358 (1865) (duress of goods); *accord* Radich v. Hutchins, 95 U.S. 210, 213 (1877) (per Field, J.); *see also* RESTATEMENT OF CONTRACTS § 493(d) (1932).

[245] For the recent recognition of economic duress in England, see GUENTER TREITEL, THE LAW OF CONTRACT 363-65 (1991). A modern version of a seamen's wage dispute was resolved, similar to Lord Kenyon's approach in *Harris v. Watson*, 170 Eng. Rep. 94 (1791), on the grounds of economic duress. *See* Universal Tankships Inc. v. International Transp. Workers Fed'n, 1 A.C. 366, 383 (H.L. 1983) (holding that the agreement of shipowner to pay more to crew was unenforceable).

In the first Michigan case of *Hackley v. Headley*,[246] the defendant would only pay two-thirds the amount the plaintiff alleged was due on a contract for logging services, and the plaintiff accepted the lesser amount, rather than suffering the delay of suing, because he was near insolvency.[247] Since there appeared to be a dispute, the preexisting duty rule was inapplicable.[248] The Michigan Supreme Court did much the same thing that the English court had done in *Skeate* by citing and containing *Astley* to its facts.[249] Justice Cooley pointed out that the defendant had not performed an illegal act and had not caused the plaintiff to be in pecuniary straits and that the plaintiff would not have alleged duress had he been financially solvent.[250] Cooley stated that to accept the plaintiff's argument "would be a most dangerous, as well as a most unequal doctrine; and if accepted, no one could well know when he would be safe in dealing on ordinary terms of negotiation with a party who professed to be in great need."[251] *Hackley* involved a threat to not pay money when due under a contract. The following year the Michigan case of *Goebel v. Linn*[252] involved an ice company's threat to not deliver ice contracted for delivery in the spring unless a higher price was paid by a brewer. The preceding mild winter had caused an extraordinarily low ice crop, and the buyer, fearful that a large quantity of beer would spoil if he did not obtain ice soon, agreed to the increase. Justice Cooley cited his opinion in *Hackley* as authority for the absence of duress in a "refusal to keep the previous engagements."[253] Cooley added that, even if there was duress initially, there was a waiver when the buyer "independently" and "freely" elected to abide by the higher price by continuing to pay it without a showing that later on a supply was unavailable elsewhere.[254] Although Justice Cooley's ruling in *Goebel* denied the existence of economic duress, it arguably may be considered a harbinger of the modern view that the preexisting duty rule should not apply to modifications made on account of unanticipated

---

[246] 8 N.W. 511 (Mich. 1881).
[247] The alleged economic duress was related to refusal to pay at due date. *Id.*
[248] A later remand of the case concluded that in fact there was no dispute. Headley v. Hackley, 14 N.W. 693 (Mich. 1883).
[249] Hackley v. Headley, 8 N.W. 511, 513 (Mich. 1881).
[250] Michigan case law continues to deny the existence of economic duress unless action is induced by an unlawful threat. Myers v. United States, 943 F. Supp. 815, 819 (W.D. Mich. 1996); Norton v. Michigan State Highway Dep't, 315 Mich. 313, 320 (1946); Apfelblat v. National Bank Wyandotte Taylor, 158 Mich. App. 258, 263-64 (1987).
[251] Hackley v. Headley, 8 N.W. 511, 514 (Mich. 1881).
[252] 11 N.W. 284 (Mich. 1882).
[253] *Id.* at 286.
[254] *Id.*

circumstances.[255] The unanticipated low ice crop provided an acceptable non-coercive reason for requesting the modification.[256]

Judicial reluctance to recognize economic duress in cases like *Hackley* and *Goebel* represented the majority position until nearly the mid-twentieth century, but there were emerging minority positions permitting relief from the preexisting duty rule based on notions of economic duress.[257] Some of these early decisions gave relief from economic duress while labeling it as relief from bad faith.[258] In fact, the remand of *Hackley* exemplifies one of those approaches.[259] The remanded economic duress case of *Hackley* returned to the Michigan Supreme Court a second time in 1883 on an appeal from the remand hearing.[260] The plaintiff argued it was "bad faith" for the defendant to raise what the jury found to be unfounded claims to avoid full contract payment for the logging services and thereby extort a modification when it was obvious that the plaintiff needed his money.[261] This time the court

---

[255] Cooley's enforcement of the modification agreement due to the "very extraordinary circumstances of the entire failure of the local crop of ice" may be considered one of the harbingers of section 89(a) of the *Second Restatement*. *Id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1979). Cooley said: "Unexpected and extraordinary circumstances had rendered the contract worthless; and they must either make a new arrangement, or, in insisting on holding the ice company to the existing contract, they would ruin the ice company and thereby at the same time ruin themselves. It would be very strange if under such a condition of things the existing contract, which unexpected events had rendered of no value, could stand in the way of a new arrangement . . . ." Goebel v. Linn, 11 N.W. 284, 285-86 (Mich. 1882). *Cf.* Lingenfelder v. Wainwright Brewing Co., 15 S.W. 844 (Mo. 1891) (criticizing Cooley's enforcement of modification in *Goebel v. Linn* as "not in accord with the almost universally accepted doctrine" of the preexisting duty rule). Alternatively, Cooley may not have referred to the preexisting duty rule because he did not agree with what *Foakes* did two years later in unifying price decreases in *Pinnel's* case, with price increases in *Stilk*, under the preexisting duty rule. *See generally* Foakes v. Beer, 9 App. Cas. 605 (H.L. 1884); Stilk v. Myrick, 170 Eng. Rep. 1168 (1809). Assuming the absence of economic duress, Cooley's approach in *Goebel* was a departure from the earlier seamen's wage cases' refusal to enforce modifications prompted by changed circumstances. *See generally Goebel*, 11 N.W. at 284.

[256] Posner approved of *Goebel v. Linn* because unanticipated circumstances indicated a lack of coercion and because modification conferred benefit to the brewer which it would have lost if the ice company had breached. KRONMAN & POSNER, *supra* note 37, at 55-57.

[257] *See* RESTATEMENT OF CONTRACTS § 493(d) (1932) (stating that duress of withholding goods can preclude free will); RESTATEMENT (SECOND) OF CONTRACTS § 176(1)(d), cmts. a, e (1979) (stating that modification induced by economic duress may be avoided).

[258] Headley v. Hackley, 14 N.W. 693 (Mich. 1883).

[259] *Id.*

[260] *Id.*

[261] *Id.* at 693. The first review of the case assumed there was a bona fide dispute. *Id.* Once the second trial verdict included a finding of no dispute, a formalist court could have employed the preexisting duty rule to refuse to enforce the agreement rather than basing

overturned the "oppressively" obtained compromise agreement because the defendant had "acted unfairly."[262] In the face of Cooley's ruling for the defendant on the economic duress issue, the verdict on remand came back again in favor of the plaintiff.[263] The second review in 1883 then supplied equitable grounds of bad faith in support of the second trial verdict.[264] Under the nineteenth century consensual theory, the defendant's conduct had not been deemed egregious enough to apply economic duress in the first appeal, but the dishonesty was sufficient for a fused court of law and equity to find bad faith.[265]

Eight years later in *Lingenfelder v. Wainwright Brewing Co.*,[266] the Missouri Supreme Court heard a contract dispute between a landowner and an architect.[267] The architect became angry when the landowner awarded a separate contract to a competing enterprise abused his advantage, because of the defendant-landowner's timetable by refusing to proceed unless he was paid more.[268] The court cited the English seamen's wage cases as a basis for a holding that there was no consideration.[269] The court employed the policy-based logic of some of the seamen's wage cases by stating that the architect "took advantage of [defendant's] necessities, and extorted the promise" and that "to permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith."[270] The court reasoned that strict enforcement of the preexisting duty rule averted duress, and it criticized Cooley for doing otherwise in *Goebel*.[271] Modern supporters of the preexisting duty

---

its ruling on bad faith; instead, this court adopted an equitable ground to support a second jury's insistence that the defendant was wrong. *Id.*

[262] *Id.*

[263] *Headley*, 14 N.W. at 693.

[264] *Id.* at 693-94.

[265] *Id.* at 694.

[266] 15 S.W. 844 (Mo. 1891).

[267] *Id.*

[268] *Id.* at 846.

[269] *Id.* at 847.

[270] *Id.* at 848. Effectively, the court merged the policy logic of the seamen's wages case *Harris v. Carter*, 118 Eng. Rep. 1251 (1854), with the consideration logic of the seamen's wage case *Stilk v. Myrick*, 170 Eng. Rep. 1168 (1809), to rule that consideration was lacking on policy grounds. *See* Lingenfelder v. Wainwright Brewing Co., 15 S.W. 844, 848 (Mo. 1891).

[271] *See Lingenfelder*, 15 S.W. at 848; Goebel v. Linn, 11 N.W. 284, 284 (Mich. 1882). For another case where a finding of lack of consideration was a stalking horse for a finding of economic duress, see *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 102 (9th Cir. 1902) (using public policy notions to find no consideration when sailors and workers at a remote location refused to work unless paid more).

rule also criticize economic duress because of the ambiguity of what constitutes economic duress.[272]

Other minority positions squarely adopted economic duress. In *Fitzgerald v. Fitzgerald & Mallory Construction Co.*,[273] the Nebraska Supreme Court heard a case involving a contractor on the verge of bankruptcy who was forced by a railroad company to take less than agreed to compensation for work done and to be done.[274] The court stated that the modified agreement "was procured under circumstances amounting to practical compulsion, which is nearly related to duress, and may be made the ground of relief."[275] The lack of an alternative course of action supplied evidence of the coercion. In *Thomas & Cross v. Brown*[276] the Virginia Supreme Court heard a case involving a landowner who refused, without any valid reason, to pay for construction work unless the contractors would accept less than agreed. The court found it necessary to take a position on economic duress since an 1887 Virginia statute had abolished the preexisting duty rule. The court ruled that the modified agreement was made under "aggravated circumstances of constraint" and said that, prior to the statute, no part payment would satisfy a debt but that the "statute was never intended to enable a party to perpetrate the wrong and injustice that the defendant has sought to accomplish in this case."[277] As a consequence of Virginia being one of the early states to abolish the preexisting duty rule, it was one of the first states to adopt economic duress in order to provide a safeguard against coerced modifications in place of the protective function consideration that had formerly performed for modifications in Virginia.

Once the defense of economic duress was widely accepted by American courts,[278] it became an important protection against coerced modifications, while affording an opportunity for restitution of any

---

[272] Janet O'Sullivan, *In Defence of* Foakes v. Beer, 55 CAMBRIDGE L.J. 219, 227-28 (1996); Antony W. Dnes, *The Law and Economics of Contract Modifications: The Case of* Williams v. Roffey, 15 INT'L REV. LAW & ECON. 225, 229-30 (1995).

[273] 62 N.W. 899 (Neb. 1895).

[274] *Id.* at 909.

[275] *Id.*; *see* Foote v. DePoy, 102 N.W. 112, 114 (Iowa 1905) (finding duress when elderly man in feeble condition signed contract with his ex-wife in order to obtain dismissal of lawsuit in order to relief himself of stress).

[276] 81 S.E. 56 (Va. 1914).

[277] *Id.* at 57. *See also* VA. CODE § 2828 (1887).

[278] *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 (1979). An English version of economic duress has appeared over the past approximately twenty years. *See* Andrew Phang, *Whither Economic Duress? Reflections on Two Recent Cases*, 53 MOD. L. REV. 107 (1990).

benefits conferred.[279] The availability of the doctrine removed the objection that abandoning the preexisting duty rule would result in judicial enforcement of coerced modification agreements. The acceptance of the doctrine contributed to the increasing numbers of courts and legislatures that abolished the preexisting duty rule, thereby facilitating analysis of the core issue of whether there was a freely assented-to modification.[280]

b. Unconscionable Modifications

Like economic duress, the complementary doctrine of unconscionability concerns the question of lack of consent as a result of an undue advantage taken of a party in a vulnerable position. Unconscionability places limits on excesses of the bargaining process. Likewise, unconscionability focuses on the negotiation procedures leading to formation of the modification. If one-sided modification terms are dictated on a take-it-or-leave-it basis by a party in a stronger bargaining position, a court may intervene. Unconscionability relief first appeared in contract formation cases by at least the eighteenth century in English chancery.[281] By the 1830s, the American treatise writers Kent and Story stated that "sharp" practices and "hard and unconscionable bargains" would be relieved by chancery.[282] By the first quarter of the twentieth century, common law courts provided disguised

---

[279] The remedy for economic duress is to obtain a ruling declaring the modification agreement unenforceable and to then recover for any benefits conferred under restitution. *See* RESTATEMENT OF THE LAW OF RESTITUTION §§ 47, 51, 150-52 (1937). Tort relief is normally unavailable for economic duress, in the absence of a traditional tort. *See* Dawson, *supra* note 240, at 285.

[280] *See* Williams v. Roffey Bros. & Nicholls (Contractors) Ltd., 1 Q.B. 1 (C.A. 1991) The presence of an economic duress defense makes a court more inclined in commercial cases "to look for mutual advantages which would amount to sufficient consideration to support the second agreement under which the extra money is paid". *Id.* The UCC abandoned the preexisting duty rule for sales contracts roughly contemporaneously when economic duress became a majority rule. *See* U.C.C. § 2-209(1) (1952).

[281] By the 15th century, chancery was providing relief for weak parties dominated by the local strong man. *See* W. T. Barbour, *The History of Contract in Early English Equity*, IV OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 78-80 (Paul Vinogradoff ed., 1974). There was consistent relief from the penalty on the conditioned bond by the 17th century. *See* SIMPSON, HISTORY, *supra* note 80, at 119-21. The fountainhead unconscionability decision in chancery, which influenced modern law, was *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82 (Ch. 1750) ("[U]nequitable and unconscientious bargains" which "no man in his senses . . . would make . . . and as no honest and fair man would accept.").

[282] 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 258 (1972); *see also* Coles v. Trecothick, 32 Eng. Rep. 592, 597 (Ch. 1804) ("[T]he inadequacy of price is such as shocks the conscience.").

unconscionability relief by manipulating traditional common law principles related to consideration, offer and acceptance, fraud, policy, etc.[283] The doctrine was naturally extended from contract formation to bar modifications made for bad reasons inconsistent with fairness.[284] Llewellyn sought to convert equity's individualized tool into black letter contract doctrine for modern standardized sales transactions covered by the UCC; the final version of the UCC's unconscionability section went further and applied to all sales contracts.[285] Later, section 208 of the *Second Restatement* recognized the case law developments this century, including the judicial analogies to the UCC, by declaring that the unconscionability doctrine applies to all types of contracts.

Analysis under both unconscionability and economic duress find relevancy in unequal bargaining positions and in the victim's sense of a lack of a viable alternative course of action. Whereas the unconscionability doctrine analyzes the unfairness of the result flowing from the lack of consensual choice, economic duress primarily concerns the coercive denial of free will causing the unfairness; and, as will be seen, the good faith standard questions the motive for seeking the modification. Unconscionability does augment the good faith requirement that a modification be for a legitimate reason. Both economic duress and unconscionability provide rescission relief; unconscionability's more firm rooting in equity facilitated greater flexibility in also allowing a questionable modification, made under less coercive circumstances than economic duress, to stand if it is reformed or divided in a way that renders the transaction fair.

c. Good Faith Modifications

Until the modern reforms, the preexisting duty rule barred contract modifications generally, whether coerced or not, though in some hardship cases courts employed fictions and other exceptions to

---

[283] *See* U.C.C. § 2-302 cmt. 1 (1999) (citing relevant cases between the 1920s and 1950s). Nevertheless, a few early decisions recognized unconscionability as a common law doctrine. *See* James v. Morgan, 83 Eng. Rep. 323 (K.B. 1675) (assumpsit); U.S. v. Hume, 132 U.S. 406 (1889) (discussing a mistake in form contract).

[284] *See* U.C.C. § 2-209 cmt. 2 (1999).

[285] UCC Reporter Karl Llewellyn's first drafts of an unconscionability section between 1941 and 1947 limited the applicability of unconscionability to the boiler plate language in standardized contracts. *See* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960). The 1948 draft, and succeeding ones leading to the final 1952 version, opened it up to any type of contract provision. *Id.*; Arthur Allen Leff, *Unconscionability and the Code–The Emperor's New Clause*, 115 U. PA. L. REV. 485, 489-95 (1967).

manipulate the doctrine of consideration to allow enforcement.[286] The UCC guarded against improperly induced modifications by replacing consideration's positive contribution of thwarting coercion with the good faith policing mechanism.[287] Good faith, along with economic duress and unconscionability, focuses upon negotiation behavior leading to the contract modification. The use of good faith here is a deviation from the objective standard of classical contract law favored by Holmes; the finding of a bad motivation or reason[288] for seeking to modify can now override an outward manifestation of consent to formation of the modification.[289]

The good faith duty owed under section 2-209 of the UCC for consensual modifications both overlaps and goes beyond the general duty of good faith required in the performance and enforcement of all contracts[290] because it also requires good faith in negotiating a contract

---

[286] *Lingenfelder* is a good example of how an obvious bad faith extortion of a modification was barred by the preexisting duty rule. *See* 15 S.W. 844, 848 (Mo. 1891). An architect, angered by the landowner giving a separate contract to a competitor, took advantage of the landowner's timetable to force a price higher than originally agreed. *Id.* at 844.

[287] The parallel use of good faith in policing open-ended language in long term contracts appeared by the early 20th century. *See* New York Cent. Ironworks Co. v. U. S. Radiator Co., 66 N.E. 967 (N.Y. 1903). Soon, New York courts began to declare that a general duty of good faith existed in all contracts. *See* Wigand v. Bachmann-Bechtel Brewing Co., 118 N.E. 618 (N.Y. 1918); Simon v. Etgen, 107 N.E. 1066, 1068 (N.Y. 1915). The traditional requirement of consideration can sometimes be seen to in effect be fulfilling the function of policing bad faith short of economic duress. In *Recker v. Gustafson*, the court was bothered by the pressure placed on the buyer by the more experienced seller of land and his attorney and refused to allow the rescission fiction to avert the use of consideration to bar the pressured modification. 279 N.W.2d 744, 747, 758 (Iowa 1979).

[288] One of the traditional functions of consideration was to enforce the promise if there was an accepted reason or motivation (or *causa*) for the promise. *See* S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 357 (2d ed. 1981); SIMPSON, HISTORY, *supra* note 80, at 321-23, 384-85.

[289] *Cf.* CORBIN, *supra* note 89, at § 106 (explaining that the contract cannot be judged exclusively by a subjective or objective standard). Corbin thought that if the "moral and economic elements" were right, courts should not apply the preexisting duty rule. *Id.* at § 171. A general standard of good faith in all contracts was being applied in chancery by at least the seventeenth century, and it was urged by Mansfield in the following century. *See* Hawkes v. Saunders, 98 Eng. Rep. 1091 (1782) (stating that it was what an honest man ought to do); Carter v. Boehm, 97 Eng. Rep. 1162 (1766) (stating that good faith bars concealment of information). *See also* Barbour, *supra* note 281, at 156-58, 163-64. After the fusion of law and equity, it became the common law rule in the U.S. by the second decade of the 20th century. *See* Wigand v. Bachmann-Bechtel Brewing Co., 118 N.E. 618 (N.Y. 1918); Simon v. Etgen, 107 N.E. 1066 (N.Y. 1915).

[290] U.C.C. §§ 1-203, 1-201(19), 2-103 (1999).

modification.[291] While the requirement of good faith negotiating is only an emerging notion in contract law, the UCC's drafters selected it to fulfill the policing function that consideration formerly performed with a meat cleaver at the bargaining and formation stage of a modification agreement.[292] There is no duty for an individual entrepreneur in the marketplace to negotiate the original contract in good faith; it is irrelevant whether there is a good commercial reason for the formation of the original contract. Accordingly, objections that the original contract was not negotiated and formed on the basis of honesty-in-fact and fair dealing will not be considered by courts, short of duress, fraud, unconscionability or other invalidating cause. Once the original bargain is struck, however, there is a common law duty to cooperate during the performance phase, and, under the UCC, this duty continues through any renegotiation of the ongoing relationship for the purpose of modifying the contract.

Since the standard of good faith described in comment 2 to section 2-209 of the UCC appears to be more stringent than the general duty of good faith in the Code, it is both curious and regrettable that the drafters did not bother to include good faith verbiage in the statutory language. Of the 400 odd sections of the UCC, 60 make specific reference to good faith, but here, where the standard needs to be more specific, there is no reference to it.[293] It is difficult to see how section 2-209(1) can operate without the good faith bargaining standard specified in the comments. Assuming, then, that the comment's gloss on the statute applies, who has the burden of proving the presence or absence of bad faith? Does the proponent of the modification have a duty to show good faith as a part of his case-in-chief or is it only necessary to establish good faith in rebuttal if evidence of bad faith is raised by the opponent? Again, the UCC is silent. The case law suggests that good faith is not a point of

---

[291] U.C.C. § 2-209 cmt. 2 (1999) ("[T]he extortion of a 'modification' without legitimate commercial reason is ineffective . . . ."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1979).

[292] Good faith *bargaining* has been required in this century in certain sensitive areas: for disclosures to consumers; in the realm of contracts with a public interest, as utilities, insurance, collective bargaining and government bids; and in certain cases of reliance and estoppel, as in franchise negotiations. *See* Friedrich Kessler & Sidney Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 401-13 (1964). *See also* U.C.C. § 2-209 (1999).

[293] This opens the debate to the argument that there is no authority for the application of a good faith standard during the negotiations of the modification. *See* Robert Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 859 (1979) (suggesting that the text of section 2-103(1)(b) of the UCC should not be used unless specifically mentioned in the text of Act).

discussion unless abuse is suggested from the surrounding circumstances; plenty of appellate opinions applying the UCC can be found where no reference is made to good faith one way or the other, sometimes even when the facts hint at questionable motivations.[294] Nonetheless, some courts do place an affirmative burden on the proponent to prove good faith in order to shift the burden of proof.[295] If bad faith becomes an issue, the proponent must prove, under the subjective standard of honesty-in-fact, that he or she was motivated by a good reason in seeking the modification.[296] In addition, the proponent must also show that, under the objective standard of fair dealing in the trade, an ordinary and reasonable merchant would have done the same thing.[297]

The good faith standard applicable to section 2-209 is augmented by the doctrines of unconscionability and economic duress. Comment 2 of section 2-209 prohibits the "extortion of a 'modification' without legitimate commercial reason." Unconscionability and economic duress supplement the policing role played by good faith by focusing on the fundamental concern here over the lack of consent caused by overreaching. Unconscionability was clearly made applicable to sales contracts and their modifications since the UCC drafters codified common law and equitable notions of unconscionability.[298] Although economic duress is not specifically referred to in the UCC, it applies to coerced sales modifications under section 1-103, which supplements the

---

[294] The following cases do not discuss good faith, even though they would seem unconscionable. Barnwell & Hays, Inc. v. Sloan, 564 F.2d 254 (8th Cir. 1977) (revealing that the farmer allegedly could not complete contract because of fire but then it appeared he sold some cotton elsewhere); *see also* Farmland Servs. Coop. v. Jack, 242 N.W.2d 624 (Neb. 1976) (stating that the farmer changed mind because price too cheap).

[295] *See* Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 146 (6th Cir. 1983) (stating that the proponent of modification must establish good faith as a part of his burden of proof).

[296] *Cf.* Business Incentives, Inc. v. Sony Corp. of America, 397 F. Supp. 63, 69 (S.D.N.Y. 1975) (holding that the legal right of termination was not coercion, even though it had a coercive affect.). *See* Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 146 (6th Cir. 1983) (holding that under honesty-in-fact, party must show that commercial reason for the modification was not just a pretext); Skinner v. Tober Foreign Motors Inc., 187 N.E.2d 669 (Mass. 1963) (holding that the high and unexpected expenses of repairing a purchased airplane are a good business reason for the contract modification); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. e (1979).

[297] *See Roth*, 705 F.2d at 146; *see also* U.C.C. §§ 2-209 cmt. 2; 2-103 (1999).

[298] *See* U.C.C. § 2-302 cmt. 1 (1999) ("The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.").

UCC with "principles of law and equity, including... duress [and] coercion." Some decisions simply assume that economic duress is a breach of honesty-in-fact and fair dealing under comment 2 of section 2-209[299] or that a bad faith extortion of a modification constitutes economic duress.[300]

In closing on good faith, it should be remembered that the preexisting duty rule effectively presumed bad faith and in the process excluded modifications that parties desired and agreed to voluntarily. After the UCC reform, consented-to modifications were binding but coerced modifications were not. The UCC drafters could have gone further because the refusal to declare all formed modifications binding, due to the good faith negotiation proviso, is opposed to undiluted notions of individualism and freedom of contract. The justification is that, after the original contract is formed, the parties drop their arm's length relationship, enter each other's camp, and become aware of any vulnerability of the other, such as a deadline, competitive disadvantage, or financial exigency.

The abrogation of the preexisting duty rule by the UCC can be criticized for creating uncertainty, but then an industrial economy foments uncertainty and change, and to say that parties may not make adjustments to their contractual relations in response to the hurly-burly of modern markets is unrealistic and inefficient.[301] The UCC replaced the uncertainty of the convoluted exceptions to the preexisting duty rule with the uncertainty of good faith, but now inefficiencies later found in the original sales contract may be cured under the governing principle of consent. Today, instead of the preexisting duty rule providing an absolute bar to necessary contract modifications, the way is clear for courts to also enforce non-sales contract modifications while still

---

[299] *See* United States v. Progressive Enters., Inc., 418 F. Supp. 662, 664-65 (E.D. Va. 1976) (finding economic duress in coerced modifications, governed by U.C.C. § 2-209, but buyer failed to raise protest); Pirrone v. Monarch Wine Co. of Georgia, 497 F.2d 25 (5th Cir. 1974). *See also* U.C.C. § 2-209 cmt. 2 (1999).

[300] *See* RESTATEMENT (SECOND) OF CONTRACTS § 176(d), cmts. a, e (1979). Under the developing notions of economic duress, a breach of the U.C.C.'s standard of good faith and fair dealing is an improper threat and violates economic duress provisions of the *Second Restatement* and the UCC. *See id.* at § 176; U.C.C. § 2-209 (1999).

[301] *See* United States v. Progressive Enters., Inc., 418 F. Supp. 662, 664 (E.D. Va. 1976) (holding that the need for modifications in long term contracts is common and is a fair business method to preserve the desirability of the business relationship). *See also* U.C.C. § 2-209 cmt. 1 (1999) ("This section seeks to... make effective all *necessary* modifications....") (emphasis added).

assuring, with a fair degree of certainty, the presence of voluntary consent through application of the complementary policing mechanisms of good faith, economic duress, and unconscionability.[302]

VI. ATTAINABLE COMMON LAW SOLUTION

The preceding portion of this study covered statutory and common law authority, revealing that the next step to complete abolition of the common law preexisting duty rule by the majority of state supreme courts has not yet succeeded. These partial reforms, grounded in consent, provide ideas and inspiration for enforcement of voluntary contract modification agreements. The remainder of this study elaborates on the consensual path available for courts to employ in overcoming the barrier presented by the rule in order to realize fair results based on consent and thereby respond to modern contextual needs. Common law courts, of course, must rationalize change within the doctrinal framework of common law contract and doctrinal approaches of a minority of common law jurisdictions that have overcome the preexisting duty rule either within or outside the confines of the doctrine of consideration.

A. Consent and Fairness

The Comments to sections 73 and 89 *Second Restatement* justify the judicial retention of the preexisting duty rule on the basis of the "suspicion" that a modification was mistaken, coerced or unconscionable, and the comments to section 89 acknowledge the criticism of the rule when one of these invalidating causes are absent.[303] The obvious rejoinder is that the bar should be limited to those types of misbehavior so the voluntary consent of the parties can be enforced in all other cases. This is the approach employed in civil law countries and under section 2-209(1) of the UCC.[304] In modern law, the resistance to reform no longer can exist because of the absence of adequate policing mechanisms against abuse since there now exist the developed doctrines of economic duress, unconscionability and good faith, unlike during the first three centuries subsequent to *Pinnel's Case*. The approach of a

---

[302] *See* Williams v. Roffey Bros. & Nicholls (Contractors) Ltd., 1 Q.B. 1, 21 (C.A. 1991) (stating that the presence of economic duress defense made court more inclined in commercial cases "to look for mutual advantages which would amount to sufficient consideration to support the second agreement under which the extra money is paid").

[303] RESTATEMENT (SECOND) OF CONTRACTS §§ 73 cmts. a-c, 89 cmt. b (1979).

[304] *See* Barry Nicholas, THE FRENCH LAW OF CONTRACT 145 (2d ed. 1992); *see also* JOHN P. DAWSON, GIFTS AND PROMISES 211 (1980) (German and French law).

strong majority of courts, as reflected in the *Second Restatement*, may stop overreaching by barring modifications outside the parameters of section 89, but it does not separate coercion and greed, on the one hand, from legitimate reasons for the parties adjusting their relationship. The preexisting duty rule certainly provides common law courts with an easy method of disposing of alleged contract modifications, but modern courts of law and equity ought not hide behind the absolutist rule in light of the resultant unfairness and inefficiencies generated by this static rule when the consensual theory provides a construct for determining the existence or lack of voluntary consent.

The preexisting duty rule tends to be unfair to some economic underdogs who would benefit from the enforcement of a consensual modification. For the inexperienced contractor or tradesman, a low bid may be made because of a lack of appreciation of the magnitude or intricacies of the job; without an adjustment, the contractor will be either unjustly compensated or will be forced to breach. The preexisting duty rule can actually aggravate the naïve contractor's losses because he or she may be induced by a promise of more compensation to pour more time and material into a losing project, rather than cutting his losses by breaching, generating an ever increasing loss if the terms of the original contract are enforceable under the preexisting duty rule.[305] The doctrine of consideration can act as a guard against improvidence at the original contract's creation, but the requirement of consideration for such a modification can cause harm here. That is not to say that it is invariably the weak who are urging enforcement of modifications in the face of the rule, but those parties with greater expertise, legal representation, and bargaining leverage are less likely to need to modify their contracts because they will make a studied bid and will make fewer errors in judgment about the extent of performance required. The sophisticated bargainer will, if necessary, negotiate successfully for flexible open-ended language in the original contract to accommodate possible market shifts and other potential factors necessitating maneuverability as contract performance unfolds. Furthermore, when a contract modification is found to be unavoidable, a knowledgeable drafter of a modification agreement will do whatever is possible to structure the modification agreement in a way that avoids the technical bite of the preexisting duty rule, as by including some inconsequential extra duty in

[305] *Cf. Williams*, 1 Q.B. at 1 (concluding that a carpenter's failure to breach and cut his losses benefited the contractor).

the modification to establish fresh consideration and by assuring that it does not violate the Statute of Frauds or any other writing requirement.

The writing provisions in section 2-209(2) of the UCC may likewise work against an underdog by allowing the freedom in the original written contract for the parties to consensually bar an informal modification.[306] It may cause harm to the weak in much the same way that strict enforcement of the parol evidence rule can work against the underdog.[307] In addition, it is commonplace for signatures to be scribbled on various parts of a standardized contract without a consumer being cognizant that it would bar a later informal modification.[308] A consumer or small business, without the aid of legal representation, could later during the performance phase of the contract be informally induced by a proffered lowered obligation or increased payments to commit scarce resources, which could better be applied elsewhere, only to subsequently discover that expectations are dashed and he or she has nothing in the end since the informal modification is unenforceable.[309] When parties consent to a modification in order to assure reasonable expectations of continuation of a contract, then, in fairness, consent ought to be enforced.

The suggestions that the elements of consent and fairness are relevant when determining enforceability of contract modification

---

[306] *But see* RESTATEMENT (SECOND) OF CONTRACTS § 148 (1979) (stating that right to make oral rescission may *not* be barred by original contract). This provides protection to the consumer who enters into a beneficial informal adjustment of a contract.

[307] Sanger v. Dun, 3 N.W. 388, 389 (Wis. 1879) (stating failure to read no defense); *cf.* Masterson v. Sine, 436 P.2d 561, 564 (Cal. 1968) (per Traynor, J.) ("[T]he party urging the spoken as against the written word is most often the economic underdog, threatened by severe hardship if the writing is enforced."). *See also* Stewart Macaulay, *Private Legislation and the Duty to Read–Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1063 (1966); *cf.* Weaver v. American Oil Co., 276 N.E.2d 144, 148 (Ind. 1971) (declaring objective standard when weaker party did not know of hardship provision); Henningsen v. Bloomfield Motors, 161 A.2d 69, 90, 91 (N.J. 1960) (holding fine print disclaimer on back of form contract not enforceable).

[308] U.C.C. § 2-209(2) (1999) provides that when contract language bars a non-merchant from an oral modification or rescission, it must be signed separately by the non-merchant. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 148 (1979) (protecting a consumer, or any party, from losing the right to be discharged by oral agreement of rescission). The bar on an informal modification may be deemed unconscionable under the UCC. *See* U.C.C. § 2-302(1) (1999).

[309] RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. c (1979) expressed concern "where an impecunious debtor has paid part of his debt in satisfaction of the whole" and lamely hoped that the rules regarding cancellation, discharge and unanticipated circumstances would cause an equitable outcome.

agreements is by no means novel. Parallel reforms of contract law based on consent and fairness have been devised over the past century to facilitate contractual adaptations to the flux and uncertainty of modern conditions, e.g., (a) the use of good faith to police open-ended language in long term contracts, (b) excuse defenses for impossibility, frustration, and commercial impracticability, (c) liberalization of parol evidence rule, (d) enforcement of good faith modifications under section 2-209 of the UCC, and (e) broad judicial support of arbitration to resolve disagreements over adjustments needed in contractual relations. The consensual theory provided twentieth century legislatures with a workable test of enforceability of sales contract modifications in place of the bargain consideration-bound preexisting duty rule. It remains for the majority of American common law jurisdictions to employ the consensual construct to devise a civilian solution based on consent and thereby abolish the common law preexisting duty rule.

B. Doctrinal Reform of Consideration to End Rule

The obvious choices in devising a common law rule that renders modifications generally binding are either to develop a theory rationalizing consideration present or to declare consensual modifications enforceable without consideration. Either approach effectively constitutes an application of the consensual theory. The UCC has taken the latter route for sales contracts, but unfortunately there is no uniform statute for general contract law to amend. The most recent restatement rejected the UCC's approach; perhaps a restatement of contract law cannot very well be expected to do this anyway.[310] It is submitted that due to the judicial reticence over the past four hundred years of acknowledging the doctrinal flaw in requiring consideration for a modification, courts should instead consider a flexible application of the rules of consideration in a way that would make modifications

---

[310] One's immediate reaction might be to point to the influence section 90 of the *Restatement* in supporting an alternative ground to consideration for promissory liability. Query whether there would be the equivalent ensuing ground swell case support to oust the preexisting duty rule. It is true, however, that promissory estoppel had been used almost exclusively for gratuitous promises prior to exceptions of section 90 and there has been a fair amount of movement against the preexisting duty rule in the form of common law and statutory reform. On the other hand, if the *Restatement* solution was that consideration be dropped for modifications, there has only been one common law jurisdiction to date that has done this; at least section 90 of the *Restatement* was bolstered by the strain of promissory estoppel rulings on gratuitous promises, which provided a foundation for subsequent case law growth. It is a close question that goes to the possibilities and purpose of a restatement of the law.

binding generally and leave the policing of coerced modifications to economic duress, unconscionability, and good faith. A few American courts accomplished this earlier in the century,[311] and the English courts seem to be perhaps headed in that direction as of late.[312] Exchange values should be left to the parties' bargained-for adjustments; what was valuable to them at one time may change, and they should be free to make that later assessment.[313] Common law contract possesses the tools to police modifications, if they were binding without consideration. Economic duress and unconscionability are both developed common law doctrines. Good faith is required in the performance and enforcement of all contracts and is enthroned in the *Second Restatement* and could be extended to modifications as has been under the UCC[314] Methodology for analyzing, the motivation for and negotiation of, modifications can be drawn from common law trends requiring good faith bargaining and from analogous case law requiring a good reason for a modification under section 2-209(1) of the UCC and section 89(a) of the *Second Restatement*.[315] Thus, the notion of reason or *causa* for a promise, which is bundled up on the meaning of consideration, would still need to be established by the proponent of a modification.[316]

A few American jurisdictions rejected the old books argument and abolished the rule. Of the four state supreme courts in the United States

---

[311] Frye v. Hubbell, 68 A. 325 (N.H. 1907) (parting with debtor's money is detriment and creditor's receipt without needing to enforce is a benefit); Clayton v. Clark, 21 So. 565 (Miss. 1897) (discussing benefit in cash-in-hand and avoiding collection problems); Brown v. Everhard, 8 N.W. 725 (Wis. 1881) (holding consideration of original contract is imported into modification).

[312] *See* Williams v. Roffey Bros. & Nicholls (Contractors) Ltd., 1 Q.B. 1 (C.A. 1991) (finding promisor received benefits of bird-in-hand, avoidance of collection costs, and continuation of performance).

[313] In *Sibree*, Baron Parke rejected the relevance of adequacy in a modification: "It may be equal value, but that we cannot enter into; it is sufficient that the parties have so agreed." Sibree v. Tripp, 153 Eng. Rep. 745, 750 (1846). Lord Blackburn acknowledged *Sibree's* position but failed to further follow it. Foakes v. Beer, 9 App. Cas. 605, 621-22 (H.L. 1884).

[314] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979) (revealing good faith and fair dealing in performance and enforcement of all contracts).

[315] *Id.* at § 89(a); U.C.C. § 2-209(1) (1999). Good faith duties during negotiation and bargaining have been required in this century for collective bargaining, for companies clothed with a public interest such as public utilities and insurers, when there has been reliance on representations made during negotiations and in the form of required statutory disclosures to consumers.

[316] *See* JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 386-87 (3d ed. 1990) (stating that cannon law concept of a promise made upon good cause goes back to the very origins of doctrine of consideration). Motive for the promise was another meaning of *causa*. *Id.*

completely refusing to apply the preexisting duty rule, three rejected the rule of *Pinnel's Case* and *Foakes* out-of-hand and the fourth accomplished the same result without referring to those hallowed precedents. There is a fifth American jurisdiction to consider, but only as to executory contracts, and again no reference was made to the precedents. The sixth common law jurisdiction to alter the traditional application of the preexisting duty rule is England.

Of the three jurisdictions forthrightly rejecting the "old books," only one of them ruled that consideration was unnecessary for a subsequent agreement changing the original contract. The initial outright rejection of the old rule came in the 1896 Mississippi case *Clayton v. Clark*.[317] This was the first common law decision to squarely reject the rule in *Pinnel's Case*, that "mischievous and misleadingly reported case" where the ruling was on a pleading defect.[318] The court was "painfully impressed with slavish adherence" to the supposed precedent.[319] *Clayton* was rendered during an era of strong support for the dogma of freedom of contract. Commerce was recognized to be less developed in Coke's time, but today, "it is as ridiculous as it is untrue to say that payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay or the hazards of litigation in an effort to collect all, is not often–nay, generally–greatly to the benefit of the creditor."[320]

Eleven years later in *Frye v. Hubbell*,[321] the New Hampshire Supreme Court cited the analysis of benefit and detriment in *Clayton* as it also rejected the rule in *Pinnel's Case*. The court stated that if the net after enforcement costs is always equivalent to cash-in-hand and if interest is always recompensed for delayed payment, then there is no detriment or benefit to support an accord, but the present parting with money is a detriment to debtor and receipt of payment before enforcement is beneficial to the creditor. The court declared: "No better guide for determination of the rights of the parties in a contract can be discovered than their purpose and intent in making it."[322]

---

[317] 21 So. 565 (Miss. 1897).

[318] *Id.* at 567. *Sibree v. Tripp* came closest to overturning the rule earlier. 153 Eng. Rep. 745 (1846).

[319] *Clayton*, 21 So. at 568. This phraseology was apt for the Reconstruction period. *Id.*

[320] *Id.* at 569.

[321] 68 A. 325 (N.H. 1907).

[322] *Id.* at 334 ("[T]he greater principle [is] that reason is the life of the law.").

The Minnesota position follows from the last point in *Frye*, that intent should be the guiding principle. The Minnesota Supreme Court announced the most advanced common law position to date when both rejecting the rule in *Pinnel's Case*, and, more fundamentally, rejecting the proposition that an accord must be supported by consideration. This view was first announced in dictum in the Minnesota Supreme Court case *Rye v. Phillips*,[323] and that dictum was later adopted as Minnesota law.[324] The *Rye* court said: "The doctrine thus involved is one of the relics of antique law which should have been discarded long ago. It is evidence of the former capacity of lawyers and judges to make the requirement of consideration an overworked shibboleth rather than a logical and just standard of actionability."[325] The court drew a parallel to past consideration cases involving waivers of bankruptcy and statute of limitations where "judges have recognized the futility of their former efforts to create a synthetic consideration."[326] The court added that if an alternative theory was needed to enforce an accord, past the parties agreement, then gift or waiver could be employed.

Minnesota is the only subscriber to the alternative common law solution of rejecting the "overworked shibboleth" of consideration in favor of a "logical and just standard of actionability."[327] The modification bargain satisfies cautionary and channeling form functions, and so rather than dwelling on the ancient mysteries of consideration, the Minnesota courts, and all courts under section 2-209(1) of the UCC, focus on whether there was voluntary consent.[328] Experience over the

---

[323] 282 N.W. 459 (Minn. 1938).

[324] Winter-Wolff & Co. v. Co-Op Lead & Chem. Co., 111 N.W.2d 461 (Minn. 1961). This case had a dissenting opinion because debtor's use of a part payment check in full satisfaction should not constitute an accord just because the creditor retained the check; the dissent stated that there needed to be a negotiated settlement agreement before the check could answer as satisfaction. *Id.*

[325] *See* Rye v. Phillips, 282 N.W. 459, 560 (Minn. 1938) (citing critical dictum in Oien v. St. Paul City Ry. Co., 270 N.W. 1, 6 (Minn. 1936)). *Oien*, along with *Herman v. Schlesinger*, 90 N.W. 460, 466 (Wis. 1902), incorrectly claimed that Connecticut had abandoned the preexisting duty rule; but *Ford v. Hubinger*, 29 A. 129 (Conn. 1894), had involved a compromise of a dispute. *See generally* Oien v. St. Paul City Ry. Co., 270 N.W. 1, 6 (Minn. 1936).

[326] Rye v. Phillips, 282 N.W. 459, 460 (Minn. 1938) (accord on non-negotiable note). *But cf.* Frye v. Hubbell, 68 A. 325, 333 (N.H. 1907) (stating that confusion arises over failure to distinguish between legal and moral obligation).

[327] *Rye*, 282 N.W. at 460. Alabama does not require consideration for modification of an *executory* contract. *See* Industrial Dev. Bd. v. Fuqua Indus., Inc., 523 F.2d 1226, 1241 (5th Cir. 1975); George v. Roberts, 65 So. 345 (Ala. 1914).

[328] Not that much of a risk is taken by a party giving up a portion of a contract right in a modification because the modification only suspends the original contract obligation, and if

past half century has witnessed no hue and cry over the coerced or bad faith modifications fomented under either Minnesota law or the UCC[329] Continental civil law has managed for centuries to control abuses while enforcing contract modifications and discharges on the basis of agreement alone.

The fourth American jurisdiction not following the preexisting duty rule is Wisconsin. Wisconsin courts achieved this in an unconventional way. In *Brown v. Everhard*,[330] the Wisconsin Supreme Court proclaimed that the consideration of the original contract was "imported" into the modified contract. The court achieved this result by misinterpreting a Lord Denman decision[331] and by making no reference whatsoever to Coke's report of *Pinnel's Case* or to *Foakes* or to the preexisting duty rule for that matter. Sir Edward Coke was the master of misconstruing and ignoring ancient precedents in order to obtain a happy modern result, and, wittingly or unwittingly, the same had been done in turn.[332] In

---

it is not satisfied the party may elect to enforce either the modification or the original contract terms. *See* RESTATEMENT (SECOND) OF CONTRACTS § 281 (1979). *Cf.* Browning v. Holloway, 620 S.W.2d 611, 616-17 (Tex. App. 1981) (revealing that if modification lessens rights and it is unclear whether it is a substituted contract or an accord, it is deemed an accord, thus requiring satisfaction).

329 *See* Butch Levy Plumbing & Heating, Inc. v. Sallablad, 126 N.W.2d 380, 385 (Minn. 1964); Winter-Wolff & Co. v. Co-Op Lead & Chem. Co., 111 N.W.2d 461, 465 (Minn. 1961); Cut Price Super Markets v. Kingpin Food, Inc., 98 N.W.2d 257, 269 (Minn. 1959); Brack v. Brack, 16 N.W.2d 557, 560 (Minn. 1944). *See also* Robert Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 859-75 (1979).

330 8 N.W. 725 (Wis. 1881) (holding that consideration and Statute of Frauds issues were intertwined); *accord* Wisconsin Sulphite Fibre Co. v. Jeffries Lumber Co., 111 N.W. 237 (Wis. 1907) (involving Statute of Frauds and consideration issues). What seemed to begin as a rule for contract changes raising a potential Statute of Frauds problem was converted by the 1930s into a general rule that consideration from the original contract was "imported" into modification in order to overcome the preexisting duty rule. Holly v. First Nat'l Bank, 260 N.W. 429, 430 (Wis. 1935) (changing of pledge agreement needs no new consideration since consideration imported); Herman v. Schlesinger, 90 N.W. 460, 466 (Wis. 1902) (accord needs consideration). In 1902, Wisconsin courts still recognized that an accord required consideration; but, by 1935, Wisconsin courts were not mentioning the preexisting duty rule in contract modification cases generally, even where there was no direct Statute of Frauds issue, and were "importing" consideration into the modification. *See Holly*, 260 N.W. at 430; *Herman*, 90 N.W. at 466.

331 *See* Stead v. Dawber, 113 Eng. Rep. 22, 26 (1839) (revealing Statute of Frauds issue).

332 *See* SAMUEL THORNE, SIR EDWARD COKE (1552-1952) 7, 13 (Selden Society Lecture, 1952) (revealing that, when Coke wrote "for it is an ancient maxim" or listed an inordinate number of authorities, one should be prepared for Coke's enunciation of a new rule). The language in some of the cases using the fiction of a rescission sound very much like Wisconsin's import fiction. *See* Awe v. Gadd, 161 N.W. 671, 673 (Iowa 1971) ("In such case the old agreement would be the consideration for the new.").

Coke's day, published court reports were not widely available and the records were in a confused state. In the United States, the confusion of the myriad of positions across the multitude of American jurisdictions, and the unavailability of out-of-state reports before the West Reporter System began in 1878, facilitated inexactitude when applying *stare decisis* in order to obtain a desired result.

The fifth jurisdiction, which only partially rejected the requirement of consideration in modifications of contracts, was Alabama. Alabama courts took the position that a subsequent modification was enforceable by "mutual assent," before a breach occurred, so long as the original contract was executory. The early decisions vacillated between saying that the mutual assent constituted the consideration for the modification[333] and saying that no consideration was needed.[334] The more recent cases have settled by stating that: "Where a contract is still executory, no consideration is necessary to support a modification of such a contract."[335] Curiously, as in Wisconsin, none of these Alabama decisions make any reference to *Pinnel's Case*, *Foakes*, *Stilk* or any other case supporting the traditional preexisting duty rule.

In 1990, England became the sixth common jurisdiction to significantly alter the traditional judicial application of the preexisting duty rule. In *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*,[336] the English Court of Appeal overcame the traditional reticence expressed in comment (c) to section 73 of the *Second Restatement* by allowing realization of the parties' intent, when coercion is not suggested, by finding consideration in the "commercial advantage to both sides" of

---

[333] Moore v. Williamson, 104 So. 645, 646-47 (Ala. 1925) (allowing modification "without any new, independent, or distinct consideration for the change, other than that of mutual assent."). Since *Strangborough v. Warner*, reciprocal promises could be consideration for each other. 74 Eng. Rep. 686 (1589). The court in *Moore v. Williamson*, 104 So. 645, 647 (Ala. 1925), claimed that *Hembree v. Glover*, 8 So. 660, 661 (Ala. 1890), specifically said that no consideration was required other than the parties' mutual assent, but in fact *Hembree* only declared a modification binding without giving a reason. *Cf.* Clark v. Jones, 4 So. 771, 773 (Ala. 1888) ("[P]arties to a contract, before a breach, may rescind at pleasure and their mutual assent is a sufficient consideration.").

[334] George v. Roberts, 65 So. 345 (Ala. 1914) (holding that an executory contract may be modified "without any new or independent consideration"). *See also* Cooper v. McIlwain, 58 Ala. 296 (1877) ("[M]utual assent is all that is necessary to support the modification or rescission.").

[335] Industrial Dev. Bd. v. Fuqua Indus., Inc., 523 F.2d 1226, 1241 (1975) (construction project).

[336] 1 Q.B. 1 (C.A. 1991).

continued performance of the contract.[337] In *Williams*, a sub-contractor, who had bid a job too low, had little incentive to continue because continued performance placed him in mounting financial difficulty by increasing his losses. The general contractor felt motivated to offer more than originally agreed both because of a penalty clause for late completion in his separate contract with the owner and because of the commercial advantage to himself of finishing the project. No concern was expressed about coercion because the general contractor in fact offered to pay more in order to induce the disheartened sub-contractor to continue. In its rationale, the English Court of Appeal reaffirmed as good law the nineteenth century precedents of seamen being barred from recovery on a promise to pay more;[338] but, unlike those cases, there was "some other consideration"[339] to support the promise to pay the sub-contractor more, found in the benefit[340] to the general contractor of

---

[337] *Id.* at 527.

[338] *Id.* at 525-26 (stating that the seamen's wage cases are based on strong public policy grounds). *See also* Stilk v. Myrick, 170 Eng. Rep. 1168 (1809); Harris v. Watson, 170 Eng. Rep. 94 (1791); *cf.* Linz v. Schuck, 67 A. 286 (Md. 1907) (reasoning that there would have been a different outcome in seamen's cases if risks that had arisen were not contemplated in the contract).

[339] Williams v. Roffey Bros. & Nicholls (Contractors) Ltd., 1 Q.B. 1 (C.A. 1991). For a similar fact situation to *Williams* resolved without the need to show consideration, under U.C.C. § 2-209(1), see *Skinner v. Tober Foreign Motors, Inc.*, 187 N.E.2d 669, 670-71 (Mass. 1963). In *Skinner*, the seller of an airplane offered to lower the price in light of the buyer's unexpected airplane repair costs and the financial problems it created for the buyer. 187 N.E.2d at 670. The court found a good business reason for the modification. *Id.* at 671-72. This modification could be justified under section 73 or section 89(a) of the *Second Restatement* or under section 2-209(1) of UCC. Under section 73, it was more beneficial to the seller to receive lower payments, rather than repossession of a defective airplane. *See* RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979). Under section 89(a), the unexpected costs of repair would be a ground for exceptional treatment. *Id.* at § 89(a). And under section 2-209(1) of the UCC, a good faith modification needs no consideration. *See* U.C.C. § 2-209(1) (1999).

[340] *See Williams*, 1 Q.B. at 20 ("This arrangement was beneficial to both sides."). *Cf.* Ward v. Byham, 2 All E.R. 318, 319 (1956) (promising to perform preexisting duty was consideration since there was a benefit to the recipient of the promise). This benefit-based consideration logic is causing some tremors in English legal circles since detriment consideration has been the sole consideration test for over a century; Glidewell and Purchas acknowledged this but thought the consideration requirement could be equally satisfied when a promisee confers a benefit on a promisor without suffering a detriment himself. *Williams*, 1 Q.B. at 5-9, 20; *see also* John Adams & Roger Brownsword, *Contract, Consideration and the Critical Path*, 53 MOD. L. REV. 536, 541 (1990) (stating that relaxation of consideration requirement increases importance of economic duress as a regulator of price modification); *cf.* TREITEL, *supra* note 245, at 116 (revealing that a benefit similar to kind in *High Trees* case was allowed as consideration for a promise in *Williams*). On the detriment side, however, there was sub-contractor's forbearance from breaching. *Id.* Perhaps rather than redefining consideration under English law, *Williams* has simply devised a special consideration rule

securing himself commercially by both avoiding the penalty and by answering his obligations to the owner of completing the project without the hassle of finding another sub-contractor for more money.[341] Despite receiving something extra to avoid the penalty, this case comes very close to relegating the seamen's wage increase cases to the public policy arena of coerced price increases. Justices Russell and Purchas stated they saw consideration solely in the mutual benefit of continuation of contractual performance, something that could be found in almost any voluntary commercial contract modification.[342]

The initial response to *Williams* was to wonder whether *Foakes* had been dramatically altered. An Australian court came to that conclusion.[343] However, an English judicial reaction soon reinstated aspects of prior law in a way reminiscent of how nineteenth century English judges reacted against Mansfield's moral obligation ideas,[344] and how twentieth century judges reacted against Judge Dennings' promissory estoppel cure for deficiencies in the preexisting duty rule and perhaps much more.[345] The reaction to possible liberal readings of *Williams* caused an exhumation of the pre-*Foakes* dichotomy of modification of contracts to perform services and those to pay money.[346] Dictum in 1994 and 1995 English decisions resisted extending the

---

for modifications, much as English law recognizes promissory estoppel solely for contract modifications under *Central London Property Trust Ltd. v. High Trees Ltd.*, K.B. 130 (1947).

[341] *Williams*, 1 Q.B. at 6 (stating that the general contractor admitted the sub-contractor bid too low). In fact, the sub-contractor only did about one-half of the performance under the modification agreement, but that lowered the penalty and put the project that much closer to completion; the court adjusted the damages recoverable by the sub-contractor accordingly. *Id.* at 5-7.

[342] *Id.* at 19, 23. *See* Blakeslee v. Board of Water Comm'rs, 139 A. 106, 110 (Conn. 1927) (holding an added compensation so party who did not breach is a benefit in that business contract continues). *See also* Oken v. National Chain Co., 424 A.2d 234, 237 (R.I. 1981) (stating that continuation of employment of employee-at-will was consideration for employer unilaterally lowering the commission rate).

[343] Musumeci v. Winadell Pty. Ltd., 34 New So. Wales L. Rep. 723, 747 (1994) (revealing that landlord had agreed to reduce rent).

[344] Chief Justice Denman repudiated Mansfield's moral obligations in 1840. Eastwood v. Kenyon, 713 Eng. Rep. 482 (1840); Atkins v. Hill, 98 Eng. Rep. 1088 (1775); Hawkes v. Saunders, 98 Eng. Rep. 1091 (1782).

[345] Central London Property Trust Ltd. v. High Trees House Ltd., K.B. 130, 135-36 (1947) (enforcing landlord's rent reduction promise on reliance grounds); Combe v. Combe, 2 K.B. 215, 219-20 (C.A. 1951) (restricting reliance relief to contract modification cases).

[346] The seaman's wage case *Stilk* represented the bar on modification promises to pay more for services, and *Pinnel's Case* was again identified with modifications of promises to pay a money debt. Stilk v. Myrick, 170 Eng. Rep. 1168 (1809); Pinnel's Case, 77 Eng. Rep. 237 (K.B. 1602). The fusion of these two types of modification promises in *Foakes* seems to be pulled asunder. *Id.*

application of the services contract decision of *Williams* to promises to pay money,[347] precisely the facts in *Pinnel's Case* and *Foakes*, without a Parliamentary mandate.[348] Others have argued that perhaps *Williams* should be read as an inroad to the preexisting duty rule only when detrimental reliance exists.[349]

Notwithstanding some English judicial resistance to reading *Williams* too broadly, the judicial reasoning provides valuable ideas to facilitate greater success in finding benefit consideration to support voluntary modification promises on both sides of the Atlantic.[350] The benefit found in *Williams* was not the bird-in-the-hand or the avoidance of collection costs, as has often been argued for unsuccessfully.[351] Instead the bargained-for benefit to the promisor-general contractor was the continuation of timely performance.[352] The sub-contractor's continuation

---

[347] The 1994 decision emphasized that *Williams* had not even mentioned the landmark decisions *Pinnel's Case* and *Foakes*. *See* J.W. Carter et al., *Reactions to* Williams v. Roffey, 8 J. CONTRACT L. 248, 257 (1995) (discussing *In re C* (A Debtor), Unreported English Court of Appeal decision of May 11, 1994). A Singaporean court seems to agree that *Williams* did not completely upend *Foakes*. *See* Sea-Land Services, Inc. v. Cheong Fook Chee Vincent, 3 SINGAPORE L. REP. 631, 634-35 (1994) (a limited exception). The 1995 decision also expressed reluctance to overrule *Foakes* when the *Williams* court did not even discuss that possibility. *In re* Selectmove Ltd., 1 W.L.R. 474 (1995).

[348] This English judicial deference to Parliament, even in reference to a rule created by the common law courts, is reflective of the modern view, emanating out of the English constitutional struggles in the seventeenth century, that Parliament is the supreme law-giver. *See* DAVID KEIR, THE CONSTITUTIONAL HISTORY OF BRITAIN SINCE 1485 293-95 (8th ed. 1966).

[349] *See* O'Sullivan, *supra* note 27, at 227-28; *see also* Carter et al., *supra* note 347, at 265-66.

[350] The *Williams* court emphasized that, if coercion was not found after applying modern policing mechanisms like economic duress, then the court was free to enforce the voluntary modification promise under a liberal application of benefit consideration. *See Williams*, 1 Q.B. at 14-16.

[351] This was the type of benefit Blackburn thought should qualify in the accord case *Foakes*, and it was likewise wistfully alluded to in the Restatement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 73, cmt c. (1979).

[352] Since the origins of the rule in *Pinnel's Case* were intertwined with the actions of debt's emphasis on the benefit of *quid pro quo*, an escape from the clutches of the rule is perhaps easier to rationalize on the benefit side of consideration. *Cf.* Pinnel's Case, 77 Eng. Rep. 237 (K.B. 1602) (stating that it "might be more beneficial to the plaintiff . . . or otherwise plaintiff would not have accepted it in satisfaction."). Indeed, in *Williams*, the court saw a benefit to both parties in fashioning a commercially workable modification so the project could continue. *Williams*, 1 Q.B. at 23. Because the financial difficulties in *Williams*, brought on by the sub-contractor's poor job of bidding, were not a basis for an excuse from performance, the general contractor could have demanded performance under the original terms and sued upon breach. *Id.* However, the general contractor found more value in continued performance, and so he waived the breach action by agreeing to the modification. *Id.* In *Watkins & Son v. Carrig*, 21 A.2d 591, 592, 594 (N.H. 1941), the court

of performance, rather than cutting his business losses and breaching, provided the general contractor with the added, or different, benefit of continuation of contract performance in order to avoid the penalty and other commercial costs of complying with his obligations to the owner.

The approach followed by the English Court of Appeal is very similar to the solution to the preexisting duty rule conundrum devised by Massachusetts in *Munroe*;[353] indeed, if the English court was aware of the Massachusetts rule and English courts were not so loath to apply American precedents, it surely would have been discussed in *Williams*.[354] As in the English case, the contractor in *Munroe* had made a losing construction contract, not caused by unanticipated circumstances, and was in resulting financial difficulty.[355] The contractor had not demanded more money but was discouraged about continuing. In order to keep the construction project going, the owner's agents informally promised the contractor more; the court enforced the price increase by finding consideration to support the second promise in the contractor's forbearance in exercising his right to breach, thereby accomplishing continuation of construction.[356] There was a benefit to the promisor-

---

found no basis to excuse the risk of performance, but once a modification was found more valuable to the promisor, he was bound by the terms of the modification.

[353] *See* Munroe v. Perkins, 26 Mass. (9 Pick.) 298 (1830) (examining the construction of hotel). *Accord* Swartz v. Lieberman, 80 N.E.2d 5, 6 (Mass. 1948).

[354] English judges operate within a single jurisdiction system, where *stare decisis* thrives best. They perceive that American common law courts play too fast and loosely with precedent; it would therefore be near hearsay to openly admit the direct influence of an American precedent. *See* PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 90, 116, 128-32, 229, 241-3 (1987). In *Williams*, the plaintiff urged the American case, *Watkins & Sons v. Carrig*, which was inappropriate since key facts there, which were absent from *Williams*, were unanticipated circumstances. *Williams*, 1 Q.B. at 1. *See also* Watkins & Sons v. Carrig, 21 A.2d 591 (N.H. 1941). Furthermore, *Watkins* surely went further than any conservative English court would be willing to go in not requiring any consideration. *Id.*

[355] Munroe v. Perkins, 26 Mass. (9 Pick.) 298 (1830) (involving defendants who, after having made a losing bargain and were unable and unwilling to finish the work, assured the plaintiff that they would pay for every minute's work and that he would not suffer). Even if English courts recognized the unanticipated circumstances exception to the preexisting duty rule, inadequacy of contract price, by making too low of a bid, does not fall under the exception since each party bears the risk of a loss based on known facts. King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105, 1107 (Minn. 1895) ("Inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient."); *accord* Western Litograph Co. v. Vanomar Producers, 197 P. 103 (Cal. 1929); Rexite Casting Co. v. Midwest Mower Corp., 267 S.W.2d 327 (Mo. Ct. App. 1954); McGowan & Connolly Co. v. Kenny-Moran Co., 202 N.Y.S. 513 (N.Y. App. Div. 1924).

[356] *Munroe*, 26 Mass. (9 Pick.) at 298. Admittedly, some additional benefit to the promisor, past continuation of contract performance, can be found in the facts of both *Munroe* and

owner in the project continuing and a detriment to the promisee-contractor in forbearing from simply breaching and paying damages.[357] The Massachusetts rule has been criticized for inviting coercion,[358] being morally unjustifiable,[359] and doctrinally unsound on the grounds that the claimed rescission was a fiction and there was no right to breach.[360] Justice Purchas admitted his own unease in *Williams* with the court's unorthodox use of the right-to-breach logic.[361] Nevertheless, this is the consideration-based logic Massachusetts and England have created to free themselves from the preexisting duty rule impediment to enforcing the modified consent of the parties.

C. *Contextual Necessity*

Whether the shortcomings of the preexisting duty rule are overcome either by rationalizing the presence of consideration to support most consensual modifications or by dropping the consideration requirement, a flexible manner of efficiently accommodating the unavoidable adjustments to modern contracts is needed. This necessity is spurred by dramatic market fluctuations and a degree of uncertainty unparalleled during the pre-industrial times of *Pinnel's Case*. This need for flexible contract adjustments has been accentuated by a tendency toward longer term and more complex contractual relations undertaken by

---

Williams. *See generally id.*; Williams v. Roffey Bros. & Nicholls (Contractors) Ltd., 1 Q.B. 1 (C.A. 1990). In *Munroe*, there were some changes in plans by the owner which placed a greater burden on the contractor, and, in *Williams*, timely performance would avoid the penalty provision in the general contractor's contract with the owner. *Munroe*, 26 Mass. (9 Pick.) at 298; *Williams*, 1 Q.B. at 1. So, even in these cases, the facts contain something different or additional being received, but in most contracts of any complexity or time period, some extra bit can be found. *See, e.g.*, Michaud v. McGregor, 63 N.W. 479 (Minn. 1895) (finding something extra in the contractor's promise to keep a record of the extent of unforeseen rocks unearthed, in order to aid the owner in documentation for a potential suit against a third party that was wrongfully depositing the rock there). Other courts have found similar consideration sufficient to avoid the preexisting duty rule. *See* D.L. Godbey & Sons Constr. Co. v. Deane, 246 P.2d 946 (Cal. 1952); Simon v. Gray, 147 N.E. 459 (Ill. 1925); Gannon v. Emtman, 405 P.2d 254 (Wash. 1965).

[357] In *Williams*, Purchas could have adhered to the detriment version of consideration followed in England by focusing on the promisee's forbearance from breaching and thus avoided the controversial benefit-based logic he employed. *See Williams*, 1 Q.B. at 19-23.

[358] King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105, 1106 (Minn. 1895) (stating that if there are "no exceptional circumstances, [the rule] invites" coercion). Purchas stated that the new English approach could not be used if there was coercion. *Williams*, 1 Q.B. at 21.

[359] Blakeslee v. Board of Water Comm'rs, 139 A. 106, 110 (Conn. 1927).

[360] *See* Barbour, *supra* note 237, at 107-109; Corbin, *supra* note 89, at § 182; RESTATEMENT (SECOND) OF CONTRACTS § 9 cmt. b (1979).

[361] *Williams*, 1 Q.B. at 21-23.

corporations with perpetual life.[362] Contract doctrine must be malleable enough to permit an integration of unforeseen events and behavior as the future unfolds.

Unlike the non-common law commercial legal systems of competing national economies, the doctrine of consideration thwarts the realization of the amended consent necessitated by fluctuating economic circumstances. European civil law does not require consideration and does not have an impediment to enforcement of modification agreements like the preexisting duty rule. Because Japan's civil code is based on the German civil code, it likewise does not have a preexisting duty rule. While Japan's civil code calls for detailed statements in written contracts, in practice the behavior of Japanese businesses is to rely upon incomplete memoranda to adjust an ongoing relationship. Moreover, Japanese commercial practice favors informal negotiated settlements of contract modifications and disputes and, failing that, prefers mediation and arbitration over actions in the courts.[363] The United Nations Convention on International Sales of Goods also allows consensual modifications without the need for consideration.[364] The commercial law of our major trading partners, outside the common law, facilitates realization of required adjustments and is better suited to efficiently accommodate the dynamics of the modern marketplace.

Notwithstanding the common law bar on modifications, field studies of the actual behavior of American businesses indicates that they adjust their contractual relations as though they were operating in a civil law jurisdiction. A 1957 survey published in Yale Law Journal indicated that manufacturers often ignored the *Statute of Frauds*;[365] and, Macaulay's

---

[362] *See* Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 391-92 (1937); Clyde Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 528, 534 (1969); Ian Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 595-96 (1974); Walter Pratt, *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 432-35 (1988).

[363] *See* J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 61-66 (1999). *See also* 1-2 JAPAN BUSINESS LAW GUIDE §§ 40-320, 40-520, 80-050 (M. Matsushita ed., 1991).

[364] C.I.S.G. Art. 29. United Nations Convention on International Sales of Goods (CISG) was enacted by U.S. Congress in 1986 and became effective on January 1, 1988. *Id.* It governs sales contracts between American contractors and a foreign party residing in a CISG signatory nation state. *Id.*

[365] *The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038 (1957) (revealing that survey of 92 manufacturers showed Statute often ignored). *Accord* Thomas M. Palay, *Comparative Institutional Economics: The Governance of Freight Contracting*, 13 J. LEGAL STUD. 265 (1984).

seminal study in 1963 showed that industrial managers and merchants preferred settling their contractual disputes by other methods than by filing suit and without reference to the niceties of the contract's verbiage.[366] More recent field studies have corroborated Macaulay's relational perspective in long term contracts.[367] Long term contractual relations are often articulated in vague, open-ended terms with the intention that problems will be resolved through consensual modifications as they arise,[368] because it is impossible to define risks with any exactitude at the onset of a long term relationship.[369] Abolition of the preexisting duty rule in favor of a consensual test for enforcement of contract modifications would permit realization of the reasonable expectations of contractors as exhibited by their behavior. Consensual behavior has been converted into law throughout the history of the common law of contract. Thus, in the famous early modern contract decision *Slade's Case*,[370] the King's Bench accommodated the trend toward informal contracting formation in an emerging money economy. During the early phase of the British industrial revolution, Lord Mansfield realistically absorbed the usage of merchants into the common law.[371] The UCC has continued this process of absorption of contractual behavior generally and, in particular, by recognizing consensual contract modifications in section 2-209.

The legal behavioralists and law and economics adherents support the consensual modifications of long term contracts, but what of discrete, one-shot contracts? Here, some law and economics advocates diverge. Posner sees a benefit to the party voluntarily promising to pay more than the original contract price because it avoids the costs of only having a damages action if the other party had instead breached the original

---

[366] Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61-62 (1963) (interviewing 68 Wisconsin businessmen); Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 L. & SOC'Y REV. 507 (1977). *Cf.* Dreyfus & Co. v. Roberts, 87 S.W. 641 (Ark. 1905) ("Commercial affairs adjust themselves along practical, and not technical, lines.").

[367] *See* Paul L. Joskow, *Vertical Integration and Long-Term Contracts: The Case of Coal-Burning Electric Generating Plants*, 1 J.L. ECON. & ORG. 33 (1985); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 PA. L. REV. 1765, 1790 (1996).

[368] *See* Macaulay, *supra* note 366, at 64; *see also* Macneil, *supra* note 362, at 595-96.

[369] *See* Dnes, *supra* note 33, at 236-37 (allowing contract modifications in long term contracts is efficient).

[370] 76 Eng. Rep. 1072 (1602) (revealing an oral bargain to purchase £16 of grain).

[371] *See* KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 126-33 (1990).

contract.[372] Posner approves of the higher modified price as a legitimate compensable opportunity cost to the would-be breachor for his continued performance.[373] However, other analysts of the economic efficiency of legal doctrine argue that the preexisting duty rule should be retained for short term contracts because general ease in contract modification raises transaction costs and also the moral hazard of intentional underbidding on the original contract and a lack of incentive to maximize efforts during the performance phase.[374] Nevertheless, assuming the presence of voluntary consent, why should one-time contractors not also be free to avoid being forced to perform according to the letter of a contract that no longer reflects their present reality? Given the predictable behavior of contractors when agreeing to needed changes in long and short term relations,[375] accepted business practice and fairness suggest that one should cooperate and conform to the adjusted agreement.[376]

Whatever predictability the preexisting duty rule lent to contract law during earlier static economic periods, its effectiveness was seriously called into question in a modern commercial and industrial economy. The common law's tradition of support for certainty and formality was ill-equipped to accommodate this state of economic uncertainty. The likelihood of the need for an amendment during the life of the contract increased by the latter part of the nineteenth century due to the longer term, relational nature of modern contracts fraught with market unpredictability. Entrepreneurs needed the flexibility to jointly alter their agreement should needs or minds change; however, the strictness of the traditional common law definiteness rule barred flexible, open-ended contract language that could have accommodated some of this uncertainty as it unfolded over the life of the contract. Still, the common law of contract had realized some parallel reforms to build on in more

---

372 KRONMAN & POSNER, *supra* note 37, at 56-57.

373 *Id.* at 57-58. Critical legal studies writers oppose the perceived immorality of the strategic breach approved of by Posner. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

374 *See* Variouj A. Aivazian, et al., *The Law of Contract Modifications: The Uncertain Quest for a Bench Mark of Enforceability*, 22 OSGOODE HALL L.J. 173, 190-91 (1984); Dnes, *supra* note 33, at 230-31, 238.

375 *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

376 *See* Brooks v. White, 43 Mass. (2 Met.) 283 (1840) (revealing that *Pinnel's Case's* rule may be urged in violation of good faith); Watkins & Son, Inc. v. Carrig, 21 A.2d 591 (N.H. 1941) (stating that the practice of business to modify contracts due to change should honor voluntary modification promise); *see also* Corbin, *supra* note 89, at § 183.

efficiently accommodating the uncertain future by the early twentieth century, e.g., (a) allowing needed open-ended language in such long term contracts as output contracts and requirements contracts, (b) allowing incorporation of trade usage and (c) enforcement of commodities futures contracts.

VII. CONCLUSION

The consensual theory applied in European civil law and reflected in partial reforms in the United States provide the theoretical grounding for a complete abolition of the common law preexisting duty rule. Abolition of the rule will permit contractors' reasonable expectations to be realized through enforcement of voluntary adjustments to contractual relations when deemed necessary. The consensual theory provides the test for across-the-board enforcement of good faith modifications of all genre of contracts consistent with the late twentieth century tilt back toward greater freedom of contract.

American common law courts and legislatures have proved capable of partially reforming the rule based on consent. While the preexisting duty rule prevented improperly-obtained modifications, it came at a heavy cost in denying voluntary consensual contract amendments that the parties perceived to be needed. Nevertheless, those reforms raised concern over the loss of the undeniable benefit provided by the doctrine of consideration in thwarting contract modifications made because of bad faith or coercion. As to those reforms of the preexisting duty rule that have been made, experience has shown that disastrous consequences have not ensued because the gatekeeper role performed by consideration has been supplanted by the modern policing mechanisms of economic duress, unconscionability, and good faith. Reforms of the preexisting duty rule could not have been justified without the development of these policing mechanisms. The consensual theory played a pivotal role in providing the reasoning for the development of these modern policing mechanisms so that an analysis could be made, in a more subtle way than under the doctrines of fraud and duress, of whether free will and consent has been manipulated or denied.

In the absence of coercion, bad faith, or other overreaching, parties do not make contract modifications unless they jointly perceive the practical need to amend their relationship. Studies of actual behavior of contractors in the marketplace indicate that they often do not conform to the preexisting duty rule in practice, but rather will modify their contracts when a legitimate business reason exists. Contractors' good

faith expectations are that their adjusted agreement will thereafter be the basis of their relationship, but strict application of the preexisting duty rule subverts the consensus the parties reached regarding what was necessary and beneficial to their ongoing relations. Moreover, the preexisting duty rule's denial of reasonable expectations creates inefficiencies by frustrating adaptation of their deal to current market realities. A modern contractual relationship ought to be viewed as an organic arrangement amenable to voluntary adjustments to meet needs as they arise. The traditional bite of the archaic rule causes parties to be unable to adjust to market shifts with the certain knowledge that their consensual modification will be binding in the courts, should either later elect to retract. An additional efficiency obtained by abolition of the rule is that it will bring American common law into line with the legal systems of our trading partners around the world, thereby enhancing uniformity in the international commercial law sphere.

The consensual theory has proved effective in enforcement of modification promises in civil law countries and also in the United States to the degree that reform has occurred. State supreme courts, which conclude that their law should be reformed to treat voluntary modifications as binding for all contracts, can rely upon the proven success where the consensual theory acts as the test for enforceability. Implementation of a consensual standard could occur within the bounds of common law contract in one of two ways: first, a good faith consensual modification could be binding, in the absence of supporting consideration, in the way that the Minnesota courts treat all contract modifications and that the UCC has done for sales; or, second, bargained-for benefit or detriment consideration could be found present in a consensual contract modification in ways similar to the approaches taken around the turn of the twentieth century by Mississippi and New Hampshire courts and more recently in England. Whatever manner is chosen for applying the consensual theory to voluntary contract modifications, jurisdictions that jettison the hoary preexisting duty rule will be employing a workable means for realization of efficiency, fair expectations, and consent.