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PERFORMANCE OF A PRE-EXISTING CONTRACTUAL DUTY AS CONSIDERATION: THE ACTUAL CRITERIA FOR THE EFFICACY OF AN AGREEMENT ALTERING CONTRACTUAL OBLIGATION

BY BURTON F. BRODY*

INTRODUCTION

The rule that performance of, or a promise to perform, a pre-existing duty cannot serve as consideration to bind a promise has been the source of extensive comment.[1] Some writers have taken the position that the rule is meritorious and have expressed concern that it is sometimes evaded.[2] Others have taken the opposite position, condemned the rule, and condoned its abridgement, if not its abrogation.[3] The major cause of these conflicting assessments is the seemingly inconsistent applications of the rule by the courts.

The apparent contradiction in application is most dramatically demonstrated by two New York decisions in the early 19th century. In the first opinion, *Bartlett v. Wyman*,[4] the Supreme Court of New York denied recovery to a sailor who sought to be

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[1] J. CALAMARI & J. PERILLO, CONTRACTS § 60 *et seq.* (1970) [hereinafter cited as CALAMARI & PERILLO]; 1A A. CORBIN, CORBIN ON CONTRACTS § 171 *et seq.* (1963) [hereinafter cited as CORBIN]; Ballantine, *Is the Doctrine of Consideration Senseless and Illogical?*, 11 MICH. L. REV. 423 (1913); Corbin, *Does a Pre-Existing Duty Defeat Consideration*, 27 YALE L.J. 362 (1918); Hudson, *Doctrine of Consideration in Iowa Revisited —Discharge or Modification of Duties*, 5 DRAKE L. REV. 3 (1955); Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27 (1897) in SELECTED READINGS ON THE LAW OF CONTRACTS 452 (1934); Comment, *Modification of a Contract in New York: Criteria for Enforcement*, 35 U. CHI. L. REV. 173 (1967); Comment, *Hard Cases Make Good Law*, 33 YALE L.J. 78 (1923). The rationale of the rule is that performance of contractual duty is not consideration because it is neither a detriment nor a benefit.

[2] Hudson, *supra* note 1, at 14; Williston, *supra* note 1.

[3] Comment, *Hard Cases Make Good Law*, 33 YALE L.J. 78 (1923); Ballantine, *supra* note 1.

[4] 14 Johns. 260 (N.Y. Sup. Ct. 1817).

paid at a rate higher than he had originally contracted for. The higher rate had been agreed to by the captain during the course of the voyage. Recovery was denied because, "The promise to give higher wages is void for the want of consideration."[5] However, in the second opinion, *Lattimore v. Harsen*,[6] the court found a sufficient consideration in a case where builders refused to fulfill their original contract, but were induced to do so by a promise of higher payments. Thus the same court, in the same month, within 70 pages of the same volume of the reports, seems to have reached opposite decisions on similar facts.

The two opinions are more bewildering because the unsuccessful sailor appears to have had the better case on the facts. He demanded more money after a rumor that Congress was about to impose an embargo had caused many sailors to switch ships.[7] Therefore, his remaining aboard was of some value to the captain. On the other hand, the builders, with no such mitigating circumstances indicated, merely "became dissatisfied with their agreement, and determined to leave off the work . . . ."[8] Yet the two cases stand, and the enigmatic nature of the pre-existing duty rule endures. The confusion is reinforced by cases holding that performance of a pre-existing duty does constitute consideration far more often than a simple statement of the rule would lead one to believe. Therefore, an attempt to resolve the apparent conflict is worthwhile.

Contemporary commercial society demands clarification of the pre-existing duty rule. Increasing technology and the continuing sophistication and refinement of the techniques of doing business stretch the time required for the performance of contracts over ever lengthening periods. These elongated performance periods result in a proportionate increase in the vulnerability of such undertakings to the accelerating pace of change in modern society.[9] And because of changed conditions, there is a greater need

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[5] *Id.* at 262.

[6] 14 Johns. 330 (N.Y. Sup. Ct. 1817).

[7] 14 Johns. at 261.

[8] 14 Johns. at 330. It may be noted that the cases are distinguishable on the ground that in *Lattimore* the original agreement contained a liquidated damages clause. On the basis of the liquidated damages clause, the court reasoned, the defendant could have had a remedy for the builder's refusal to perform the first contract; the builder then could be viewed as having relied on the defendant's having foregone his remedy. The sailor's original contract had no similar clause. This paper develops the idea that a "liquidated damages analysis" is only a judicial technique for carrying out more fundamental principles.

[9] A. TOFFLER, FUTURE SHOCK (1970).

for, and frequency of, modification of original contracts.

In such a commercial climate, the enigmatic nature of the pre-existing duty rule is a luxury. This paper proposes to resolve the inconsistent applications of the rule, draw its boundaries, and describe the right of the parties to an executory contract to modify the performances owed under it. Setting the boundaries of the pre-existing duty rule will also shed light on the rules for modification of executory bilateral contracts because the problems are essentially identical. They are actually only views of the same situation from different perspectives. One is hesitant to point out the selfsame natures for fear of insulting one's readers. However, clarity takes priority over good manners and necessitates a brief explanation of the conceptual sameness of the problems of modification and the pre-existing duty rule.

If one party to an executory bilateral contract alters his performance with the full consent and agreement of both parties, and the other party does nothing different than was originally required of him by the contract, the party altering his performance can allege that his second promise (*i.e.*, his altered performance) is without consideration and therefore unenforceable. *The effect of the modification is thus destroyed.* The basis for such an allegation is that the second party does nothing different; rather, he is merely performing what was required of him by the original contract. Traditional doctrine dictates that the performance of a pre-existing duty cannot, for this reason, be consideration for a promise. Thus, the pre-existing duty rule and modification of contract are inextricably intertwined and analysis of one must include the other.

This analysis of these intertwined problems will establish the following:

> **First**. One of the significant functions of the pre-existing duty rule is the prevention of extortion, abusive dealing, and economic coercion by denying enforcement to modifications in situations where courts suspect such practices.
>
> **Second**. In modification cases, the pre-existing duty rule begs the question. The issue is *not* whether there is consideration for the second promise (the modification wherein one party agrees to pay more for the same service): but rather, the issue is the justification of the party receiving the promise of greater remuneration for

refusing to perform the original contract. The efficacy of a modification will, to a large extent, depend on the propriety of the refusal to perform the duty created in the original contract.

Third. The legal bridge between the pre-existing duty rule and an enforceable modification is the surrender, by the party receiving the promise of greater remuneration, of a claim arising under the original contract. The surrender of that claim, in traditional terms, constitutes the consideration for the promise of greater remuneration. The claim surrendered by the party receiving increased remuneration need only be a claim in which he has a reasonable and honest belief, as distinct from a claim that is ultimately legally effective.

This paper is focused on the study of the pre-existing duty rule as it applies to duties arising under executory contracts. It is this area in which understanding offers the most benefit. The other facets of the problem, for example, performance of official duties as consideration and the payment of less than the full amount owed, present distinct difficulties either of theory or policy, which, even if resolved, would contribute little to an understanding of modification.

Performance of official duties as consideration will not be discussed in this paper because the rule prohibiting such consideration is a matter of policy which transcends contract theory. Policemen, firemen, elected officials, and other public servants cannot be permitted to peddle their services on a public commercial basis if any modicum of honesty is to be maintained in the functioning of government. It seems prudent that this social policy decision should not enter into the analysis of contract doctrine.

Ironically, however, just such a commingling of social policy and contract law may lie at the threshold of the seeming inconsistency of the pre-existing duty rule. An early case, *Harris v. Watson*,[10] concerned a sailor seeking to be paid at a rate higher than he had originally signed aboard for. Lord Kenyon found against the sailor and made the policy point quite clearly:

> If this action was to be supported, it would materially affect the navigation of this kingdom. It has been long since determined, that

[10] 170 Eng. Rep. 94 (K.B. 1791).

> when the freight is lost, the wages are also lost. . . . This rule was founded on a principle of policy, for if sailors were in all events to have their wages, and in times of danger entitled to insist on an extra charge on such a promise as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.[11]

Less than 20 years later, still another decision involving a sailor suing to enforce a promise of increased wages reached the courts. In *Stilk v. Myrick*,[12] Lord Ellenborough with equal clarity shifted the basis of denial of the claim from policy to contract by saying:

> I think Harris v. Watson . . . was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship.[13]

Thus, while the performance of official duties being barred as consideration for the private promise to pay for them is clearly a matter of policy, there is some justification for an attempt to rationalize the rule through contract theory. Today the principle is so thoroughly established without the aid of contract theory that any analysis based on contract law is superfluous. The significant point is that contract doctrine is one means of implementing social policy. That the social policy has shifted or that it has been achieved by legislation rather than judicial decision does not alter the fundamental fact that contract doctrine can serve to accomplish goals and achieve goods not directly related to the commercial concept of contract.

Also excluded from this analysis is the rule that payment of a lesser amount cannot discharge a duty to pay a greater amount. This rule, which is known as the Doctrine of *Foakes v. Beer*[14] or the Rule in *Pinnel's Case*,[15] has itself been the subject of much controversy. Because the doctrine has within it a series of inconsistencies and errors and was so contrary to the thinking of even

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[11] *Id.* This policy decision dealing with sailor's wages may be the basis for distinguishing the New York cases, Bartlett v. Wyman, 14 Johns. 260 (N.Y. Sup. Ct. 1817) (a sailor) and Lattimore v. Harsen, 14 Johns. 330 (N.Y. Sup. Ct. 1817) (which did not involve a seaman). However, there is not the slightest hint in either New York opinion that the court considered maritime policy.

[12] 170 Eng. Rep. 1168 (C.P. 1809).

[13] *Id.* at 1169.

[14] Foakes v. Beer, 9 App. Cas. 605 (1884).

[15] Pinnel's Case, 77 Eng. Rep. 237 (C.P. 1602).

the justices who articulated it in *Foakes v. Beer*,[16] it cannot be productively analyzed from a contract point of view. Rather, any attempted analysis of it becomes enmeshed in the internal difficulties of the rule itself.

The first problem with the rule that payment of a lesser amount is not discharge of a debt of a greater amount is that it is not truly a contract rule.[17] *Pinnel's Case*,[18] upon which the court in *Foakes* relied, was an action in *debt*. *Debt* grew out of *detinue*, a property writ, and required that the plaintiff seek to recover a sum certain. There was no element of consideration, nor even a concept akin to it, required in *debt*. *Foakes* was an action in *assumpsit* (contract) and, therefore, *Pinnel* was a most inappropriate and confusing precedent. The problem is that although the rule makes sense as a property rule, it is ludicrous as a contract rule.

An even greater error in *Foakes'* reliance on *Pinnel* is that *Pinnel* was decided on the pleadings. Therefore, *Pinnel's* discussion of consideration is clearly *obiter dictum*.

Further, *Foakes* placed great reliance on the fact that Lord Coke was a reporter of *Pinnel*. Yet later, when Coke became a judge, he drew with the greatest precision the line between satisfaction of a debt and consideration in contract when he said:

> [A]lso if a man be bound to another by a bill in [£1000] and he pay unto him [£500] in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of [£1000] this [£500] is no satisfaction of the [£1000] but yet *this is good and sufficient to make a good promise, and upon a good consideration, because he hath paid mony, (s) five hundred pounds, and he hath no remedy for this again.*[19]

However, the gravest problem with the Doctrine of *Foakes v. Beer* is its incompatibility with modern business practices. The opinion of the House of Lords which created the doctrine demonstrates this problem. The opinion voices the doubts of the Justices as to the commercial wisdom of the rule, but such doubts fell victim to precedent and Lord Coke's fame. This incompatibil-

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[16] 9 App. Cas. at 622. There were four separate opinions in the case.

[17] *See* Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1889); Ferson, *The Rule in* Foakes v. Beer, 31 YALE L.J. 15 (1921); Gold, *The Present Status of the Rule in Pinnel's Case I*, 30 KY. L.J. 72, and *II*, 30 KY. L.J. 187 (1941).

[18] 77 Eng. Rep. 237 (C.P. 1602).

[19] Bagge v. Slade, 81 Eng. Rep. 137 (K.B. 1614) (emphasis added).

ity with the then current commercial practice subjected the doctrine to early ridicule[20] and eventual oblivion, by way of either direct legislation or judicial exception or overruling.[21]

Refusal[22] or failure[23] to distinguish the duty to pay a sum certain from strictly executory contractual duties has obscured the pre-existing duty rule and prevented full understanding of the criteria for modification of executory contracts. Cases coming within the Doctrine of *Foakes* are, in accurate analysis, outside the doctrine of consideration. Therefore, in order to achieve both of the goals of this paper—an understanding of the pre-existing duty rule and a demarcation of the criteria for modification—such cases will not be considered.

II. TRADITIONAL THEORY OF CONSIDERATION

In the analysis of this problem it will be useful to set forth

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[20] *E.g.*, Clayton v. Clark, 74 Miss. 499, 21 So. 565 (1897). The court stated:

> The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept and the actual acceptance of a lesser sum in full satisfaction of a larger sum is without any consideration to support it; that is, that the new agreement confers no benefit upon the creditor. However it may have seemed 300 years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day, and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, costs, 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. Why shall not money—the thing sought to be secured by new notes of third parties, notes whose payment in money is designed to be secured by mortgage, and even negotiable notes of the debtor himself—why shall not the actual payment of money, cash in hand, be held to be as good consideration for a new agreement, as beneficial to the creditor, as any mere promises to pay the same amount, by whomsoever made and whomsoever secured? . . . And a rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability and of last resort, even when yielding reluctant assent to it.

Id. at 509-10, 21 So. at 569.

[21] Gold, *supra* note 17, at 187.

[22] *E.g.*, 1A CORBIN § 174 recognizes the distinction but does not choose to pursue it.

[23] Coffee & McKeithan, *The Requirement of Consideration for the Discharge of Contractual Obligations in Texas*, 33 TEX. L. REV. 225 (1954); *see* Hudson, *Doctrine of Consideration in Iowa Revisited—the Bargain Element*, 5 DRAKE L. REV. 67, 68-70 (1956); Comment, *Modification of a Contract in New York: Criteria for Enforcement*, 35 U. CHI. L. REV. 173 (1967).

briefly the traditional consideration theory justifying the pre-existing duty rule because many, if not most, of the cases evading the rule are set in the terms of the traditional doctrine. Typically, the insufficiency of a pre-existing duty as consideration has been explained through the detriment/benefit test of consideration.[24] A concise contemporary articulation of this particular application of the detriment/benefit test is:

> On principle, the second agreement is invalid for the performance by the recalcitrant contractor or is no legal detriment to him whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance under the second agreement a legal benefit to the promisor since he was already entitled to have the work done.[25]

To date, analyses of cases dealing with the pre-existing duty rule have focused on the reasoning of the detriment/benefit test. This paper will go beyond consideration of the detriment/benefit test in order to uncover the principles which underlie the test as applied to pre-existing duty cases. First, however, it will be advantageous to view the traditional doctrine in action.

III. TRADITIONAL THEORY AS APPLIED

A. *Performance of a Pre-Existing Duty Not Consideration*

Because of the unique connection of the law of contracts with the commercial development of the English-speaking nations, the most accurate insight into any particular rule is through its application to commercial transactions. This section will include a survey of cases where the pre-existing duty rule has been applied—in situations involving bailments, construction contracts, installment loan contracts, leases, and brokerage contracts. In these cases the implications of the pre-existing duty rule to commercial policy are apparent, and little comment is necessary. Following the survey of the application of the rule, several cases will be analyzed in depth in an attempt to disclose the true basis of the rule.

1. Bailments

In *De Cecchis v. Evers*[26] the pre-existing duty rule was ap-

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[24] *See* CALAMARI & PERILLO § 61; 1A CORBIN § 172; 1 S. WILLISTON, CONTRACTS § 130 (3d ed. 1957) [hereinafter cited as WILLISTON]; Corbin, *Does a Pre-Existing Duty Defeat Consideration?*, 27 YALE L.J. 362 (1918); Williston, *supra* note 1.

[25] 1 WILLISTON § 130, at 532.

[26] 54 Del. 99, 174 A.2d 463 (Super. Ct. 1961).

plied in a bailment situation. The plaintiff telephoned the defendant, a warehouseman, and inquired about the storage of furniture, rugs, and appliances. The plaintiff was informed about rates and packing requirements, but at no time was she told of any limits on the liability of the storage company. Plaintiff agreed to the terms and instructed the defendant to pick up the goods, which was quickly accomplished. A few days later the plaintiff received warehouse receipts through the mail. Three and a half years later, the plaintiff requested the goods and they were delivered; but before the defendant would release them, he demanded that the plaintiff sign the receipts that had been mailed to her. The receipt had printed upon it a clause limiting the defendant's liability for damage to $50.00 per package. In the suit by the plaintiff to recover for physical damage to the goods, the defendant sought to invoke the limitation. The court ruled in favor of the plaintiff and refused to limit liability. The basis for the refusal was that a contract had been made orally and the limitation of liability did not arise until days after, when the receipts were first delivered to the plaintiff. As such, the limitation was viewed as a modification of the original contract. The court found that there was no consent to, nor consideration for, the modification.

2. Construction Contracts

Tri-City Concrete Co. v. A. L. A. Construction Co.,[27] a construction contract case, is an excellent example of the conceptual identity of the modification problem and the pre-existing duty rule. Tri-City, the plaintiff, orally agreed to supply concrete as ordered by A.L.A., the defendant, and to deliver the concrete to the job site. Further, the oral agreement provided that each delivery was to be accompanied by a sales memorandum, to be signed by A.L.A.'s agent.[28] One clause of the memorandum provided that the buyer was to be liable for any damage to the seller's truck which occurred while the truck was on the job site. During one such delivery, the truck tipped over and fell into an excavation on the job site. The seller sued to recover for the damage. The court denied recovery on the basis that the sales memorandum could not serve as a modification of the original agreement (which

[27] 343 Mass. 425, 179 N.E.2d 319 (1962).

[28] There was a question whether the employee signing the memorandum involved in the litigation was in fact authorized to do so, and the court considered agency rationale. However, the court disposed of the case on contract grounds.

contained no such provision as to damage to equipment) because such modifications must be supported by consideration.

Mainland v. Alfred Brown Co.,[29] involving the subcontracting of electrical work, also demonstrates the operation of the rule. The subcontractor agreed to supply materials and labor to the contractor at the construction site. This agreement was silent as to who bore the risk of loss on goods delivered to, but not installed at, the site. Fire destroyed goods stored on the site. The subcontractor alleged a subsequent promise by the general contractor to reimburse the subcontractor for the loss if the subcontractor would finish the job. The subcontractor's suit on the promise to pay for the loss was unsuccessful because the court found that he bore the risk of loss unless there was a specific agreement to the contrary. The court further found that the oral promise to reimburse could not serve as such an agreement to shift the risk of loss because

> [t]he oral assurance of reimbursement for that loss given by the contractor did not constitute an enforceable promise. The subcontractor was obligated to complete his contract notwithstanding such assurance. Consequently, that assurance, or promise, was given without consideration.[30]

The issue of the pre-existing duty rule most frequently appears in construction contracts in regard to determining the right to receive payment for "extras."[31]

3. Installment Contracts

The pre-existing duty rule has also been used to further the law's policy of encouraging the extension of credit by protecting lenders, especially purchase-money lenders. In *In re Dahn*[32] a husband and wife had become jointly liable on a conditional sales agreement for the purchase price of a mobile home. After the husband's death the wife attempted to have his estate pay the balance of the contract. To implement this plan, she refused to make any payments and turned the mobile home over to the lender. After a period of time the lender sold the home and filed suit for the deficiency. The wife counterclaimed for damages, claiming the lender had promised to hold the home until her

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[29] 85 Nev. 654, 461 P.2d 862 (1969).

[30] *Id.* at 656, 461 P.2d at 864.

[31] Watson Lumber Co. v. Guennewig, 79 Ill. App. 2d 377, 226 N.E.2d 270 (1967); *see* Britton v. Gabriel, 2 N.C. App. 213, 162 S.E.2d 686 (1968).

[32] 204 Kan. 535, 464 P.2d 238 (1970).

claim against the estate had been determined. The court found for the lender on the ground that there was no consideration for the lender's promise. There was no consideration because the wife was obligated under the conditional sales agreement to deliver the home to the lender when in arrears. Therefore, the fulfillment of the conditional sales contract duty could not be consideration for the lender's promise to hold the home pending the outcome of the claim against the estate.

A similar result was achieved in *Walden v. Backus*.[33] There, the plaintiff had sold a motel to the defendant on an installment contract. The defendant took possession and began making payments. After the defendant missed a payment, the plaintiff urged him to keep the motel and continue payment. Finally, the defendant surrendered the premises and left the keys with the plaintiff. The plaintiff resold the motel for a lower price and sued the defendant for the balance. The defendant contended that the surrender of the premises had been consideration for the plaintiff's promise to release the defendant. The court found that there was no consideration for the alleged promise of release because the defendant was obligated under the original installment contract to return the keys and surrender the premises to the plaintiff in the event of default. Therefore, the surrender could not have been consideration for the release.

The pre-existing duty rule has similarly been invoked to protect account creditors.[34]

4. Leases

The pre-existing duty rule has also been used in lease situations to protect landlords. In *Green v. Millman Brothers Inc.*[35] an agreement by the landlord to accept a lower rent was held ineffective on the basis of the rule. After the lessee had rented and occupied space in a shopping center, its business was not what had been anticipated. The lessor therefore agreed to a reduction in rent of $150.00 per month. After 1 year at the reduced rental the lessor sued to recover the original higher rental except for the 1-year period. The Michigan court held that the lessor could recover because there was no consideration for the promise of the

[33] 81 Nev. 634, 408 P.2d 712 (1965).

[34] *See* International Shoe Co. v. Carmichael, 114 So. 2d 436 (Fla. Dist. Ct. App. 1959); O'Brien v. General Motors Acceptance Corp., 362 P.2d 455 (Wyo. 1961).

[35] 7 Mich. App. 450, 151 N.W.2d 860 (1967); *cf.* Feldman v. Fax, 112 Ark. 223, 164 S.W. 766 (1914).

reduced rental in that the lessee-defendant did only what was required of it by the original lease—pay rent.

In a classic application, the rule was invoked in *Little v. Reddit*[36] to void an option to renew a lease. The plaintiff's assignor had rented the premises to the defendant. Twenty-five months after the commencement of the lease, the plaintiff's assignor, in further consideration of the rent, had granted to the defendant the right to renew for a period of 1 to 10 years after the original 10-year term. The court declared the option void because it was a modification of the original lease; as such, it required consideration. The obligation to pay rent was held not to be consideration for the option because the obligation to pay had been created by the original lease.

5. Brokerage Contracts

In *Block v. Drucker*[37] the rule was applied to a brokerage contract. The fact pattern hints at an underlying reason for the apparently conflicting applications of the pre-existing duty rule. The plaintiff was retained to find a buyer for the defendant's house at a set figure. The plaintiff produced a buyer at a lower price, and the defendant agreed to sell at this lower figure. The defendant then insisted that the plaintiff accept a lower commission than had been provided for in their original agreement, and the plaintiff acceded. The defendant subsequently sold the house to another buyer at a higher figure.

The plaintiff sued for, and recovered, the higher commission. The defendant argued on appeal that the verdict for the commission at the higher figure could not be upheld because of the subsequent agreement by the plaintiff to accept a lower commission. The court rejected this argument, finding that, "This agreement was not an effective novation [*sic*] (modification) of the original agreement since it was not supported by consideration."[38] To assess this holding, it is necessary to recognize the plaintiff's plight when the promise to accept a lower commission was extracted from him. He had worked to find a buyer, and unless he agreed to the lower commission, the fruits of his labor would have been denied him.

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[36] 264 Ala. 371, 88 So. 2d 354 (1956). *See also* Goldsbrough v. Gable, 140 Ill. 269, 29 N.E. 722 (1892).

[37] 212 So. 2d 890 (Fla. Dist. Ct. App. 1968).

[38] *Id.* at 891.

B. *Cases Revealing the True Operation and Application of the Rule*

The rationale underlying the application of the pre-existing duty rule, and thus explaining the apparent contradictions in its application, is candidly articulated in the case of *Lingenfelder v. Wainwright Brewing Co.*[39] That case involved a contract for the construction of a brewery. The architect employed to do the work also had an interest in a refrigeration manufacturing concern. When the architect learned that the brewer had ordered refrigeration equipment from a competitor of the architect's firm, he refused to continue with the construction of the brewery. In his pique, the architect, "took away his plans, called off his superintendent on the ground, and notified Mr. Wainwright that he would have nothing more to do with the brewery."[40] Mr. Wainwright, the owner of the brewery, wanted the brewery completed as soon as possible. Stymied and pressured by the work stoppage, Wainwright agreed to pay the architect 5 percent on the cost of the competing refrigeration equipment if the architect would resume construction. The architect completed the work but Wainwright refused to pay the 5 percent. This suit, by the architect's executors, ensued.

The court held against the architect, denying his claim to the 5 percent on the refrigeration equipment. In its opinion the court addressed itself to the two issues of major concern to this analysis. The first point was the allegation by the plaintiff that the original contract had been abrogated and a new one (*i.e.*, a modification) requiring the 5 percent premium, had replaced the original. The court, on the basis of the facts, rejected this argument, stating, "I find in the evidence no substitution of one contract for another."[41]

The court then turned its attention to whether there was "any consideration for the promise of Wainwright to pay Jungenfeld [the deceased architect] 5 per cent. on the refrigerator plant."[42] Not surprisingly, the court found that there was no consideration because the architect had done only what he had been already obligated to do by the first contract. Therefore, the law regarded the second contract as a *nudum pactum*.

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[39] 103 Mo. 578, 15 S.W. 844 (1891).

[40] *Id.* at 585, 15 S.W. at 846.

[41] *Id.* at 586, 15 S.W. at 846.

[42] *Id.* at 592, 15 S.W. at 847.

The holding and analysis of *Lingenfelder* are similar to many such cases reaching the same result. The candor of Justice Gantt in explaining the holding, however, sets his opinion apart. He discloses what moved the court to invoke the pre-existing duty rule against the architect:

> No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, *and extorted* the promise of 5 per cent. on the refrigerator plant as the condition of his complying with his contract already entered into. Nor was there even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part. . . .
> To permit plaintiff to recover under such circumstances would be to offer a premium on bad faith, and to invite men to violate their most sacred contracts that they may profit by their own wrong.[43]

Further evidence that the court was motivated by fear of extortion or abusive dealing is in Justice Gantt's statement: "[A]nd [the law] will not lend its process to aid in the wrong."[44]

Relying on the insight provided by Justice Gantt's opinion, it is the primary contention of this paper that the key to the enigmatic nature of the pre-existing duty rule is a fear of misdealing. If a court suspects that the second contract—the modification—was extorted or otherwise unfairly extracted from the promisor, it will employ the pre-existing duty rule to deny enforcement of the second contract. On the other hand, if the court does not suspect abusive dealing, it will enforce the second contract by ignoring the consideration issue,[45] by finding an exception to the pre-existing duty rule, or by devising a mechanical route around it.

Numerous cases, old and new, support the theory that a desire to prohibit misdealing is the key to the understanding of

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[43] *Id.* at 592-93, 15 S.W. at 848 (emphasis added). *But see* Austin Instrument Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971), where instead of asserting the pre-existing duty rule to defend against the coercing contractor's suit for the extra money, the aggrieved, coerced party paid the money and sued for damages on the theory of duress to force repayment of the sum wrongfully extracted from him.

[44] 103 Mo. at 595, 15 S.W. at 848.

[45] *See* Savage Arms Corp. v. United States, 266 U.S. 217 (1924). The Court decided that a review of the issue of consideration for modification of a government contract was unnecessary; it upheld the modification and found in favor of the government:

> Whether the agreement was made reluctantly, or appellant got the worst of the bargain, are matters unnecessary to be considered. It is enough that, without fraud or coercion, it did agree.

Id. at 221. Corbin recognizes the potential of such an analysis, but does not develop it. 1A CORBIN § 183.

the pre-existing duty rule. Although no opinion quite matches *Lingenfelder's* candor in announcing this concern as the key to the rule, examination of a few cases applying the rule will support this theory.

Alaska Packers' Association v. Domenico,[46] a case with facts similar to those of *Lingenfelder*, quotes the passage about extortion from that case. Men who had signed in San Francisco to work the Alaskan salmon fishing season demanded and got a promise of higher wages after their arrival in Pyramid Harbor. The court denied enforcement of the promise of higher wages on the ground of lack of consideration because of the pre-existing contractual duty to provide these same services. The coextensive import of *Alaska Packers'* and *Lingenfelder* is best demonstrated by the facts seized upon by the court to support its holding:

> The evidence showed, and the court below found that it was impossible for the appelant to get other men to take the places of the libelants, *the place being remote, the season short and just opening*; so that, after endeavoring for several days without success to induce the libelants to proceed with their work in accordance with their contracts, the company's superintendent . . . *yielded to their demands* . . . .[47]

It is clear that the court in *Alaska Packers'* was concerned with economic extortion and misdealing, just as Justice Gantt was in his condemnation of the architect.

In *King Construction Co. v. W. M. Smith Electric Co.*,[48] the concepts of economic coercion and the pre-existing duty rule are neatly juxtaposed. King, a bidder on an Atomic Energy Commission contract, obtained an offer from Smith for the construction of a crane required by the AEC. Smith bid $16,691, and King used that figure in its bid to the AEC. King was awarded the contract and was instructed to commence work immediately. The AEC contract made time of the essence, and penalty provisions were included. The day after the award, King entered into an oral contract with Smith for the crane at $16,691. Less than a week later, Smith informed King that it would not deliver the crane at the agreed price. For about a month King attempted to find another crane, but, as it turned out, Smith was the only practical source. Therefore, King entered into a written contract with

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[46] 117 F. 99 (9th Cir. 1902).

[47] *Id.* at 101 (emphasis added).

[48] 350 S.W.2d 940 (Tex. Civ. App. 1961).

Smith for a crane; but the price was $30,750, instead of the prior lower price.

Smith sued King for the balance on the contract as modified. King counterclaimed for payments made in excess of the price set by the original contract. The majority of the court held for King on both claims finding that the modification[49] was not fully agreed to by King. The court held that King had signed the second agreement under duress and therefore was not bound by it. The court equated economic coercion with duress.

The concurring opinion, on the other hand, chose as the central issue the lack of consideration for the second promise. King raised as one of its points on appeal:

> [T]he parties having entered into a valid oral contract . . . for the sale and purchase of the crane specified for $16,691.00, there was no consideration for the later written agreement for . . . the sum of $30,750.00 for the crane.[50]

Seizing on this, the concurring opinion denied the validity of the modification, not on the basis of duress, but on the basis that there was "no real or true consideration for the making of the new contract."[51]

Here again the almost identical natures of the pre-existing duty rule and the right to modify an executory bilateral contract can be seen. The majority opinion made clear that the right to modify a contract is limited by the extent to which the modification is arrived at freely. The concurring opinion reflected the same thinking, but chose to express it through the pre-existing duty rule and the absence of consideration.

Another recent case offering insight into the relationship of the pre-existing duty rule and modification demonstrates the same concern with abusive business practices as do the other cases where the rule is invoked. *Nicholas v. Harger-Haldeman*[52] dealt with the purchase of an automobile "on time" in Southern

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[49] The Texas court refers to the second agreement as a "novation," that is, substituting one obligation for another. *Id.* at 943. That statement is no doubt correct under Texas law. For consistency with UNIFORM COMMERCIAL CODE § 2-209 and for clarity, however, this paper treats such an agreement as a modification, restricting the term novation to the meaning given in RESTATEMENT OF CONTRACTS § 424 (1932), that is, a modification involving a new party as well as a new obligation.

[50] 350 S.W.2d at 945.

[51] *Id.* at 947.

[52] 196 Cal. App. 2d 77, 16 Cal. Rptr. 195 (1961).

California and involved pervasive misdealing reflective of current commercial and consumer problems.

Nicholas, the plaintiff-buyer, was not an American by birth and had difficulty with the English language. He went to defendant-seller's automobile sales room to purchase a new car. The salesman "switched" him up to a more expensive model by offering him a most attractive deal. The deal, which in typical fashion required manager approval, set the price of the $5,000 model at $4,100. This price was to be paid by a trade-in credit on Nicholas' old car of $950 plus a cash down payment of $300; the balance was to be paid in monthly payments, commencing August 1st, of just over $100.

The necessary managerial approval was given in 6 minutes. Nicholas and the salesman signed some papers and Nicholas made a $20 cash deposit and signed over the title to the car he traded in. It was agreed that Nicholas would bring in the $280 balance of the down payment the next day and pick up his new car. Nicholas returned as scheduled and made the payment, but was told that still another day was necessary before delivery of his new car.

When Nicholas returned the third day to get the car he was vaguely informed of some difficulties and was told that an additional $200 was needed on the down payment plus an undisclosed amount for insurance. The salesman began writing up a new contract for the extra $200 and $139 for insurance. Nicholas said he would not sign and that the deal was off. The salesman refused, saying that the deal was closed and Nicholas' old car could not be returned to him. The salesman then said that the added $200 could be put in the balance to increase the monthly payments. Papers were presented to Nicholas for his signature. He signed and was told copies would be mailed to him. He finally got his new car.

Two weeks later Nicholas received a contract calling for $200 to be paid July 7th. He did not make that payment, but did make the first payment as scheduled by the original contract. The new car was repossessed and Nicholas was told that the repossession was caused by his failure to make the $200 pickup payment which had been due on July 7th. Nicholas then offered to pay the $200 immediately. The defendant-seller's credit manager refused to accept the money and advised Nicholas to see the insurance man.

Nicholas saw the insurance man, who advised him to take

out more insurance. Nicholas refused, returned to the credit-manager, and demanded his car. The credit manager refused to return the car unless Nicholas would pay the $200 plus $1,000 for the repossession service and the balance due. Nicholas declined and filed suit for the conversion of personal property in the car and for punitive damages.

In their defense the sellers argued that the second contract superseded all prior negotiations and that therefore Nicholas' breach of the second agreement justified the repossession of the car. Thus, the defense maintained, there could have been no conversion. The trial court held that there was no breach by Nicholas and that the second contract was not valid, or if it was, that the seller-defendant had waived strict compliance with it.

The appellate court affirmed the decision for the buyer. It grounded its decision on the lack of consideration for the second agreement because of coercion, stating:

> Apparently believing that he was forced to sign a new contract to save his downpayment and Dodge car, plaintiff signed Exhibit K [the second contract or modification], the conditional sales contract of June 26. There was no further consideration for the execution of a new agreement. It was all for the benefit of the defendant. The basic doctrine generally required by the several states is that a promise to pay an additional or greater amount than that which the promisee is already under contractual obligation to the promisor to pay is without consideration.[53]

C. *Forms of Misdealing Prevented by the Rule*

Alaska Packers, *King Construction*, and *Nicholas* clearly demonstrate the use of the pre-existing duty rule by courts to avoid sanctioning agreements that have resulted from extortion or economic coercion. In most of the cases reviewed in the remainder of this article, courts have been concerned with the potential for economic extortion arising from the interdependence of parties to a contract once performance has begun. The rule, however, has been applied to prevent numerous other forms of misdealing.

In *Moehling v. W. E. O'Neil Construction Co.*[54] the Illinois Supreme Court used the pre-existing duty rule to deny a disloyal agent the benefits of her double dealing. The plaintiff, a licensed real estate broker, was retained by the defendant to acquire land for it. The defendant needed land from which fill

[53] *Id.* at 88, 16 Cal. Rptr. at 202.
[54] 20 Ill. 2d 255, 170 N.E.2d 100 (1960).

could be taken for use in a road construction project the defendant had undertaken. The plaintiff found land that met the defendant's needs and began the steps necessary to acquire it for the company. However, the plaintiff alleged that she then entered into an oral contract with the defendant whereby the defendant agreed that the plaintiff could acquire 10 acres of the tract for herself. These 10 acres were not appropriate for the defendant's use, but had great commercial value for other uses. The defendant refused to convey the 10 acres to the plaintiff, and she sued to obtain specific performance of the oral contract.

The court found for the defendant, that there was serious doubt whether the plaintiff had sufficiently proved the oral contract. The court emphasized that even if the plaintiff had proved the existence of the oral contract, she could not enforce it because there was no consideration for the promise to let the plaintiff have the 10-acre parcel. The plaintiff claimed that the consideration for the oral promise of the 10 acres was her acquisition of the land for the defendant. The court invoked the pre-existing duty rule, stating rather bluntly:

> In short, plaintiff performed no act and rendered no service to defendant with respect to the . . . land other than what she was already required and obligated to do by reason of the legal relationship of principal and agent existing between them.[55]

The court was most clear in its condemnation of the plaintiff's conduct of her agency. It pointed to two particularly treacherous acts of the broker. She had negotiated a deal which postponed for 2 years the right to remove fill, an arrangement patently contrary to the defendant's needs. Further, she had not consulted with her client as to the terms of the option she did acquire. The court summed up the thinking behind its resort to the pre-existing duty rule, saying that

> [h]er failure to do so, as well as her entire course of conduct, leads us to the conclusion that she abandoned the interests of her principal and sought only to advance her own.[56]

Another case used the rule against a suspected forgery.[57] The seller and buyer entered into a lease of the seller's stock in a corporation. However, immediately after executing the instruments requisite for the lease, the seller informed the buyer that

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[55] *Id.* at 266, 170 N.E.2d at 106.

[56] *Id.* at 268-69, 170 N.E.2d at 108.

[57] Johnson v. Tanner, 59 Wash. 2d 606, 369 P.2d 307 (1962).

the terms of the lease violated company policy pertaining to such agreements. The parties then converted their arrangement to a sale, with a loan of $3,250 from the seller to the buyer. The buyer went to work for the company; and, as was the custom in the area, an amount in keeping with his loan commitment to the seller was deducted from his earnings and paid to the seller. In this fashion the buyer fulfilled his obligations.

However, the seller alleged that a subsequent agreement calling for a purchase price of $15,000 had been executed by the parties. The Supreme Court of Washington stated that there was evidence that the parties had never discussed such a contract before it was signed, that there was no witness willing to testify that he had seen the buyer sign it, that the buyer denied signing it, that the alleged signature on the $15,000 contract was in a different form than that which the buyer customarily signed, and that the handwriting was dissimilar. The trial court had found that the signature was not that of the buyer. The supreme court affirmed that finding of fact, but went further in its discussion of the law.

It held that even if the trial court had found the signature genuine, it should still have found for the buyer. This result would have been dictated by the lack of consideration for the buyer's promise to pay $15,000, since the seller was already obligated to sell the stock to the buyer for $3,250.

In *Murphy v. Royal American Industries, Inc.*[58] the rule was invoked to thwart an evasion of the Securities Act. The plaintiffs agreed to exchange some stock for stock in the defendant company. The defendant agreed that the stock it would give in exchange would be registered and freely transferable. Additionally, the defendant agreed that if it somehow failed to deliver registered stock, it would repurchase the stock it did deliver to the plaintiffs at a price of $2.50 per share. Later, it was discovered that the stock that had been earmarked for transfer to the plaintiffs had not been registered and that a registration would have to be undertaken unless the shares were restricted to investment purposes. In order to obviate the necessity of a registration and still be able to complete the original contract, the defendants placed on the certificates a legend to the effect that the shares

[58] 188 So. 2d 884 (Fla. Dist. Ct. App. 1966), *cert. denied*, 201 So. 2d 465, *cert. denied*, 389 U.S. 953 (1967).

were for investment purposes, had not been registered, and could not be transferred unless registered. Further, at the closing the plaintiffs signed an investment letter which also acknowledged that they took the shares for investment purposes and had no intention of selling them.

Subsequently, the plaintiffs made a demand on the defendant to repurchase the shares at $2.50 per share as required by their agreement. The defendant refused, and the plaintiff sued to enforce the agreement. The defendant alleged that the investment letter and the legend on the stock had modified the original agreement, thereby waiving the registration provision. The court found for the plaintiffs, saying that the plaintiffs' recital of the intention not to dispose of the stock was executed at the request of the defendants in an effort to avoid violation of the federal law. The court then turned to the question of the pre-existing duty rule:

> Such receipt [of the investment letter] did not constitute a modification of the contract in that there was no consideration for a change or modification. . . . An estoppel did not arise in that by signing the investment letter plaintiffs received no benefit but merely acknowledged a known fact that they might not be able to sell their stock until registered, and such action by the plaintiffs was not to the detriment of the defendants . . . . The same did not constitute a waiver of the provisions of the contract in that there was no showing of the intentional relinquishment of a known right.[59]

Although the court clearly was concerned with the efficacy of the modification, its concern with the protection afforded by the Securities Act is equally clear. The court permitted completion of the sale of the unregistered stock, but did not permit the defendants to bypass the alternative protection the plaintiffs had obtained.

The pre-existing duty rule has also been used to monitor the work of fiduciaries. In *Carpenter v. Taylor*[60] the rule was used to prevent an assignee for the benefit of creditors from taking advantage of his position. The plaintiff, as assignee for the benefit of creditors, after inventorying the assets of the debtor felt a surplus could be had. Therefore, he entered into an agreement with the debtor-assignor whereby the debtor would pay him (the assignee) a commission on any surplus realized, in recognition of his astute

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[59] *Id.* at 886-87.

[60] 164 N.Y. 171, 58 N.E. 52 (1900).

management. A surplus was achieved, but the debtor would not pay the commission, and the assignee sued. The court found for the debtor on the theory that the assignment for benefit of creditors had obligated the assignee to manage to the best of his ability. Therefore, his promise to do so in return for a commission could not be consideration for the promise to pay a commission because it was a promise to perform a pre-existing duty.

The pre-existing duty rule has also been used to frustrate attempts to make a testamentary disposition without conforming to the wills act and simultaneously to prevent the circumvention of community property law. In *In re Bray's Estate*[61] the testator hired his son by a former marriage to work for him. After the son had been employed in the testator's business for 6 years, the testator began taking funds from the business and depositing them in a joint account with the son. The son knew of the existence of the joint account, but knew nothing about the amounts deposited. After the testator's death his widow claimed half of the joint account as community property. The son alleged it was salary. The court expressed its concern about the testator's secrecy, the invasion of community property, and the attempted evasion of the Statute of Wills. It ruled in favor of the widow on the ground that the son had already been bound to work under his employment contract, and that therefore there was no consideration for the joint bank account.

A similar theory was employed in *In re Crea*[62] to deny efficacy to an alleged waiver of the debt owing from a son to the testator.

The pre-existing duty rule has also been used in situations where the integrity of government officials might be in question. It has certainly been used to maintain the integrity of competitive bidding for government work. In *Board of Education v. Barracks*[63] a taxpayer filed suit to enjoin payment by the board of education to a contractor who had built a school and who sought payment of an extra $24,500 pursuant to an oral modification agreed to by the board. The facts were that the contractor was the low bidder and was awarded the contract. He supplied a performance bond. After work began the contractor said costs had risen because of World War I and that he could not complete the work unless he

[61] 230 Cal. App. 2d 136, 40 Cal. Rptr. 750 (1964).

[62] 27 N.Y.2d 339, 266 N.E.2d 815, 318 N.Y.S.2d 133 (1971).

[63] 235 Ill. App. 35 (1924). *See also*, Gragg v. James, 452 P.2d 579 (Okla. 1969); Montgomery v. City of Philadelphia, 391 Pa. 607, 139 A.2d 347 (1958).

was paid an extra $33,500. There was an unofficial meeting of the school board, attended by a majority of the members (including the president and secretary), the architect, and the contractor. At this unofficial meeting it was agreed that the contractor should continue construction and that the board would protect him from loss on the contract. Later, at a regular meeting of the board, the contractor's extra compensation was limited to $24,500 because that figure would raise the contractor's remuneration to what the next lowest bid had been.

The court granted the injunction enjoining the extra payment to the contractor. The pre-existing duty rule was the basis of the decision. A major factor in the court's reasoning was that the contractor had supplied a bond; therefore, if the contractor had in fact refused to complete the school, the board could have had the work done by someone else and charged any increased costs to the bondsman.[64] The court also specially noted that there had been other bidders who could have been called on if the contractor had abandoned the work. The court dwelt at length on the questionable nature of the informal board meeting at which the modification had been made. It pointed out that state law required a recording of votes on expenditures and that there had been none. Further, state law required all business of the board to be conducted at regular or special meetings, with minutes kept. This meeting was neither a regular nor a special meeting; and although the secretary was present, no minutes were taken.

The court's feelings about the informal meeting at which the alleged modification was made are best summed up in its own words:

> The board later did not pretend to settle on this basis [the agreement to pay his extra costs] but allowed Schwartz [the contractor] the amount of the second lowest bid, and the substance of all the testimony is, that some members favored meeting Schwartz's loss and others did not favor such a plan, but that it all occurred by individual suggestions from members of the board and no vote was taken. Informal and uncertain action of this kind by various members of the Board of Education cannot be the basis of official action under which the school district is to be burdened with an indebtedness of $24,500, and in the opinion of this court, the district by such action never assumed any legal liability.[65]

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[64] Because of the bond the court refused to apply the changed circumstances exception. *See* text accompanying notes 66-94 *infra*. It felt that one of the purposes of the bond was to hedge against just such an occurrence; *i.e.*, the contractor, through its bondsman, assumed the risk of change.

[65] *Id.* at 48-49 (1924).

From these cases it is clear that the pre-existing duty rule is an example of the employment of a rule of law to implement a social or economic policy independent from contract law. Courts look at the facts surrounding the making of the second promise. If there is evidence of economic extortion or misdealing, courts apply the pre-existing duty rule and deny enforcement to the second contract. In cases where courts are satisfied that there is no misdealing, they do not apply the rule.

The subject of the remainder of this investigation is the various legal techniques used to escape the pre-existing duty rule. In a case where the second promise results from a change in circumstances, courts frequently apply what will here be called the changed or unforeseen circumstances *exception* to the pre-existing duty rule. In some cases courts avoid the rule entirely rather than find an exception to it. They may so avoid the rule by finding that a party has in fact performed a different duty, not a pre-existing duty. Or a court may avoid the rule by finding that the original contract was mutually rescinded and a new contract formed. Another means of escaping the internal technicalities of the rule and its exception is to enforce the modification on a theory that one party has relied on the modification to his detriment. And in some cases courts may completely avoid any problem with the rule by simply holding that no consideration is required to support a second promise.

IV. THE CHANGED OR UNFORESEEN CIRCUMSTANCES EXCEPTION TO THE RULE

The changed or unforeseen circumstances exception to the pre-existing duty rule is applicable when unforeseen or extreme changes in circumstances occur between the formation and the performance of a contract. Courts refrain from applying the pre-existing duty rule because the changed circumstances demonstrate that the second contract was based on fair rather than abusive dealing. The legal analysis for the exception is this: the changed circumstances subject the pre-existing duty to doubt or to an honest and reasonable dispute; or they create an honest and reasonable belief in one party that he is discharged from his duty by the defense of impossibility. The settlement of the dispute or the giving up of the defense of impossibility is consideration for the altered promise.

This exception to the pre-existing duty rule typically appears in construction contracts. It is often held that if changed or un-

foreseen circumstances arise during the construction of a building, which make completion of the structure substantially more difficult than the parties had originally thought, an agreement to pay the contractor a greater price for his efforts is enforceable.[66]

Linz v. Schuck[67] is a classic example of the operation of the exception. The plaintiff, a contractor, agreed to dig a cellar under the defendant's house for $1,500. After work began, it was discovered that the house stood on a hard crust of earth approximately 3 feet thick. However, beneath the crust was a quagmire of soft wet mud to such a depth that it was impossible to put in the cellar as contemplated. The contractor stopped work, but the owner of the house still desired a cellar and kept after the contractor to see if anything could be done. Finally, the contractor agreed to construct a small cellar by extensive draining and the use of concrete and cement footings if the owner would pay or reimburse the additional costs involved.

The court enforced the contractor's right to receive payment under the subsequent agreement, saying,

> When two parties make a contract, based on supposed facts which they afterwards ascertain to be incorrect, and which would not have been entered into by the one party if he had known the actual conditions which the contract required him to meet, not only courts of justice but all right thinking people must believe the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or to pay him additional compensation. If the difficulties be unforeseen, and such as neither party contemplated, or could have from the appearance of the thing to be dealt with anticipated, it would be an extremely harsh rule of law to hold that there was no legal way of binding the owner of property to fulfill a promise made by him to pay the contractor such additional sum as such unforeseen difficulties cost him.[68]

The opinion lacks precision in the technical points of contract because it relied solely on the moral and ethical reasons to enforce the subsequent promise to pay more. However, *Linz* relied heavily on *King v. Duluth, Missabe & Northern Railway*,[69] in which the Minnesota Supreme Court, in its own syllabus of its opinion, made very clear that the changed or unforeseen circum-

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[66] 1A CORBIN § 184; 1 WILLISTON § 130; Annot., 138 A.L.R. 136, 138 (1942); Annot., 55 A.L.R. 1333 (1928); Annot., 25 A.L.R. 1450, 1459 (1923).

[67] 106 Md. 220, 67 A. 286 (1907).

[68] *Id.* at 230, 67 A. at 288.

[69] 61 Minn. 482, 63 N.W. 1105 (1895).

stances in that case related directly to the consideration question, and specifically to the pre-existing duty rule:

> *Held* that, where one party to a contract refuses to perform it unless promised some further pay or benefit than the contract provides, and the promise is made . . . the promise is without consideration, unless the refusal was induced by substantial and unforeseen difficulties in the performance, which would cast upon the party additional burdens not anticipated by the parties when the contract was made.[70]

A. *The Rationale of the Exception*

Not only does *King* make clear why changed or unforeseen circumstances trigger an exception to the pre-existing duty rule, but it also clarifies the relationship of the pre-existing duty rule and the fear of extortion. While *King* articulates the changed or unforeseen circumstances exception to the pre-existing duty rule, the court held that King's difficulty did not come within the exception.

King was a contractor who entered into a contract with the railway to construct a roadbed through a part of the Missabe Mountains. The contract was made in January of 1893, and performance began almost immediately. In late February unforeseen difficulties were encountered which increased the cost of construction by $40,000. Consequently, King notified the railway that he could not proceed. The railway agreed to modify the original contract and pay for the added costs so that King would not be compelled to the work at a loss. On the basis of this subsequent promise, King completed the job and filed suit to collect the added costs. The railway claimed that there was no consideration for the alleged promise to pay extra for the work, relying on the pre-existing duty rule.

In stating the criteria for the unforeseen circumstances which would create an exception to the rule, the court explained that the reason for the exception is that the changed circumstances dispel any suspicions of misdealing. The court described the circumstances as follows:

> They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; *for they are sufficient if they are*

[70] *Id.* at 482, 63 N.W. at 1105.

> *of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation.* 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.[71]

The court found against King on this point and held the exception inapplicable because frozen ground in the Missabes in late February was neither so unusual nor so unforeseeable as to prevent its being anticipated by the parties.[72] Therefore, King entered into the contract knowing full well the difficulty ahead. As to the pre-existing duty rule, the court held that King elicited the second promise only to relieve himself of a losing bargain and thus did not come within the exception.[73]

King clearly illustrates the major thesis espoused in this paper, that courts invoke the pre-existing duty rule rather than being put in the position of placing an imprimatur of legality on agreements extorted or coerced from one of the parties. At one point in the opinion Chief Justice Start stated

> where the refusal to perform and the promise to pay extra compensation are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party.[74]

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[71] *Id.* at 488, 63 N.W. at 1107 (emphasis added).

[72] *Id.* at 488-89, 63 N.W. at 1107, where the court says:

> Do the allegations of fact contained in the plaintiff's [King's] first alleged cause of action bring his case within the exception? Clearly not; for eliminating all conclusions, and considering only the facts alleged, there is nothing to make the case exceptional, other than the general statement that the season was so extraordinary that in order to do the stipulated work it would require great and unusual . . . expense. . . .

The fact that the court was denying King the benefits of the exception might well have required that the court very clearly state the criteria to come within it in order that the disappointed litigant fully understands the basis of the denial.

[73] However, the court found for King on a separate count, on the ground that the railway had broken the original contract by changing the proposed line to such an extent that it caused delay which justified King in refusing to proceed with the work under the first contract.

[74] 61 Minn. at 486, 63 N.W. at 1106.

The existence of new and unforeseen conditions, explained Justice Start, rebuts the inference of extortion:

> But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party 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. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted . . .*[75]

From this examination of *King* and its handling of the exception to the pre-existing duty rule, it is clear that the circumstances surrounding a denial of obligation under the original contract will markedly influence the court's suspicions and, thus, its eventual determination about abusive dealing. Close scrutiny of the original contract duty is vital to resolving the seemingly contradictory applications of the pre-existing duty rule and to establishing thereby the boundaries of the right to modify an executory bilateral contract. This close scrutiny is required to determine the reasonableness of the refusal to perform the original contract duty by the party seeking the greater amount under the modification. The reasonableness of that refusal to fulfill the original duty is a crucial factor in any determination as to abusive dealing. Therefore, it is contended that the consideration for the second promise is not the relevant issue; rather, the pertinent issue is the justification for refusing to perform the original duty. The degree of justification for that refusal dictates the application of the pre-existing duty rule. In this way, as has been stated, reconciliation of the contradictory applications of the pre-existing duty rule demands exploration beyond the superficial questions of contract theory which surround the second contract. Only thorough assessment of the original contract relation will produce a sufficient understanding of the second.

B. *The Relationship of Restatement 76 and the Changed Circumstances Exception to the Pre-Existing Duty Rule*

The *Restatement of Contracts*, section 76(a), provides that a pre-existing duty that is neither doubtful nor subject to honest and reasonable dispute is not sufficient consideration; and sec-

[75] *Id.* at 487, 63 N.W. at 1107 (emphasis added).

tion 76(b) provides that the surrender of an invalid claim by one who does not have an honest, reasonable belief in its possible validity is not consideration. These two rules provide a legal bridge for the changed circumstances exception to the pre-existing duty rule. The change in circumstances raises doubt as to the continued obligation to perform a pre-existing duty or creates an honest and reasonable belief that one party could use the defense of impossibility. In the language of the *Restatement*, the performance of the disputed duty or the surrender of a claim honestly and reasonably believed to be valid is consideration for the other party's altered obligation. Therefore, the changed circumstances exception to the pre-existing duty rule not only appeals to one's sense of justice and fairness, as *Linz v. Schuck*[76] maintained, but also has a firm foundation in legal theory.[77]

King v. Duluth, Missabe & Northern Railway,[78] the case which dramatized the reason for the exception, specified that the changed or unforeseen circumstances which would constitute a sufficient basis for an exception to the pre-existing duty rule need not be of the same degree required for actual discharge by impossibility.[79] This distinction between the requirements for an exception to the pre-existing duty rule and for discharge is explained in an earlier opinion of the same court, *Michaud v. McGregor*.[80]

Michaud was a contractor who had contracted to build a store for McGregor on McGregor's lot in Duluth. While excavating for the purpose of putting in the foundation, Michaud discovered a large quantity of rocks on the land. The rocks had been placed on the land by the city at an earlier date and had sunk into the soft subsoil so that it was impossible to drive the pilings. Neither party knew of the rocks at the time of entering into the construction contract. McGregor maintained that removal of the rocks was covered by the contract, but Michaud denied that as-

[76] 106 Md. 220, 67 A. 286 (1907). *See also* Healy v. Brewster, 251 Cal. App. 2d 541, 59 Cal. Rptr. 752 (1967).

[77] 1 WILLISTON § 130 at 532 recognizes the relationship, but limits it to matters of interpretation of the original contract.

[78] 61 Minn. 482, 63 N.W. 1105 (1895).

[79] *Id.* at 488, 63 N.W. at 1107, where the court describing the changed circumstances sufficient to permit an exception to the pre-existing duty rule, said:

> They need not be such as would legally justify the party in his refusal to perform his contract . . . or to justify a court of equity in relieving him from the contract. . . .

[80] 61 Minn. 198, 63 N.W. 479 (1895).

sertion. The parties entered into an oral agreement calling for McGregor to reimburse Michaud for the actual costs of removal of the rock. After McGregor's refusal to reimburse, Michaud filed suit to collect the costs of removing the rock.

McGregor pleaded that there was no consideration for the promise to reimburse, adverting to the pre-existing contractual duty to build the store. The court, Chief Justice Start again writing the opinion, discussed the pre-existing duty rule and abusive dealing in passing. In this case, the court had applied the exception discussed in *King* and went deeper into the underlying legal rationale. It articulated as the basis for upholding the modification the dispute caused by the unforeseen circumstances.

The court reasoned that the discovery of the rock was an unforeseen circumstance. Each party maintained that the other was responsible for removal and the contractor refused to proceed unless reimbursed. This controversy was compromised by the subsequent oral agreement by McGregor to pay the cost of removing the rock if Michaud would return to work. The court said: "These facts disclose a valid consideration to support the contract. *A bona fide controversy was settled.*"[81]

The changed circumstances necessary to bring a case within the exception to the pre-existing duty rule need not be such as to form the basis for discharge; they need only be such as to create a reasonable and honest belief that the original duty is discharged.

Another case demonstrating that the changed circumstances exception to the pre-existing duty rule is well grounded in the law surrounding settlement of disputes is *United Steel Co. v. Casey*.[82] There, Casey contracted to construct furnaces for the steel company at a set unit price. The agreement provided that any modifications had to be in writing. Subsequently the parties orally agreed to a change in computing the cost, so that upon completion Casey claimed that it was entitled to an extra $100,000. The court of appeals first disposed of the question of the oral modification on the basis of the jury's finding in favor of Casey,[83] and then moved on to what it deemed the more important issue, United Steel's claim that there was no consideration for the oral agreement.

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[81] *Id.* at 202, 63 N.W. at 480-81 (emphasis added).

[82] 262 F. 889 (6th Cir. 1920).

[83] *Id.* at 890, 891.

In its discussion of the consideration question, the court pointed out that United had delayed the project by failing to deliver plans, by making at least two changes in location, and by misjudging the amount of excavation that would be necessary. As a result of these errors on United's part, Casey was forced to do the work in the winter when it was far more difficult. The court found for Casey on the ground that the oral agreement settled Casey's claims under the written agreement. They said:

> In this case there is substantial evidence that the Steel Company had so delayed, hindered, and embarrassed Casey Company in the performance of its contract that it would at least have had a bona fide claim for damages, regardless of the amount that it might have recovered in a suit based on such a claim.
>
> . . . If the Casey Company, after making this contract, had brought action for damages occasioned by the delays incident to change of location and failure of the Steel Company to furnish plans it would have been met with the answer that any claims for damages it may have had were waived and compensated by the provisions of the new contract, regardless of whether it had, in terms, waived such damages.[84]

Thus, the pre-existing duty rule was overcome by a finding that the consideration for the second contract—the modification—was the surrender of a reasonable and honest claim arising out of the first contract. The court specifically distinguished this case from *Lingenfelder v. Wainwright Brewery Co.*[85] and similar holdings which invoke the pre-existing duty rule against modifications by saying:

> In that case Lingenfelder, [*sic*] (Jungenfeld, the architect) at the time the oral contract was made to pay him 5 per cent. on the refrigerator plant as the condition of his complying with his contract relating to other matters, *had no claim for damages whatever against the owner, nor was there any reasonable excuse for his refusal to perform work covered by that contract according to its terms.*[86]

A similar result was achieved in a case where the dispute arose as to the contractor's duty to repair or insure his work after it had been completed but before the entire project had been finished. In *Baldwin Contracting Co. v. Buck Building Co.*[87] the contractor was retained to install sewers in the defendant's pro-

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[84] *Id.* at 893.

[85] 103 Mo. 578, 15 S.W. 844 (1891).

[86] 262 F. at 892 (emphasis added).

[87] 206 Cal. App. 2d 171, 23 Cal. Rptr. 483 (1962).

ject. After the sewers were in and "accepted" by the defendant, they were damaged by another contractor. The plaintiff refused to repair his original work unless paid, and the defendant agreed to pay. The plaintiff repaired the work, but the defendant refused to pay. At the trial the defendant asserted that the plaintiff was obligated by the original contract to repair the damage and further, that the plaintiff was obligated to insure his work until the project was fully completed. Therefore, according to the defendant, the promise to pay for the repairs was unenforceable because it was not supported by consideration. The court specifically rejected the defendant's consideration arguments, finding that there had been an honest dispute as to the plaintiff's obligation to insure. The court found that the second promise to pay was in settlement of that dispute and so was supported by consideration.

This "settlement-of-a-dispute" analysis has also been used to uphold agreements between spouses. *Holsomback v. Caldwell*,[88] a suit between the executors of a deceased couple, is a good example. The husband and wife had separated, and the wife was about to file for divorce. The husband promised her that if she returned to him, he would leave her all his property when he died. The husband predeceased the wife and did not leave his property to her. Upon suit the husband's estate claimed that there was no consideration for his promise because the wife had been obligated to return to her husband because of the marriage relationship. The court, however, found for the wife because she had had grounds for divorce. They found that her return had been in settlement of her valid claims against her husband and hence had been consideration for his promise to leave her the property.

The case that conclusively demonstrates the relationship of the theory of *Restatement* section 76 and the pre-existing duty rule is *Crown v. Cole*.[89] In that case, the court *did not* find a reasonable and honest dispute and therefore invoked the pre-existing duty rule to deny efficacy to the second contract. The plaintiff had agreed to purchase the defendant's house. The price was set, and the buyer made the initial payment of $1,500, which was comprised of $1,000 in cash and a note for $500. After the agreement was made, the plaintiff alleged another agreement to the effect that the purchase by him of the seller's home was

[88] 218 Ga. 393, 128 S.E.2d 47 (1962).
[89] 211 Pa. Super. 388, 236 A.2d 532 (1967).

conditional on the plaintiff's ability to sell his own home. The plaintiff alleged that the consideration for the modification was the surrender of the legal right to withhold payment of the note and to contest its validity. The court found that there was no consideration for the modification and denied the plaintiff's suit to recover the money paid, saying:

> This is an ingenious but unacceptable argument. . . . [T]he principle [is] that the promise for a forebearance from prosecuting a lawful claim may be a sufficient consideration for an oral promise. However, it does not support the principle that forebearance from contesting a valid claim constitutes consideration. A contract cannot be based on a promise to do a thing to which a party is already bound, except where the existence of the duty is subject to a reasonable dispute. . . . Forebearance to assert an invalid claim, or to interpose an invalid defense to a valid claim, by one who does not have an honest and reasonable belief in its possible validity is not considered sufficient consideration.[90]

It is also interesting to note that the opinion in *Crown* first disposed of a question of fraud before it dealt with the consideration issue and invoked the pre-existing duty rule against the plaintiff. Although the court specifically found that the seller was not guilty of fraud, it was obviously concerned that the seller had not dealt fairly. This concern is apparent in the court's addressing the question of fraud even though the appellee-buyer had not pursued the fraud issue on appeal.[91]

C. *Increasing Frequency of the Exception*

There has been increasing liberality in the application of the doctrines of impossibility and frustration.[92] The application of these doctrines, which attempt to accommodate within contractual relationships the effect of a change in circumstances outside the relationship, will increase dramatically in an era in which change itself has become perhaps the most important social phenomenon.[93] The impact of these doctrines has been profound

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[90] *Id.* at 392, 236 A.2d at 534.

[91] However, the fraud theory is not pressed in this appeal. It is appellees' present contention that the written contract was modified by a subsequent oral agreement which made the sale of their property a condition to the completion of the sale covered by the written agreement. A written agreement can be modified by a subsequent oral agreement provided the latter is based upon a valid consideration and is proved by evidence which is clear, precise and convincing.

Id.

[92] 6 CORBIN § 1320.

[93] A. TOFFLER, FUTURE SHOCK (1970).

despite the fact they are comparatively new.[94] Not surprisingly, there are serious disagreements among jurisdictions as to the effect of particular types of changes. Such lack of unanimity is typical of developing theories, especially as their import spreads into other areas of legal thinking.

One might expect the expanding liberality in the application of the doctrines of impossibility and frustration to cause a reduction in the requirements for the changed circumstances exception and to create increasing reliance on the exception. Increased liberality in application of the changed circumstances exception would naturally result from the expansion of the doctrines of impossibility and frustration because the changed circumstances required for invoking the exception need not be of the degree required for discharge. The change in circumstances need only dispel the taint of abusive dealing and give rise to a reasonable and honest dispute or give grounds for a reasonable belief that one is discharged. The difference in legal impact is the difference between the total discharge of a contract and the amendment of it.

V. THE MASSACHUSETTS VIEW

The pre-existing duty rule has not been a substantial barrier to contract modification in Massachusetts because of an early case which held that a party to a contract had an almost absolute right to refuse to perform that contract and accept the consequences of that decision, *i.e.*, a suit for damages. Massachusetts had no problem with the rule because surrender of the "right" to break the first contract was consideration for the second agreement. In *Monroe v. Perkins*[95] the plaintiff had promised to build a hotel for the defendant for a certain sum. There were some changes in the plans, and it was alleged that the defendants promised to make good any extra costs the plaintiffs incurred. The suit for the added amount met the defense of no consideration under the pre-existing duty rule. The court found for the plaintiff, saying:

> The parol promise, it is contended, was without consideration. This depends entirely on the question, whether the first contract was

[94] The doctrine of impossibility is generally thought to have begun with Taylor v. Caldwell, 122 Eng. Rep. 309 (K.B. 1863), and that of frustration with Krell v. Henry, [1903] 2 K.B. 740. It is not the purpose here to confirm or refute the significance of either opinion; rather, it is to accept them simply as fairly recent developments in the millenium of the common law era.

[95] 26 Mass. (9 Pick.) 298 (1830). *Compare* Jack R. Allen & Co. v. Farris & Co., 372 S.W.2d 582 (Tex. Civ. App. 1963).

> waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterward went on upon the faith of the new promise and finished the work. This was a sufficient consideration.[96]

This thinking has not been limited exclusively to Massachusetts,[97] although the courts of that jurisdiction have adhered to it with the greatest devotion.[98] The chief spokesman of this view of the limited effectiveness of contract has been Mr. Justice Holmes. In his *Common Law* he described the legal effect of contract as follows:

> The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.[99]

Later, Holmes repeated this rather pejorative assessment of contract: "The duty to keep a contract at common law means a prediction that you may pay damages if you do not keep it—and nothing else."[100]

This so-called right to break a contract was not well received by theorists. Barbour disputed Holmes on three grounds.[101] First, specific relief was as old, if not older, a remedy than an action for damages. Secondly, medieval lawyers tended to think exclusively in terms of remedies, not rights. This tendency was especially prevalent in breach of contract because of assumpsit's tort heritage where damages were exclusive. Barbour added that this devotion to form might well have been nurtured by the competition between law and equity. Law courts promoted damages in an attempt to keep the equitable contract remedies to a minimum and thus enlarge their own docket. Thirdly, and most significantly, the Holmes theory did not hold up under the scrutiny

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[96] 26 Mass. (9 Pick.) at 305.

[97] *See, e.g.*, Frye v. Hubbell, 74 N.H. 358, 68 A. 325 (1907); Watkins & Son v. Carrig, 91 N.H. 459, 21 A.2d 591 (1941). Other cases have discussed the theory, but courts have found stronger bases for their decisions. *See, e.g.*, Bishop v. Busse, 69 Ill. 403 (1873); Goebel v. Linn, 47 Mich. 489, 11 N.W. 284 (1882).

[98] *See, e.g.*, Simons v. American Dry Ginger Ale Co., 335 Mass. 521, 140 N.E.2d 649 (1967). *But see* Michael Chevrolet, Inc. v. Institutions for Sav., 321 Mass. 215, 72 N.E.2d 514 (1947).

[99] O. HOLMES, THE COMMON LAW 236 (1963).

[100] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

[101] Barbour, *The "Right" to Break a Contract*, 16 MICH. L. REV. 106, 107-09 (1917), in SELECTED READINGS ON THE LAW OF CONTRACTS 500 (1931).

of Barbour's Hohfeldian analysis. Barbour maintained that modern practice in both equity and law permitted enforcement in kind through either specific performance or restitution. Therefore, he concluded, the primary right of a promisee is the right to performance. Any other rights are secondary. The correlative to a right is a duty; therefore, Barbour asserted, promisors have the duty to perform. The ability not to perform and to suffer damages is not a right, but rather a power.[102] He concluded:

> It is submitted, therefore, that neither the history of the common law nor logic sustains the proposition that there is no legal obligation to perform a contract or, conversely, that there is a right to break a contract.[103]

Others have joined Barbour in disputing Holmes and the so-called Massachusetts view.[104] However, the most penetrating analysis of the flaws of the "right to break a contract" theory is contained in *King v. Duluth, Missabe & Northern Railway*,[105] where the Minnesota court said about such an assertion of power:

> In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. Surely it would be a travesty on justice to hold that the party so making the

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[102] In fairness to the Holmes' view of "the right to break a contract" it must be noted that when taken to its *full* conclusion, this view will achieve as fair a resolution of the underlying problems as the pre-existing duty rule analysis of this paper. Like the pre-existing duty rule, the "right to break a contract" analysis *if pursued to completion*, also denies the fruits of abusive dealing.

The Holmes' position in *The Common Law* was that there was a right to break a contract *subject to the payment of damages*. If a party exercising "the right to break a contract" is forced to answer in damages, abusive dealing is equally effectively stopped. For instance, suppose *A* enters into a valid contract to construct a brewery for *B* for *X* dollars. After performance begins, *A* exercises his "right to break a contract" and forces *B* to promise to pay *X* plus *Y* dollars for the same brewery.

Under the pre-existing duty rule analysis of this paper, it is clear that *A* could not enforce the promise of extra compensation because there was no consideration for it. Thus *B* would have the brewery for *X* dollars.

Under the "right to break a contract" analysis, *A* could enforce the promise of extra compensation (*X* plus *Y* dollars) because the first contract did not bind him; and therefore, his second performance was not the performance of a pre-existing duty. However, *A*'s "right to breach," according to Holmes, was subject to the payment of damages. *B*'s damages resulting from *A*'s exercise of the "right to break the contract" would be *Y* dollars (the difference between the cost of substituted performance—the second contract—and the "rightfully" broken one). Thus, *B* would have, as justice demands, the brewery for *X* dollars.

[103] Barbour, *supra* note 101, 16 MICH. L. REV. at 109, SELECTED READINGS at 503.

[104] Beale, *Notes on Consideration*, 17 HARV. L. REV. 71, 80 (1903); Corbin, *Does a Pre-Existing Duty Defeat Consideration?*, 27 YALE L.J. 362 (1918); Williston, *supra* note 1.

[105] 61 Minn. 482, 63 N.W. 1106 (1895).

> promise for extra pay was estopped from asserting that the promise was without consideration. A party [the promisee] cannot lay the foundation of an estoppel by his own wrong.[106]

Thus, the flaw of the Massachusetts rule is that it begs the issue; in doing so, it permits the exact injustice the pre-existing duty rule is geared to prevent. Suffice it to say that even Massachusetts has recognized these weaknesses and has limited the doctrine.[107]

VI. Two Techniques of Avoiding the Common Law Pre-Existing Duty Rule

The facts of particular modifications have often presented courts with an opportunity to escape altogether the perceived boundaries of the pre-existing duty rule when they are assured that a case involves no extortion or misdealing. Where appropriate, courts have found that the second contract actually called for additional or different acts, and that the performance of the second contract was therefore not the performance of a pre-existing duty. The other technique is to find a mutual rescission of the original contract and a simultaneous entry into the second. The first of these techniques, finding different or additional acts, is often an accurate interpretation of the facts and therefore has a sound legal basis.[108] The other technique is questionable because too often it is not well grounded in the facts.

A. *Additional or Different Acts*

In *D. L. Godbey & Sons Construction Co. v. Deane*[109] the plaintiff agreed to do the cement work for the foundation and retaining walls on the defendant's building. Their original contract called for the plaintiff to be paid at a rate of 76 cents per cubic foot of cement as determined by the measurement of the forms. Because of difficulties arising from such a computation

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[106] *Id.* at 487, 63 N.W. at 1106, 1107.

[107] Bailey v. First Realty Co., 305 Mass. 306, 25 N.E.2d 712 (1940); Fienberg v. Adelman, 260 Mass. 143, 156 N.E. 896 (1927); Torrey v. Adams, 254 Mass. 22, 149 N.E. 618 (1925); Parrot v. Mexican Cent. Ry., 207 Mass. 184, 93 N.E. 590 (1911).

[108] According to RESTATEMENT OF CONTRACTS § 84 (1932) (emphasis added), consideration is not insufficient because of the fact

> (c) that the party giving the consideration is then bound by a duty owed to the promisor . . . to render some performance similar to that given or promised, if the act or forbearance given or promised as consideration *differs in any way* from what was previously due . . .

[109] 39 Cal. 2d 429, 246 P.2d 946 (1952). See other construction cases finding different acts, *e.g.*, Smith v. Gray, 316 Ill. 488, 147 N.E. 459 (1925); Gannon v. Emtman, 66 Wash. 2d 755, 405 P.2d 254 (1965).

and because the plans called for a good deal of cement to be poured outside of the forms, the parties agreed to change the method of computing payments due the plaintiff. Under the modification the plaintiff was to be paid 76 cents per cubic foot for the cubic feet actually poured rather than as determined by measurement of the forms. After completion, the plaintiff filed suit to recover under the terms of the modification.

The defendant pleaded that there was no consideration for the modification. The court found consideration based on the changes in performance. The changes in the method of computation created different rights and duties. Further, the plaintiff had promised daily reports of cubic feet poured, and both parties were relieved of the burden of measuring the forms.

A similar situation arose in *Jenkins v. Watson-Wilson Transportation System, Inc.*,[110] where the plaintiff agreed to haul goods in his own truck for the defendant. Somewhat later, a special government project involving the hauling of dangerous materials was undertaken by the defendant. The plaintiff's equipment was inadequate for the dangerous work, so he agreed to use a special trailer and do the work at a lower rate than called for by his original contract with the defendant. Subsequently, the plaintiff sued to collect as provided for by the original agreement. The court found for the defendant because the trips on the dangerous project were not within the original contract.

Another application of this technique appears in *Greenfield v. Millman.*[111] Greenfield was an attorney representing a purchaser of Millman's hotel. As payment Millman agreed to take notes secured by a purchase money mortgage. Further, Millman orally agreed that if the third mortgage (his, it would appear) was reduced to $15,000 and the first two mortgages were consolidated, he would subordinate his mortgage to the others in order to facilitate refinancing of the first two. At a second meeting, Greenfield offered a subordination agreement for Millman's signature. Millman refused, and Greenfield said he would personally guarantee the payment if Millman signed. Millman did and sued on the guaranty.

Greenfield contended there was no consideration for the guaranty because Millman was already obligated to subordinate

[110] 183 Neb. 634, 163 N.W.2d 123 (1968).

[111] 111 So. 2d 480 (Fla. Dist. Ct. App. 1959).

his mortgage. The court, in finding that there was consideration for Greenfield's second promise, pointed out that the second subordination agreement differed substantially from the first. The second did not require the reduction of the third mortgage, nor did it require the consolidation of the first two mortgages. Further, it permitted a substantial increase in the interest rates on refinancing. Because of these substantial differences, the court reasoned that the second promise to subordinate was not a promise to perform a pre-existing duty.

In *Connersville Country Club v. F. N. Bunzendahl, Inc.*[112] a contractor sued to collect extra compensation because changes in the plans upon which he had based his bid had greatly increased the amount of work to be done. The defendant countered that the plaintiff was not entitled to payment for its alleged extra work because the original contract required plaintiff to build a golf course; and, despite the changes, the plaintiff still had only built a golf course (albeit a different one!). The court clearly stated the rationale behind the additional work theory, but then mixed it with the changed or unforeseen circumstances exception to reach a confused, but nonetheless just, conclusion. It said:

> If we were to accept appellant's position and argument, the appellant could theoretically be entitled to a golf course which could run from Connersville to Indianapolis [in excess of 50 miles], and at a price not to exceed the maximum stated in the contract. This is an absurd deduction, but where do we draw the line? We do not intend to state a hard and fast rule which can be applied in every case, for each case has its special circumstances, but it is clear that in this case where the appellant has made substantial deviations of a nature which were unforeseen and unanticipated by the appellee; and, also, where the magnitude of deviation does not normally arise in such contracts, then we have no choice but to strike down the maximum price provision [of the original contract]. To hold otherwise would not only be unjust, but also unconscionable, and such a result, this court cannot countenance.[113]

B. *Mutual Rescission*

A second major way that courts avoid the pre-existing duty rule is by the mutual rescission technique. In a situation where parties have entered into a contract and then subsequently modified it, altering the performance of one of the parties, a court may conclude, without thorough analytical development, that the parties mutually rescinded the first contract and substituted the

[112] 140 Ind. App. 215, 222 N.E.2d 417 (1966).

[113] *Id.* at 228, 222 N.E.2d at 426.

second in its place. At the outset, this technique must be distinguished from the Massachusetts view. The Massachusetts view is not a mutual rescission analysis; it is that one party had the right to refuse to perform and suffer a suit for damages. Under the Massachusetts view the consideration for the second contract is the forbearance from the right to answer only in damages. Mutual rescission, on the other hand, is a voluntary act of both parties; the consideration is either the mutual releases or the second set of obligations.

The best example of the mutual rescission technique is *Schwartzreich v. Bauman-Basch, Inc.*,[114] which dealt with a modification of an employment contract. Schwartzreich, a talented designer, contracted in writing to work for Bauman-Basch commencing in November of 1917 at a salary of $90 per week for a period of 1 year. In October, Schwartzreich was offered more money to work for someone else. He discussed the offer with Bauman-Basch; and, as a result of the talk, a new written contract was drawn calling for a salary of $100 per week. At that time Schwartzreich gave his copy of the first contract to Bauman, and there was some testimony that the signatures were torn off the first contract. Schwartzreich worked under the second agreement until December, when he was fired.

Schwartzreich filed suit for damages because of the breach of the second contract. The defense was that there was no consideration for the second contract because Schwartzreich had merely promised to perform a pre-existing duty. The court found for Schwartzreich by finding a mutual rescission and hence no pre-existing duty. The rescission analysis has some merit in *Schwartzreich* because the facts as to the handing back of the original contract and the tearing off of the signatures provide some evidence upon which to base a finding of mutual rescission.

Too often, however, cases resorting to the mutual rescission analysis do not have quite so firm a footing in the facts. A good example is *Sasso v. K. G. & G. Realty & Construction Co.*,[115] where the plaintiff was prevented from fulfilling a contract to install tile in the defendant's building because of an unforeseen scarcity of tile and a dramatic rise in its price.[116] The parties

[114] 231 N.Y. 196, 131 N.E. 887 (1921).

[115] 98 Conn. 571, 120 A. 158 (1923).

[116] This appears to have been a perfect case for application of the unforeseen circumstances exception analysis based on problems arising from the entry into World War I.

subsequently agreed that the defendant would reimburse the plaintiff for the amount of the increased cost of tile. Confirming this understanding, the defendant wrote the plaintiff:

> "On February 10, 1920, you entered into a contract with our company. . . . You have been delayed in your work on account of the scarcity of tile and in the meantime the price of materials has advanced. We are, therefore, willing *in order to assist you in completing your contract*, to agree to pay you the difference in the cost of materials over and above the prices submitted in a schedule that you sent us. . . ."[117]

In the suit by the plaintiff to enforce this modification, the defendant pleaded that there had been no consideration for it. The court found the consideration question not to be material because what actually had happened was an abandonment or rescission of the original contract. The consideration for the defendant's promise to pay the increased cost had been the plaintiff's promise to do the work.

The difficulty with the decision is not the result, but the finding of a mutual rescission. Upon what facts is the finding based? Here, there was no handing back of the copies of the original agreement nor any testimony about tearing off signatures, which had justified the finding in *Schwartzreich*. Further, the defendant's letter specifically spoke in terms of completing the contract, not of abandoning it as the court found.

Critics of the mutual rescission analysis have condemned it because of its total disregard of reality.[118] Frequently there is not even the slightest hint that the parties feel themselves totally relieved from their contractual obligations. At no point do the parties believe that either of them may abandon the contract with impunity. The most incisive reprobation of the mutual rescission analysis is contained in Comment *b* of section 89D of *The Restatement (Second) of Contracts*:

> The same result called for by paragraph (a) [*i.e.*, effective modification] is sometimes reached on the ground that the original contract was "rescinded" by mutual agreement and that new promises were then made which furnished consideration for each other. That theory is rejected here because it is fictitious when the "rescission" and new agreement are simultaneous, and because if logically car-

However, the court did not touch on it, and it must be assumed that counsel did not offer it. That the court was open to such analysis is demonstrated by its later opinion in Blakeslee v. Board of Water Comm'rs., 106 Conn. 642, 139 A. 106 (1927).

[117] 98 Conn. at 574, 120 A. at 159 (emphasis added).

[118] 1A CORBIN § 186; 1 WILLISTON § 130A.

ried out it might uphold unfair and inequitable modifications.[119]

In *King v. Duluth, Missabe & Northern Railway*[120] Justice Start criticized cases using the mutual rescission doctrine: "The doctrine in these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice. . . ."[121]

VII. RELIANCE ON THE MODIFICATION

Another way courts may avoid the pre-existing duty rule and enforce contract modifications is by finding that a party has relied on an otherwise unenforceable modification. *Restatement (Second) of Contracts* section 89D provides that reliance on a modification makes that modification enforceable. Lord Denning included reliance on a modification as the basis for its enforcement in his article, *Recent Developments in the Doctrine of Consideration.*[122] However novel such a theory may have been for contemporary England, reliance as a basis for enforcement of modifications was well established in American case law at a much earlier time. *Wadsworth v. Thompson,*[123] an early Illinois case, clearly found that reliance by the promisee was consideration for a contract modification.

There, Thompson secured the repayment of a loan to him from Wadsworth by delivering possession of certain items of personal property to Wadsworth. The parties understood that the personal property was to be forfeited if Thompson failed to repay at the due date of the loan. A short time prior to the time for repayment, Thompson told Wadsworth that he would be unable to repay on time and asked that the notes be renewed. Wadsworth refused to renew the notes, but agreed to extend the time for repayment by 3 weeks.

Prior to the expiration of the 3-week extension, Thompson tendered the repayment. Wadsworth informed him that he was willing to accept the money, but a part of the personal property

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[119] RESTATEMENT (SECOND) OF CONTRACTS § 89D, comment *b* at 212 (Tent. Draft Nos. 1-7, 1973).

[120] 61 Minn. 482, 63 N.W. 1105 (1895).

[121] *Id.* at 486, 63 N.W. at 1106.

[122] 15 MODERN L. REV. 1 (1952). *Contra,* Bennson, *Want of Consideration,* 16 MODERN L. REV. 441 (1953).

[123] 8 Ill. 423 (1846). *See also,* Beach v. Covillard, 4 Cal. 316 (1854); American Food Co. v. Halstead, 165 Ind. 633, 76 N.E. 251 (1905); Pratt v. Morrow, 45 Mo. 404, 100 Am. Dec. 381 (1870); Arbogast v. Mylius, 55 W. Va. 101, 46 S.E. 809 (1904). *Contra,* Fichter v. Milk Wagon Drivers' Union Local 753, 382 Ill. 91, 46 N.E.2d 921 (1943). However, the reliance on the alleged modification was beneficial rather than detrimental.

had been sold at auction, and those items could not be returned. Instead, Wadsworth offered to credit Thompson's account with the money received from the sale. Thompson refused and sued Wadsworth for trover and conversion of the goods sold.

On appeal, Wadsworth raised the question of consideration for the extension. In finding for the plaintiff, Justice Koerner, said:

> Neither a court of Law, or a court of Chancery, can permit fraud or circumvention to be perpetrated in this manner. I do not mean to say that there was actually a fraud intended in this case, but the failure to keep the promise had identically the same effect as if wilful deceit and imposition had been practised. If the promise of extension had not been made, it is [*sic*] is it not reasonable to suppose that Thomson [*sic*] would have strained every nerve to rescue goods, considered by him worth $1,000 [the loan was for $305.00], from impending sacrifice? He had several days left to make arrangements for the redemption of his property, but by the act of the defendants he was lulled into a false and dangerous security. He suspended his efforts, and when he proposed paying the money within the time, he had been told that his property would not be considered as forfeited, he had found to his great surprise, that part of it had already been disposed of under the auctioneer's hammer, and at great loss. We cannot now, in justice, admit of such a defence as this: "True, we extended the time, and told you that he [sic] (we) would not claim the goods as our own, but as you did not pay us a cent, or hand over a pepper-corn, we were not bound by our promise, and you must submit to the loss." Even if the promise of the defendants had been wholly gratuitous, we would still hold that under the peculiar circumstances of this case, the extension of time would be binding upon the defendants.[124]

The detailed analysis of the facts, the recognition of the import of those facts, and most significantly, the concern with Thompson's reactions to Wadsworth's promise to extend the time indicate that the court adopted the reliance theory as a means of enforcing the modification. But *Thompson* is by no means an atypical analysis.[125]

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[124] 8 Ill. at 430-31. *Compare Wadsworth with* Central London Property Trust Ltd. v. High Trees House Ltd. [1956] 1 K.B. 130, where Lord Denning maintained that reliance on a modification was a recent development in England. The changed or unforeseen circumstances exception also could have been applied to the *High Trees* case. *See also* Kelley v. R.F. Jones Co., 22 Cal. App. 113, 77 Cal. Rptr. 170 (1969); King Constr. Co. v. W.M. Smith Elec. Co., 350 S.W.2d 940 (Tex. Civ. App. 1961); *cf.* De Blois v. Boylston & Tremont Corp., 281 Mass. 498, 183 N.E. 823 (1933).

[125] *See, e.g.*, Strahn v. Johnson, 197 Iowa 1324, 196 N.W. 731 (1924); Blaess v. Nichols & Shepard Co., 115 Iowa 373, 88 N.W. 829 (1902); Maxwell v. Graves, 59 Iowa 613, 13 N.W. 758 (1882).

In *Carter Realty Co. v. Carlisle*[126] a purchaser of land gave the seller notes for the land. The purchaser made part payment, and the parties then agreed that he would reconvey the land to the seller and take back the notes. Under the modified agreement the seller was to keep the cash that had been paid by the purchaser and return only the notes. The purchaser reconveyed the land, but the seller could not return the notes because he had negotiated them to a bank. However, the seller assured the buyer that the notes would be cancelled. The court described the purchaser's subsequent conduct in a way that made clear what the decision had to be. It said, "[R]elying upon and depending upon this agreement, [to return only the notes], [he] bought another home at a great expense to himself and thereby placed himself in a position where he had no need for the lot originally purchased . . . ."[127] The court, of course, found for the purchaser and enforced the modification of the contract. In so doing, the court cited *Moses v. Woodward*[128] as authority and fell in line with a series of Florida cases.[129]

The best indication of Florida's devotion to reliance as a means of enforcement of modifications appears in a federal case interpreting and applying the Florida rule. The case is *Canada v. Allstate Insurance Co.*,[130] in which the court infers the existence of a modification upon which the company could rely. Canada was an agent for the company. His employment contract specifically provided that he was entitled to compensation only during the term of employment; he would receive no commission on policies he had written during his employment which were renewed after he had left the company. The contract also required written notice of termination. Canada was asked to resign, but refused. He was then informed orally that he was fired. Thereafter, he conducted himself as if his employment had been terminated; *i.e.*, he turned in his supplies, accepted termination pay, and withdrew from the Allstate benefit programs.

The majority of the court found, based on the conduct of the parties, that an oral modification of the employment contract had

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[126] 113 Fla. 143, 151 So. 498 (1933).

[127] *Id.* at 145, 151 So. at 499.

[128] 109 Fla. 348, 147 So. 690 (1933).

[129] 90 So. 2d 916 (Fla. 1956); Harris v. Air Conditioning Corp., 76 So. 2d 877 (Fla. 1955); Tussing v. Smith, 125 Fla. 578, 171 So. 238 (1936).

[130] 411 F.2d 517 (5th Cir. 1969).

taken place, permitting oral notice of termination.[131] Allstate relied on the modification by paying the commissions on the policy renewals to Canada's successor, thus making the oral termination under the modification enforceable.

Another case, *St. Louis Fire & Marine Insurance Co. v. Lewis*,[132] is both tragic and charming. It demonstrates that facts which lend themselves to the enforcement of a modification on the basis of reliance can also lend themselves to a finding of consideration. Lewis owned a horse named Magnolia Dandy on which he carried an insurance policy with the defendant. He sold Magnolia Dandy and purchased Kaplan Twist. Lewis contacted the defendant's local agent, complied with the company's demands for verification of the animal's health, and succeeded in obtaining the company's assurance that the coverage had been switched to the new horse. Soon thereafter, Kaplan Twist died. Investigation disclosed that the animal's intestine had become twisted on its spine, causing gas to back up into its stomach. Eventually, the stomach burst; its contents clogged the lungs, causing death.[133]

The insurance company defended against Lewis' claim by contending there was no consideration for the change of coverage, *i.e.*, the modification. On this issue the court found for Lewis.[134] It observed that when Lewis cancelled the insurance on Magnolia Dandy, a refund was due him under the policy. Foregoing his right to that refund was sufficient consideration for the different coverage. However, had it chosen to, the court could have reasoned that Lewis' foregoing his right to the refund and not seeking alternative coverage was reliance on the company's assurance of the change of coverage. Such reasoning would have been an exact duplication of the Illinois court's analysis in *Wadsworth v. Thompson*.[135]

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[131] The dissent disagreed that Canada's actions subsequent to oral notice could constitute assent to the modification. Rather, Judge Codbold argued that Canada's conduct was as consistent with his obligation to mitigate and perfect his rights as it was with assent to modification.

[132] 230 So. 2d 580 (Miss. 1970).

[133] Those who are prone to disrespect the dead might observe that Kaplan Twist had literally drowned in his own bile.

[134] The case was remanded to the trial court for a better determination of Kaplan Twist's value.

[135] 8 Ill. 423 (1846). For other examples of passive reliance in the belief that insurance was in force, see Lusk-Harbison-Jones, Inc. v. Universal Credit Co., 164 Miss. 693, 145 So. 623 (1933); Kukuska v. Home Mutual Hail Tornado Ins. Co., 204 Wis. 166, 235 N.W. 403 (1931).

Thus, it is clear that reliance by the parties on a modification of an executory bilateral contract can constitute the basis for the legal efficacy of the modification. Such a use of the concept of reliance overcomes some of the difficulties of the pre-existing duty rule. However, one shortcoming of the reliance theory is that it does not necessarily satisfy the need to demonstrate freedom from misdealing. The extracted or extorted promise that concerned the court in *Lingenfelder v. Wainwright Brewery Co.*[136] can easily turn into extorted performance. Thus, although the reliance analysis may avoid the pre-existing duty rule, it may well also lose the benefit of it.

VIII. MODIFICATION WITHOUT CONSIDERATION

Partly in response to the apparent contradictions in the pre-existing duty rule (especially as it has been aggravated by the distaste for the Doctrine of *Foakes v. Beer*),[137] and partly in response to the needs and business practices of fast-moving entrepreneurs, attempts have been made to remove consideration as a requirement for effective modification.[138] The leading example of such an attempt is section 2-209(1) of the *Uniform Commercial Code*.[139] Comment 1 states the purpose of the section:

> [T]o protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.[140]

The "technicalities" to which the comment refers must be the pre-existing duty rule. Also note that Comment 1 limits itself to "necessary" and "desirable" modification.

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[136] 103 Mo. 578, 15 S.W. 844 (1891).

[137] 9 App. Cas. 605 (1884). *See* text accompanying notes 14-21 *supra*.

[138] *See* Gateway Co. v. Charlotte Theatres, Inc. 297 F.2d 483 (1st Cir. 1961) (dictum); Lunsford v. Wilson, 113 Ga. App. 602, 149 S.E.2d 515 (1966) (dictum); Andrews v. Wilkie, 181 Neb. 398, 148 N.W.2d 924 (1967).

[139] UNIFORM COMMERCIAL CODE § 2-209. Subsection (2) of 2-209 permits a private Statute of Frauds to be included in the original contract, thus limiting any modification to a writing. This formal validation technique as an alternative to the informal one of consideration is no doubt fundamental to the Code's approach to the problem of modification. *See* Comment 3 to 2-209. There is the distinct possibility that the parties may orally waive the clause which requires a written modification and then modify the contract; *see* C.I.T. Corp. v. Jonnet, 419 Pa. 435, 214 A.2d 620 (1965). Nonetheless, the formal validation technique, as opposed to the informal one, presents problems all its own, and does not necessarily overcome the difficulties implicit in the pre-existing duty analysis. For an excellent analysis of New York's difficulties with its formal modification device as a substitute for a consideration analysis, see Comment, *Modification of a Contract in New York: Criteria for Enforcement*, 35 U. CHI. L. REV. 173 (1967).

[140] UNIFORM COMMERCIAL CODE § 2-209, Comment 1.

Some clarification of what is meant by "necessary" and "desirable" is given in Comment 2, which states:

> However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.
>
> The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade . . ." and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance . . . .[141]

When read with Comment 2, section 2-209(1) does not seem as radical a departure from the common law requirement of consideration as it might appear to be from its words, "needs no consideration to be binding." On the contrary, read with Comment 2, section 2-209(1) is quite in accord with what has been demonstrated in this article to be the common law approach to modifications through the pre-existing duty rule.

Clearly, Comment 2 states that 2-209(1) will not be used to permit extortion, exactly the concern of the court in *Lingenfelder v. Wainwright Brewery Co.*[142] Moreover, the comment falls in line with this article's analysis of the pre-existing duty rule by pointing out that the existence of a legitimate commercial reason dispels any inference of extortion.[143] The similarity of 2-209(1) and this analysis of the pre-existing duty rule is reinforced by the statement in Comment 2 that the good faith test may in some situations require an objectively demonstrable reason for the modification.[144] And in noting that market shifts causing loss to one party may be the basis of a modification even if the shifts are insufficient to excuse performance under the Code's equivalent of impossibility, Comment 2 is in total agreement with the point made earlier that surrender of a reasonable and honest belief in a claim to discharge from the first contract is consideration for a second contract.[145]

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[141] *Id.*, Comment 2.

[142] 103 Mo. 578, 15 S.W. 844 (1891). *See* text accompanying notes 39-44 *supra*.

[143] *See* text accompanying notes 71-75 *supra*.

[144] *See* text accompanying notes 75-76 *supra*.

[145] *See* text accompanying notes 76-90 *supra*.

The similarity of this analysis of the pre-existing duty rule and the approach of finding modifications enforceable without consideration can also be seen in cases. In *Carpenter Paper Co. v. Kearney Hub Publishing Co.*,[146] a pre-Code case applying the no-consideration rule subsequently enacted by 2-209(1), the validity of a modification of a contract to supply newsprint was questioned. The modification consisted of an increased price to which the buyer objected on the grounds of economic coercion. The court invoked the rule that an executory contract may be changed by a subsequent agreement which does not require any new consideration. It went on, however, to report in detail the relations between the parties and the state of the paper business. The court satisfied itself that the seller's conduct was fair and reasonable in the light of all that had transpired in the industry over the years. Further, it found that the seller treated the buyer in the same manner it had treated all its customers. In all, the court found nothing reprehensible in the seller's conduct and was satisfied that the seller had not been guilty of any misdealing. Thus satisfied, the court, in keeping with 2-209, Comment 2, held that no consideration was necessary for the modification.[147]

Another case invoking the rule that consideration is unnecessary for modification also lends itself to the analysis of the pre-existing duty rule set forth earlier. The case, citing 2-209(1) as its basis, is *Skinner v. Tober Foreign Motors, Inc.*[148] The plaintiff sought the return of an airplane he had purchased from the defendants. Under their original contract, the plaintiff was to make 24 monthly payments of $200 each and a 25th payment of $353.34. Before the due date of the first payment, the plane developed engine trouble. It was discovered that the plane required a new engine costing $1,400. The plaintiff could not afford to purchase both the new engine and the airplane, so he offered to return the plane to the seller. The defendant-seller decided that it would alleviate the buyer's financial burden by reducing the first year's

[146] 163 Neb. 145, 78 N.W.2d 80 (1956).

[147] Had the court been in a jurisdiction which required consideration for effective modification and had the buyer then raised the pre-existing duty rule, the court could have applied the changed or unforeseen circumstances exception. The original supply contract had been made in 1942 and the modification in 1947. World War II could have been found to have caused sufficient changes in market conditions to justify application of the exception; *see* Blakeslee v. Board of Water Comm'rs, 106 Conn. 642, 139 A. 106 (1927).

[148] 345 Mass. 429, 187 N.E.2d 669 (1963).

payments to $100 per month. After about 6 months, the defendant informed the plaintiff that $200 per month would be necessary. Eventually the defendant repossessed the plane, giving rise to the suit for its return.

The defendant maintained that the alleged modification was unenforceable because it lacked consideration. The court found for the plaintiff on the basis of section 2-209(1). However, had the Code not been in force, an identical result could have been achieved under this article's analysis of the pre-existing duty rule.

The defendant would have alleged that there had been no consideration for the modification because the plaintiff, by promising to pay $100 per month, was merely promising to perform a pre-existing duty in that the original contract already required plaintiff to pay $200. The court could have found consideration by means of the following analysis:

1. The faulty engine constituted a breach of the sales contract. At least it gave the plaintiff a reasonable and honest belief in a claim for breach, or in his right to declare the contract at an end;

2. The consideration for the reduced payment was the plaintiff's forbearance from assertion of that claim.

Thus, both in the comments to 2-209(1) and in the outcome of the cases, the pre-existing duty rule and the right to modification are opposite sides of the same coin. Any modification that would be unenforceable because of the pre-existing duty rule would also fall short of the Code tests of good faith and reasonable commercial standard of fair dealing.

Section 89D of the *Restatement (Second) of Contracts* reflects the same attitude.[149] It places the modification of executory contracts in the portion of the *Restatement* entitled, "Contracts Without Consideration." However, the *Restatement Second's* approach is slightly different from the Code's.

It requires for effective modifications without consideration, that they be "fair and equitable in view of circumstances not anticipated by the parties when the contract was made."[150] Comment *b* following the section, directed at the pre-existing duty aspect of modification, explains that the fair and equitable test

[149] RESTATEMENT (SECOND) OF CONTRACTS § 89D (Tent. Draft No. 1-7, 1973).
[150] *Id.* at § 89D(a).

goes beyond the mere absence of coercion. It requires an objectively demonstrable reason for seeking a modification. The *Restatement* view is thus consistent with the assertion in this article that an understanding of the pre-existing duty rule requires investigation beyond the superficial contract questions surrounding the making of the second contract.[151] It is also consistent with the assertion that the application of the pre-existing duty rule is really determined by the justification for refusing to perform the original contract.[152]

However, the second substantive implication of Comment *b* to section 89D is not in such perfect accord with this analysis. It maintains that "[t]he reason for modification must rest in circumstances not 'anticipated' as part of the context in which the contract was made . . . ."[153] This would appear to limit avoidance of the pre-existing duty rule to the changed or unforeseen circumstances exception. Such a limitation, if it is in fact intended, is somewhat restrictive in view of the other techniques for avoiding the rule covered in this analysis. However, read together with the "fair and equitable" requirement of the section itself, there is no such limitation. This paper's analysis of the pre-existing duty rule, therefore, remains essentially compatible with the views of the drafters of the new *Restatement* who, to overcome the burden of the pre-existing duty rule, eliminated consideration as a requirement for modification.

It should be no surprise that the *Restatement* theory that *just* modifications of executory contracts are effective without consideration is in fundamental agreement with this paper's analysis of the rule. This article has shown that the seemingly inconsistent applications of the pre-existing duty rule result from courts' using the rule to prevent abusive dealing. A rule doing away with the requirement of consideration for modifications, but requiring such modifications to meet standards of fairness, reasonableness, and freedom of assent, is in complete accord with the traditional use of the pre-existing duty rule as articulated in this analysis. To the extent that UCC 2-209(1) and *Restatement (Second)* section 89D bring standards of fairness more to the analytical forefront in resolving the question of enforceability of mod-

[151] *See* text accompanying notes 75-76 *supra*.

[152] *See* text accompanying notes 39-53 *supra*.

[153] RESTATEMENT (SECOND) OF CONTRACTS § 89D, Comment *b* at 211 (Tent. Draft No. 1-7, 1973).

ifications than did the judicial reliance on the pre-existing duty rule, these contemporary statements of the principles are a significant improvement. They are better because they make the criteria for enforcement patent, and thus serve to minimize confusion resulting from seemingly contradictory applications of the pre-existing duty rule.

IX. Fact Patterns Which Dispel Suspicions of Abusive Dealing

When courts have satisfied themselves that there is an absence of abusive dealing, they have found a means of enforcing the new agreement either by applying the changed circumstances exception to the pre-existing duty rule or by avoiding the rule entirely by employing one of the other techniques. An earlier section surveyed cases where courts applied the pre-existing duty rule to prevent abusive dealing.[154] Here will be surveyed various kinds of fact patterns which induce courts *not* to apply the rule. The cases illustrate the various ways courts escape the pre-existing duty rule.

A. *Misperception of the Subject Matter*

In numerous instances the parties to a contract have seriously misjudged the subject matter of their contract and then, on the basis of that misjudgment, seriously miscalculated the work to be done. In such cases courts have determined the validity of the second contract which takes into account the changed conditions on the basis of one of the following: (1) consideration arising from settlement of an honest dispute; (2) a significant change in the work to be done, so that doing the additional work is not performance of a pre-existing duty; or (3) allocation of the responsibility for the misjudgment. Most of the court opinions reflect, to differing degrees, each of these techniques.

A case fully in accord with the analysis presented here is *Pittsburgh Testing Laboratory v. Farnsworth & Chambers Co.*[155] The court discussed the changed circumstances exception and used the "settlement-of-disputes analysis," but only as alternatives. It never mentioned the relationship of the doctrines.[156]

Pittsburgh agreed to test the concrete installed by Farn-

[154] *See* text accompanying notes 54-65 *supra*.

[155] 251 F.2d 77 (10th Cir. 1958).

[156] *Id.* at 79.

sworth on the runways of an airport Farnsworth was constructing as general contractor. Farnsworth estimated that the work would take 7 months and agreed to pay Pittsburgh $24,450 for the testing during that time. However, the estimate of time was based on Farnsworth's belief that 600,000 tons of dirt would have to be moved. As it turned out twice that amount of dirt was moved, and the construction was delayed accordingly. Pittsburgh refused to honor the lump sum contract, the parties renegotiated, and a new contract was created. When Farnsworth refused to honor the second contract, Pittsburgh sued to enforce it.

The court found consideration on either of two grounds. First, the changed circumstances took the case outside the preexisting duty rule. And second, there was a valid dispute over the original contract. The time limit in the original contract was 7 months; Pittsburgh's performance was clearly pushed beyond that limit. Therefore, the second contract was viewed as a settlement of the valid time dispute arising from the original contract. The court, while it chose the two theories of major concern to this analysis, implicitly also expressed concern that the miscalculation of the dirt to be moved was entirely Farnsworth's responsibility; and, as a result, Pittsburgh was required to do more work than had been contemplated by the original contract.[157] Pursuing this reasoning, the court could have completely avoided the preexisting duty rule and found that the additional work actually constituted a different duty.

A similar result obtained in a California case, *Healy v. Brewster*,[158] where a subcontractor relied on earth core samples taken and supplied by the county. The core samples were taken in an unprofessional manner and failed to disclose a layer of hardpan (a rocklike stratum) through which the contractor had to bore. This required additional work and the defendant-general contractor's representative authorized the subcontractor to go ahead with the work. The defendant's representative also assured him that he would be compensated for the extra expense by the county. Upon failure of the general contractor to pay for the extra efforts, the subcontractor brought suit. The defendant, among

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[157] *Compare* Pittsburgh Testing Lab. *with* Watkins & Son v. Carrig, 91 N.H. 459, 21 A.2d 591 (1941), where the court gives the reader a choice between a mutual rescission analysis or a gift analysis.

[158] 251 Cal. App. 2d 541, 59 Cal. Rptr. 752 (1967). *See also* Bailey v. Breetwor, 206 Cal. App. 2d 287, 23 Cal. Rptr. 740 (1962); Evergreen Amusement Corp. v. Milstead, 206 Md. 610, 112 A.2d 901 (Ct. App. 1955).

other things, pleaded that there was no consideration for the modification.

The court held that the subcontractor could recover for the extra work and expenses on the basis that the county's core samples were misleading and constituted a breach of an implied warranty of their correctness. Further, the court found consideration because the existence of the hardpan constituted a mutual mistake of fact sufficient to justify the subcontractor in seeking to rescind the original contract. Therefore, pursuing the work for the promise of additional compensation was simply forebearance by the subcontractor from asserting a valid legal claim to discharge and, as such, was consideration for the general contractor's subsequent promise.

The California court spelled out the relationship of: (1) the pre-existing duty rule, (2) the changed circumstances exception to it, and (3) the causal connection of a change in circumstances to the creation and subsequent settlement of a valid legal dispute. Lastly, the decision made clear the dependence of the efficacy of a modification of an executory bilateral contract on those three concepts.

Another case involving misjudgment is *Grand Trunk R. Co. v. H. W. Nelson Co.*[159] In that case the defendant railroad misjudged the intentions of its neighbors. The plaintiff was retained to construct some track for the railroad. Construction was delayed and the proposed route was changed twice because persons in the vicinity of each of the first two routes threatened to enforce negative easements against the property in order to keep the railroad out. The defendant promised to reimburse the plaintiff for the extra expenses resulting from the delay, but later reneged on that promise. The court enforced the promise of extra compensation on the basis that the extra work was a result of the changed circumstances (*i.e.*, the fact that enforcement of the easement was threatened).

Typical of the "change in duty" analysis is *Gannon v. Emtman*,[160] where the plaintiff agreed to prepare the defendant's land for irrigation farming for $6,000. The written contract contemplated leveling and grading. It further provided that if rock removal became necessary, it would be done for $16.50 per hour.

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[159] 116 F.2d 823 (6th Cir. 1941).

[160] 66 Wash. 2d 755, 405 P.2d 254 (1965).

After work began, rock removal became necessary and, additionally, a need arose to move fill from another area to the area from which the rocks had been removed. The defendant orally agreed to pay the $16.50 hourly rate for moving fill.

After the defendant failed to pay for moving the fill, the plaintiff sued. The defendant asserted the pre-existing duty rule. The court found consideration and decided the case in the plaintiff's favor. The court pointed out that the doing of an act neither expressly nor implicitly part of the existing contract, nor contemplated by that contract, falls outside the pre-existing duty rule. The parties had never contemplated the need to move fill from one area of the land to another. Therefore, moving it was not performance of a pre-existing contractual duty.[161]

However, the court in *Gannon* recognized that the underlying concern was abusive dealing. It observed that when the need to move fill arose, the parties had four alternatives. They could have lowered the overall grade; they could have decided to borrow dirt from the area being leveled; they could have decided to bring fill from an adjacent area; or they could have determined to abandon the project. The court concluded its observation by finding that the alternative selected was not *unreasonable*.

The court's allocation of responsibility for the misjudgment or miscalculation can be seen in two cases. In *Simpson Timber Co. v. Palmberg Construction Co.*[162] the court found that the contractor was not entitled to extra compensation simply because of greater difficulty in meeting its contractual obligation. The court was convinced that the contractor could have discovered the greater difficulty by reasonable inspection. And in *James A. Haggerty Lumber & Mill Work, Inc. v. Thompson Starrett Construction Co.*[163] a buyer was not permitted to enforce the seller's subsequent promise to renegotiate on the basis of a claim by the buyer that the orders (29 in number) had been hastily given without attention to price.

B. *Unforeseen Natural Phenomena*

Goebel v. Linn[164] is a classic example of the unforeseen cir-

[161] *See also* Smith v. Gray, 316 Ill. 488, 147 N.E. 459 (1925); Baldwin's Steel Erection Co. v. Champy Constr. Co., 353 Mass. 711, 234 N.E.2d 763 (1968).

[162] 377 F.2d 380 (9th Cir. 1967).

[163] 22 App. Div. 2d 509, 256 N.Y.S.2d 1011 (1965).

[164] 47 Mich. 489, 11 N.W. 284 (1882). It is interesting to note that in Lingenfelder v. Wainwright Brewery Co., 103 Mo. 578, 155 S.W. 844 (1891), Justice Gantt misconstrued

cumstances exception where the unforeseen circumstances were in natural phenomena. The plaintiff's assignor[165] entered into a contract to supply ice to the defendant's brewery from November 1879 through December 1881. The amount of ice was to be dictated by the defendant's needs. The price was to be $1.75 per ton, and in the event of a shortage during the 1880 season, the price would be $2.00 per ton (in contemporary analysis, it would be said that the ice company had assumed the risk of a mild winter beyond any shortage driving the price above $2.00 per ton). Ice was supplied under the contract until May of 1880, at which time the defendants were notified by the ice company that no more ice could be supplied under the contract because the exceedingly mild winter had severely reduced the ice crop. Negotiations took place seeking to reach an agreement at a higher price. The defendant was in a precarious position because, without an adequate supply of ice, the brewing process could not continue and the inventory and work in progress would be a total loss. The parties finally agreed to a price of $3.50 per ton, and notes were issued for this amount. All the notes were paid except the one in controversy. The defendant sought to assert the payments on previous notes as a set off against the plaintiff's suit on the note in question, because, in the defendant's view, those payments of the notes constituted overpayment on the original ice supply contract.

Goebel, confusing the concept of a duty to pay a sum certain with strictly executory contractual duties. *See* text accompanying notes 14-23 *supra*. In *Lingenfelder* Justice Gantt stated:

> It is true that as eminent a jurist as Judge Cooley, in *Goebel v. Linn* . . . held that an ice company which had agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879 until January 8, 1881, at $1.75 per ton, and afterwards, in May, 1880, declined to deliver any more ice unless the brewery would give it $3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered that opinion, we are still of the opinion that his decision is not in accord with the almost universally accepted doctrine, and is not convincing, and certainly so much of the opinion as held that the payment by a debtor of a part of the debt then due would constitute a defense to a suit for the remainder is not the law of this state, nor do we think of any other where the common law prevails.

Id. at 594, 155 S.W. at 848. Contrary to Justice Gantt's interpretation of *Goebel*, that case is in basic agreement with the *Lingenfelder* analysis. Both cases illustrate the relationship of the fear of abusive dealings and the enforcement of contract modifications. In *Lingenfelder* the court found no reasonable basis for altering the original agreement. In *Goebel* the court found the plaintiff's insistence on a higher price reasonable.

[165] Although the subject of the litigation was a note, presumably a negotiable one, the plaintiff was treated as an assignee rather than as a holder in due course, apparently because the note was transferred to him after it had become due.

The defendant alleged that there was no consideration for the promise to pay the higher amount and that the promise had been obtained by duress. The court disputed the defendant's consideration argument, finding that there was consideration in that ice had in fact been supplied. The court framed the issue in terms of the pre-existing duty rule when it summarized the defendant's position: "What the defendants disputed is, the justice of compelling them to pay the sum stipulated in the note when according to their previous contract they ought to have received the ice for a sum much smaller."[166]

In finding for the ice company's assignee, the court reflected the same concern with abusive dealing that *Lingenfelder* had:

> If the ice company had the ability to perform their contract, but took advantage of the circumstances to extort a higher price from the necessities of the defendants, its conduct was reprehensible, and it would perhaps have been in the interest of good morals if defendants had temporarily submitted to the loss and brought suit against the ice company on their contract.[167]

However, in finding that the ice company's conduct was not in fact reprehensible, the court found that the unusually mild winter brought the case within what *King v. Duluth, Missabe & Northern Railway*[168] later designated as the changed or unforeseen circumstances exception. The Michigan court described the effect of the mild winter as follows:

> 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, and constitute a bar to any new contract which should provide for a price that would enable both parties to safe their interests.[169]

A U.S. Supreme Court case, *United States v. Cook*,[170] also indicates the effect of unforeseen natural phenomena on the pre-existing duty rule. In this case, the unforeseen phenomenon was the San Francisco Earthquake. The plaintiff was the executor of the estate of the architect for a federal building to be erected in

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[166] 47 Mich. at 492, 11 N.W. at 285.

[167] *Id.*

[168] 61 Minn. 482, 63 N.W. 1105 (1895).

[169] 47 Mich. at 493, 11 N.W. at 285-86.

[170] 257 U.S. 523 (1922).

San Francisco. The architect's contract called for him to be paid a fee of 5 percent of the actual cost of construction. The earthquake and fire delayed construction 3 years and drove the cost of labor and materials to a premium. Congress authorized that the contractor be reimbursed his additional costs and expenses caused by the delay and increased prices. Under this congressional authorization the contractor was paid an additional $101,907.66.

The architect's estate sued to recover 5 percent of the additional cost awarded to the contractor, some $5,095.38. The Supreme Court upheld the Court of Claims' finding for the architect on the ground that the congressional change of the original agreement was justified and that the increased costs were, therefore, a valid part of the actual costs which formed the basis of the architect's fee.

Another case showing the influence of unforeseen natural phenomena is *Tussing v. Smith.*[171] There a mortgagor renegotiated his loan with the mortgagee because 3 successive years of violent storms had reduced the value of the land to far below the amount of the mortgage. In the suit by the mortgagee to enforce the terms of the original mortgage, the mortgagor argued the modification. On the first hearing, the court found that the modification was not binding because of the pre-existing duty rule. However, on rehearing, the court reappraised the situation and enforced the oral modification of the mortgage. In its opinion on rehearing[172] the court emphasized the effect of the 3 years of storms and found consideration for the modification in making extensive repairs to the premises.

C. *Political Acts*

The leading case permitting the changed circumstances exception to the pre-existing duty rule to apply to political acts is *Blakeslee v. Board of Water Commissioners.*[173] It dealt with the economic impact of World War I on a construction contract.

Blakeslee agreed to construct a dam for the City of Hartford within 33 months. At the time of entering into the contract, both

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[171] 125 Fla. 578, 171 So. 238 (1936).

[172] *Id.*

[173] 106 Conn. 642, 139 A. 106 (1927). *Compare Blakeslee with* Central London Property Trust Ltd. v. High Trees House Ltd., [1956] 1 K.B. 256, where the court used a reliance theory, rather than the unforeseen circumstances exception. *See* note 124 *infra.*

parties understood that great amounts of earth and rock would have to be moved, which would require large quantities of high explosives. Further, the parties understood that great amounts of coal would be necessary to operate heavy equipment and that much steel, concrete, and pipe would be required to complete the job. Moreover, it was understood that much skilled and unskilled labor would be employed. Shortly thereafter the United States became involved in the war. The result of the national preparation for an eventual entry into the conflict was an extreme shortage of labor and materials. Additionally, embargoes on transportation prevented shipment of goods that were available. As a practical matter, construction became impossible.

Consequently, Blakeslee and the defendant negotiated a second agreement. The defendant agreed to waive the original contract's liguidated damages clause if Blakeslee would proceed with the construction. The defendant also promised to seek legislation which would permit it to pay Blakeslee the additional costs resulting from the war's interference (such a bill was subsequently passed, without the defendant's aid). The dam was eventually completed, but at a cost of $159,000 more than had been agreed to in the original contract. When the defendant refused to pay the added amount, Blakeslee sued.

The defendant demurred to the complaint, asserting, among other things, that there had been no consideration for the alleged contract for increased compensation because the plaintiffs had, "performed no services or furnished no material except those required under that contract [the original one]."[174]

The Connecticut court found that the plaintiff had indeed stated a cause of action because consideration could be found. The court specifically brought the case within the changed or unforeseen circumstances exception, relying on *King v. Duluth, Missabe & Northern Railway*.[175]

Another example of the effect of war involved the Commodity Credit Corporation. Although *Mid-State Products Co. v. Commodity Credit Corp.*[176] takes a radically different analytical approach to modification, it is in essence in accord with tradi-

[174] 106 Conn. at 647, 139 A. at 108.

[175] 61 Minn. 482, 63 N.W. 1105 (1895). *Compare King with* Transatlantic Financing Corp. v. United States, 259 F. Supp. 725 (D.D.C. 1965); Commercial Car Line v. Anderson, 224 Ill. App. 187 (1922).

[176] 196 F.2d 416 (7th Cir. 1952).

tional doctrine. At the urging of Commodity Credit the plaintiff entered the egg powdering business. Commodity Credit agreed to pay a fixed price for the eggs the plaintiff powdered. Subsequently, the price of eggs dropped dramatically so that Commodity Credit (a so-called federal corporation, *i.e.*, the United States government) was forced to subsidize the falling egg prices and, at the same time, also pay the high fixed price to the plaintiff. The defendant forced renegotiation and reduced the price paid to the plaintiff.

The plaintiff sued for the difference in price, alleging it had no choice but to go along with the defendant's demands for a lower price because the defendant was its only customer. The court found for the defendant, upholding the modification. However, the court avoided the consideration problem by saying no new consideration was required for the modification. On the other hand, the court revealed at least some allegiance to standard doctrine when it cited the existing emergency wartime conditions as justifying the forced renegotiation, because the defendant was required to act in the public interest.

The point is that although the court articulated its holding by saying no consideration was required for the modification, it also could easily have reconciled its analysis with the traditional doctrine of the pre-existing duty rule by means of the changed circumstances exception.[177]

D. *Labor Strife*

Some courts have found a strike or similar labor difficulty to be a sufficient change in circumstances or unforeseen event to come within the exception. An early such case was *Guaranty Iron & Steel Co. v. Leyden.*[178] The plaintiff agreed to do iron work for the defendant's building. A strike occurred which delayed work that had to be completed before the plaintiff could do his iron work. When the plaintiff could finally commence work, costs were considerably higher than had been anticipated so he slowed his work on the defendant's building by diverting his energies to later-acquired jobs which were profitable. The defendant promised to pay more for the completion of the work on his building if the plaintiff would proceed without interruption.

[177] *See also* Stovall v. Williams, 100 Ariz. 1, 409 P.2d 711 (1966), where the government's economic influence as a major purchaser forced a contract modification which was subsequently upheld in favor of an attaching creditor.

[178] 235 Ill. App. 191 (1924), *cert. denied*, 236 Ill. App. 631 (1925).

The plaintiff sued to collect the higher amount and was met by the plea of no consideration (*i.e.*, the pre-existing duty rule). The court found for the plaintiff. It reasoned that the delay in the plaintiff's starting work, caused by the strike, justified the plaintiff's withdrawal. Therefore, his going ahead with the work, despite a right to withdraw, constituted consideration for the defendant's promise.

A similar result was reached in *Unitec Corp. v. Beatty Safway Scaffold Co.*[179] There, the plaintiff offered to construct radomes for the defendant at a cost of $14,000 for materials only or for $25,500 if the plaintiff supplied labor as well as materials. The defendant accepted the labor and material formula and a written contract was drawn. Two days after the work began, the plaintiff's employees refused to cross a picket line at the job site. According to the plaintiff, the parties orally modified their agreement by switching to the $14,000 contract for materials only.

In the plaintiff's suit to enforce the modification, the defendant asserted that there had been no consideration for the modification. The court found for the plaintiff, saying that a mutual partial rescission of a bilateral executory contract is always supported by consideration in that each party forgoes its rights against the other.

Another case recognizing the impact of labor difficulties, but granting relief on grounds of mutual rescission rather than under the changed or unforeseen circumstances exception was the subject of some severe criticism.[180] The case is *Siebring Manufactur-*

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[179] 358 F.2d 470 (9th Cir. 1966).

[180] *See* Hudson, *supra* note 1. Referring to *Siebring* and other Iowa cases it is said that

> [t]he Iowa court, at least in result, has considerably weakened, if not killed the doctrine of consideration in cases involving the discharge or modification of existing duties. It is suggested, however, that although there may be agreement as to the justice of the result as individual cases referred to herein, a proposition in some doubt, the bending of doctrines, the inconsistency and lack of correlation and citation between cases where basically the same functional problem is presented, and the lack of specific articulation of the court's policy reasons for reaching results in certain cases, makes it more difficult for the practitioner or member of the public to predict what the court will do with the case in the future.

Id. at 14. The impact of this criticism is tempered by the author's treatment of modification of a contract and discharge of a liquidated debt by the payment of a lesser amount as interchangeable concepts, or, to use his words, "basically the same functional problem." He thus indulges in the confusion alluded to in the introduction to this article. Hudson correctly criticizes the circuitous reasoning of the rescission analysis at other points in his work, but he could not be more inaccurate in his condemnation of the Iowa court for pursuing individual justice over consistency. The *Siebring* case is just, well

ing Co. v. Carlson Hybrid Corn Co.[181] There the plaintiff contracted to sell corn crib roofs to the defendant at prices of $60 per roof or $44 per roof depending on the size. The plaintiff alleged that 2 weeks later there was another contract between the parties, raising the prices to $72 and $50 per roof. Between the two contracts a serious steel strike had developed, and the plaintiff was forced to buy steel at black market prices. The plaintiff and defendant had discussed the new market situation, and it was asserted that the defendant agreed to pay the higher prices and pass them along to its customers.

In the plaintiff's suit to collect the higher price, the defendant pleaded that there was no consideration for the second contract. The court found for the plaintiff, reasoning that there was no need for new consideration where a former contract was merely modified. The mutual releases of the old contract were sufficient to bind each party to the new contract.[182]

E. *Economic Fluctuation*

The landmark case in finding drastically altered market conditions sufficient to bring a case within the changed or unforeseen circumstances exception to the pre-existing duty rule deals directly with a changed market and also comes close to dealing with unforeseen circumstances of classic proportion. The case, *Bishop v. Busse*,[183] deals with a contract entered into a few days after the

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founded in doctrine (the changed or unforeseen circumstances exception to the pre-existing duty rule, not the rescission analysis), and leads to a high degree of predictability.

This article hopes to demonstrate incidentally that justice, legality, and consistency of decision need not be mutually exclusive goals. It is this writer's belief that quite the contrary is more likely the case and that law and justice are twin concepts.

[181] 246 Iowa 923, 70 N.W.2d 149 (1955).

[182] *Compare* Kovacich v. Metals Bank & Trust Co., 139 Mont., 449, 365 P.2d 639 (1961) *and Siebring with* Western Lithograph Co. v. Vanomar Producers, 185 Cal. 366, 197 P. 103 (1921), where increased cost of labor and materials did not relieve the promisor:

> Whether the rule of these cases [referring to Michaud v. McGregor, 61 Minn. 198, 63 N.W. 479 (1895) and King v. Duluth M. & N. Ry., 61 Minn. 482, 63 N.W. 1105 (1895)] be correct or not, it has no application to a case where the increased costs of the contractor are due merely to fluctuations in the market price of labor and materials. The risk of such fluctuation is a burden which he necessarily contemplates and assumes when he makes the contract.

185 Cal. at 370-71, 197 P. at 105. To see how courts have dealt with remarkable cost changes, compare Sasso v. K.G. & G. Realty & Constr. Co., 98 Conn. 571, 120 A. 158 (1923) (rescission analysis); Frank C. Clemens Plumbing Co. v. H.C. Huber Constr. Co., 73 Ohio L. Abs. 7, 136 N.E.2d 382 (Ohio Ct. App. 1954); San Gabriel Valley Ready-Mixt v. Casillas, 142 Cal. App. 2d 137, 298 P.2d 76 (1956); and W.D. Miller Constr. Co. v. J.G. Watts Constr. Co., 223 Ore. 504, 355 P.2d 215 (1960).

[183] 69 Ill. 403 (1873).

great Chicago Fire of October 9, 1871. The contract was for the construction of a house, and the price for each kind of work was set out with specificity. After the work was under way, prices rose sharply. The builder alleged a second contract in which the owner promised to pay any additional amounts the rising market demanded. In the suit by the builder, the modified contract was attacked as lacking consideration. The Illinois Supreme Court found consideration. Its reasoning deserves a full report:

> In this case, brick had risen from $15 in the wall to $22 or $23, and labor and materials had also advanced in the same proportion. And the evidence shows that if appellees had completed the building at the prcies first agreed upon, they would have lost about $8,000; that, on appellees failing to perform the contract, appellant could have recovered the damages occasioned by the breach. But this he may have considered of less advantage to him than the completion of the building, and if so, that of itself would have been a sufficient consideration to support the new agreement. It is held that one promise is sufficient to support another, and that where a party will derive a benefit from the performance of a contract, that is a consideration for a promise to pay for such benefit.
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> Again, the rise in the price of materials for building to so large an extent was, no doubt, according to the law of demand and supply, occasioned by the scarcity of buildings or a much larger demand than the supply, and if so, rents must have been enhanced to an extent equal to the rise in labor and materials. And if this was true, then we could see a strong inducement to change the contract rather than not have the building erected. If he had not agreed to the change, he was notified that appellees would not erect the building, and he would have been left to his legal remedy for the recovery of damages for the breach of contract, and he would have been deprived of the profits derived from enhanced rents, if there were such. But whether there were such increased rents or not, the mutual promises formed a sufficient consideration to support the new contract.[184]

Clearly, the court was motivated by the changed market conditions. The court neatly argued the consideration question. Notice, however, the court's concern with the owner's inducement to enter into the second contract. It is this concern that the second contract was freely given that brings *Bishop* in line with the other cases and again demonstrates the true thrust of the pre-existing duty rule as a weapon against abusive dealing.

A second case, *Barr v. Snyder*,[185] shows a slightly different facet of the pre-existing duty rule's relationship with the concept

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[184] *Id.* at 407-08.

[185] 294 S.W.2d 4 (Mo. 1956).

of fair dealing. Barr agreed to purchase an apartment building and some furniture located therein from Snyder. Soon after, the parties amended their agreement to permit Snyder to sell some of the furniture independently. He sold it and at the closing credited the buyer, Barr, with the proceeds of the sale. However, Barr refused to accept the closing statement, allegedly because the furniture had been sold for less than full value. Instead, Barr filed suit for conversion of the money and note that had been placed in escrow as provided in the original contract.

As the conversion suit made its way through the courts, the value of the building increased greatly. And almost 5 years after the date of the contract, the buyer, Barr, was permitted to file an amended petition abandoning her conversion claim and seeking specific performance instead.

The Supreme Court of Missouri affirmed a lower court's denial of specific performance to Mrs. Barr on the merits of the claim. It found that she was not entitled to specific performance because she herself had refused to honor the amended contract. The court specifically withheld its opinion on the propriety of the plaintiff's amending her suit after having pursued it so long on the conversion theory.[186]

The court found consideration for the modification in that the obligations of both parties had been affected. In effect, the court used the mutual rescission analysis. However, one cannot help but notice the court's concern with the relationship between the sharp increase in the value of the building and the plaintiff's decision to amend the cause of action so she could keep the now valuable building. The court seemed to choose the mutual rescission analysis as a convenient means of enforcing the second contract, and preventing the plaintiff from profiting from her own intransigence.

Another case opting for the rescission analysis also demonstrates that the exigencies of a free market economy will influence the application of the pre-existing duty rule. The case is *Williams v. Cassidy*,[187] and it deals with the sale of real estate by contract. In October of 1928, the defendant agreed to sell land to the plaintiff for $1,600, payable at the rate of $20 down and $20 per month.

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[186] *Id.* at 11.

[187] 237 Iowa 1042, 23 N.W.2d 423 (1946). For the influence of the Great Depression of 1929, see Ewing v. Benson, 281 N.W. 197 (Iowa 1938).

The plaintiff took possession and paid $676 by March, 1933. At that time the parties entered into a second agreement which called for the plaintiff to pay, in addition to the $676 already paid, only $500 more at the reduced rate of $5 down and $5 per month. The plaintiff adhered to the terms of the second contract and fulfilled them. After this full performance, the plaintiff sued to force the defendant to execute a deed.

The defendant alleged that there was no consideration for the second contract because of the pre-existing duty rule. The Supreme Court of Iowa affirmed a decree in favor of the plaintiff. It is clear that economic conditions entered into the court's analysis. The court, at the threshold of its opinion, took judicial notice of the depression and the resulting diminution of real estate values. The court showed how the depressed economic conditions directed its analysis and at the same time fell in line with the concern in *Lingenfelder* with freedom from abusive dealing, when it said:

> There is no evidence on either side as to what the value of the home was in 1933 but even a superficial recognition of the conditions then existing persuades us to the view that there may have been *impelling reasons on both sides* for the supplemental contract . . . .[188]

Thus again, the relationship of the changed or unforeseen circumstances exception to the pre-existing duty rule is observed in its function of assuring a court that the second agreement was freely given—at least to the extent that the promisor was compelled by market realities rather than the promisee's abusive tactics.

A leading opinion taking the position that economic change cannot justify avoiding the pre-existing duty deals with the enforceability of an agreement to reduce rent.[189] The case, *Levine v. Blumenthal*,[190] adheres to the conventional view of contract in a

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[188] 237 Iowa at 1048, 23 N.W.2d at 427 (emphasis added). *Contra*, Westland Constr. Co. v. Chris Berg, Inc., 35 Wash. 2d 824, 215 P.2d 683 (1950).

[189] The duty to pay rent is more akin to the duty to pay a sum certain than it is to the typical executory bilateral contract, which is the major concern of this analysis. This is especially true in view of the traditional treatment of lease provisions as independent. The case is included here not to perpetuate the confusion of the concepts consistently decried. Rather, it is used because it succinctly and clearly states its position. For analysis consistent with the analysis of executory bilateral contract duties in a lease situation, see Priddie v. Goudchaux, 112 S.W.2d 492 (Tex. Civ. App. 1938); Liebreich v. Tyler State Bank & Trust Co., 100 S.W. 152 (Tex. Civ. App. 1936).

[190] 117 N.J.L. 23, 186 A. 457 (1936), *aff'd* 117 N.J.L. 426, 189 A. 54 (1937).

free market economy. It cites earlier cases enforcing modifications responding to economic crises, but disagrees with those decisions. However, the disagreement is patently a matter of policy. The landlord's position was that the agreement to reduce rent was unenforceable for lack of consideration. The court found for the landlord, saying:

> They [referring to cases applying the changed circumstances exception to such facts] exhibit the modern tendency, especially in the matter of rent reductions, to depart from the strictness of the basic common-law rule and give effect to what has been termed a "reasonable" modification of the primary contract.
>
> So tested, the secondary agreement at issue is not supported by a valid consideration; and it therefore created no legal obligation. General economic adversity, however disastrous it may be in its individual consequences, is never a warrant for judicial abrogation of this primary principle of the law of contracts.[191]

Even if one takes the view that courts should not use contract law to make economic policy, one must recognize that such judicial regulation occurs. Here, the changed or unforeseen circumstances exception to the pre-existing duty rule became the vehicle by which courts could express their beliefs as to the proper distribution of the impact of the depression. Courts believing the promisor should bear the risk applied the pre-existing duty rule; courts believing the opposite applied the exception.

The point is, again, that inquiry beyond the questions of contract theory into the facts surrounding the second contract is necessary to determine the legality of a modification. Such inquiry reveals that changed or unforeseen circumstances affecting the performance of the original contract can control the applicability of the pre-existing duty rule and thus eventually determine the enforceabiltiy of a modification of the original contract.

CONCLUSION

It is worth observing that even the most obscure technical legal theory is bottomed on principles of fairness and justice. The primary objective of this analysis has been to resolve the apparently inconsistent applications of the pre-existing duty rule. The seemingly contradictory decisions are resolved with the discovery that courts use the pre-existing duty rule to prevent abusive dealing. Few courts reveal their true purpose in invoking the rule to deny enforcement of a particular agreement. And thus, the pre-

[191] 117 N.J.L. at 29, 186 A. at 459 (citations omitted).

existing duty rule has been misunderstood and undeservedly condemned. This disapproval culminated in UCC 2-209(1) and *The Restatement (Second)* section 89D dispensing with the requirement of consideration for modifications. The drafter's comments to both these works make clear that the changes permitting modification without consideration are to overcome the pre-existing duty rule.[192]

Without question, this particular reform fostered by the Code and *Restatement* is valuable. It serves to bring the law into conformity with what is deemed good contemporary commercial practice. Further, the language of the section 89D and the comments to 2-209 indicate that questions of fair dealing are the primary criteria of modification. The reforms, however, do not go far enough. More exact language in the Code and *Restatement* could have clarified the pre-existing duty rule, and with it, the general doctrine of consideration. Such explicit redrafting would have served the commercial world as well. Entrepreneurs would have been given clearer guidelines by which to conduct their dealings. Instead, the drafters chose to avoid the problems and accomplish their goal by eliminating consideration as a requirement for enforceable modifications. In this regard they have repeated the errors of the past.

Whether or not additional revisions are undertaken is of secondary concern. What is important is that the pre-existing duty rule and the right to modify executory contracts be understood. These fellow concepts may be better understood if the rules are stated:

> Performance of, or a promise to perform an existing contractual duty is consideration for a promise of extra compensation for its performance if:
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> 1) there was no abusive dealing in eliciting the promise of extra compensation;
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> (2) the promisee of the promise of extra compensation relied on the promise. Changed or unforeseen circumstances discovered or arising after formation of the original contract and which make the performance of the duty under the original contract subject to a reasonable doubt, rebut any natural inference of abusive dealing which surrounds the promise of extra compensation.

[192] UNIFORM COMMERCIAL CODE § 2-209, Comment 1; RESTATEMENT (SECOND) OF CONTRACTS § 89D, comment *a* at 211 (Tent. Draft Nos. 1-7, 1973).