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LABOR DISPUTES IN CONTRACT LAW: THE PAST AND PRESENT OF *ALASKA PACKERS' ASS'N V. DOMENICO*

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I. INTRODUCTION

In a previous article,[1] I wrote about a "legal archaeology" project, in which I researched the historical and economical background of one of the canonical first year contract cases, *Alaska Packers' Ass'n v. Domenico*.[2] In this piece, I am going to undertake an examination of Professor Snyder's central theory, that using contract law to resolve labor disputes distorts contract law in unfortunate ways,[3] and see how it plays out against *Alaska Packers'*. As Professor Snyder notes, my research into *Alaska Packers'* suggests that the classical contract doctrine was not well suited to dealing with the emerging problems of labor relations at the turn of the last century.[4] I conclude, however, that examining the case to see if the labor context in turn distorted the development of contract doctrine reveals some complications to Professor Snyder's theory.

In Part II, I will give a brief recapitulation of the facts and background of *Alaska Packers'* as revealed by my digging into the case. In Part III, I will briefly discuss the doctrinal evolution of duress and the pre-existing duty rule before and after *Alaska Packers'* and conclude that this evolution complicates, but does not negate, Professor Snyder's insight into the "pernicious effect"[5] of labor disputes on the development of contract doctrine. Finally, in Part IV, I will point out the continuing relevance of the case to the intersection of labor and

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1. Debora L. Threedy, *A Fish Story:* Alaska Packers' Association v. Domenico, 2000 UTAH L. REV. 185.

2. 117 F. 99 (9th Cir. 1902).

3. *See* Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 35 (2003).

4. *Id.*

5. *Id.*, at 34.

contracts, and suggest that a hundred years of experience dealing with labor disputes has not clarified the lesson of *Alaska Packers'*.

II. A Fuller Factual Narrative For *Alaska Packers'*: What Legal Archaeology Reveals

Alaska Packers' involved a lawsuit brought by a group of Alaskan salmon fishermen to recover wages they claimed were due and owing.[6] The fishermen had been hired in San Francisco in the early spring of 1900.[7] According to the allegations in their complaint, when they arrived at the cannery in Pyramid Harbor, Alaska, they discovered that the nets provided by the canning company were substandard.[8] They then refused to continue working until the company either provided new nets or raised their wages.[9] Due to the distance from the mainland and the short duration of the salmon fishing season, obtaining replacements for the nets, or for that matter the fishermen, was not feasible, and the general manager of the cannery agreed to raise their wages.[10] A new written contract was drawn up and executed.[11] When the fishermen returned to San Francisco in the fall, however, the canning company refused to pay anything more than the originally agreed upon wages.[12]

The central factual dispute at trial was whether the nets provided by the company were adequate.[13] If the nets were inadequate, then the fishermen would have been justified in their work stoppage due to the failure of an implied condition in their employment contract, that is, that the company would provide serviceable equipment to the fishermen. If the nets were adequate, then the fishermen could not justify their work stoppage on that ground.

Most of the fishermen were Italian immigrants.[14] At trial, three of the fishermen testified through an interpreter that the nets were old and rotten, that they could be ripped apart with two fingers, and that they would not hold the salmon.[15] Conversely, the general manager of the cannery testified that only the bottom half of the nets were in this condition, that the top half was new and strong, and that in the location where they fished, the salmon were found only toward the surface of the water.[16] Due to the fact that most of the fishermen did

6. Domenico v. Alaska Packers' Ass'n, 112 F. 554, 555 (N.D. Cal. 1901), *rev'd*, 117 F. 99 (9th Cir. 1902).
7. *Id.*
8. *Id.* at 556.
9. *Id.*
10. *Id.* at 555.
11. *Id.* at 555–56.
12. *Id.* at 556.
13. *Id.*
14. Threedy, *supra* note 1, at 204.
15. *Id.* at 206–07.
16. *Id.* at 207.

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not speak English[17] and that they were fishing at Pyramid Harbor for the first time,[18] the possibility exists that the fishermen may not have understood the unique nature of the nets used by Pyramid Harbor.

The trial judge held that the nets were indeed serviceable.[19] According to the trial judge's written opinion, this conclusion was based upon his assumption that, of course, the company would have wanted the fishermen to catch as many fish as possible.[20] This assumption, however, may have been erroneous.

There are at least four reasons why the company may not have cared whether the fishermen were catching as many fish as possible. First, it was common at that time for Alaskan canneries to catch more fish than they could process before the fish spoiled.[21] Canning was not yet mechanized and was a very labor intensive process. Moreover, there was no way of refrigerating the caught fish. Whether this problem of catching too many fish too quickly applied to the cannery at Pyramid Harbor is unknown but it is a possibility.

Second, whether or not the cannery was able to can the fish before they spoiled, Pyramid Harbor was prepared to can only a specific amount of salmon.[22] It had limited supplies on hand for canning, all of which had to be brought up from California before the salmon season began. Thus, it was possible that the cannery would not have sufficient supplies on hand to can all of the salmon caught by the fishermen.

Third, Pyramid Harbor spent more to can a case of salmon than other canneries.[23] It also spent a disproportionate amount on fishing gear, compared to other canneries.[24] The lack of wide, flat beaches in the vicinity of Pyramid Harbor prevented the cannery from using the more efficient seine nets and required it to use the less efficient and more expensive gill nets. The manager of the cannery may well have been concerned about the cost per case of salmon and may have tried to economize by reusing a portion of last year's nets.

Finally, the cannery did have another source of fish. Despite the assumption by the court, it was not relying exclusively on its employ-

17. *Id.* at 205.

18. *Id.* at 206.

19. *See* Domenico v. Alaska Packers' Ass'n, 112 F. 554, 556 (N.D. Cal. 1901), *rev'd*, 117 F. 99 (9th Cir. 1902).

20. *Id.* ("The [cannery's] interest required that [the fishermen] should be provided with every facility necessary to their success as fishermen, for on such success depended the [cannery's] profits. . . . In view of this self-evident fact, it is highly improbable that the [cannery] gave [the fishermen] rotten and unserviceable nets . . . .").

21. Threedy, *supra* note 1, at 209.

22. *Id.* at 211.

23. *Id.* at 202, 211.

24. *Id.*

ees' catch for its seasonal production. Each year, the cannery bought a significant number of fish from the local Native American tribes.[25]

Moreover, the trial judge did not explicitly address whether it was possible that the fishermen in good faith, albeit mistakenly, believed the nets were inadequate. The uniqueness of the nets and the language barriers between the immigrant fishermen and the general manager may well have created such a misunderstanding.

Despite having lost on the central factual dispute, the trial judge ruled in favor of the fishermen.[26] He did this by invoking the contract doctrine of novation.[27] That doctrine provides that parties to a contract are free to terminate their existing contract and enter into a new one.

We can only speculate upon the trial judge's reasons for his decision. He may have been a firm believer in the concept of freedom of contract and felt that his obligation was to enforce the parties' intent, as he understood it,[28] despite his rejection of the fishermen's asserted reason for striking. He may have interpreted the executing of a new contract, with the formality of reducing it to writing and having it witnessed by a government official[29] as an objective manifestation of the parties' intent to terminate the old contract and enter into a new one. Alternatively, he may have believed that the fishermen's work stoppage was based upon a good faith belief that the nets were inadequate, whatever their actual condition, and thus been willing to enforce the modification.[30] It is even possible that he may have been

25. *Id.* at 212.

26. Domenico v. Alaska Packers' Ass'n, 112 F. 554, 560 (N.D. Cal. 1901), *rev'd*, 117 F. 99 (9th Cir. 1902).

27. *Id.* at 557.

28. Of course, reliance on "the parties' intent" is endlessly problematic. First of all, it presumes that the parties shared a unitary intent, which may not be the case. The fishermen may have intended to terminate the old contract and enter into a new one while the company, through the general manager, may have only intended to modify the contract. There is also the possibility that one or both of the parties did not have a specific intent with regard to this legal issue; that is, they may not have appreciated the fine distinction between a novation and a modification, and so may not have intended either. Their intent may have been the general one of entering into a binding agreement. Finally, there is the problem of how a judge or any other third party is to determine what actually is going on in the head, assuming that is where intent is formed, of another person.

29. Alaska Packers' Ass'n v. Domenico, 117 F. 99, 101 (9th Cir. 1902).

30. This is the current UCC standard. Official Comment 2 to U.C.C. § 2-209(1) (2003) states:

> Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding.
>
> However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith.

sympathetic to workers as a class and willing to use any doctrine that would allow them to prevail.[31]

On appeal, the Ninth Circuit reversed the judgment in favor of the fishermen.[32] The court held that it was error to apply the doctrine of novation and that the correct rule to apply was the pre-existing duty rule.[33] That rule provided that, where there is a pre-existing duty to perform an act, that act could not serve as consideration for a promise. Thus, the fishermen having been under a pre-existing contractual duty to work for the company for the originally agreed upon wages, there is no consideration "available" to support the company's promise of additional wages.

Although the court justifies its rejection of the novation rule by invoking a "weight of authority" argument,[34] the court's language reveals that, from a policy perspective, the court was concerned about the possibility of bad faith and coercive behavior on the part of the fishermen.[35]

Alaska Packers', viewed from a labor law perspective, is fairly typical of its time. From labor's perspective, the case did little to recognize workers' grievances or support the self-help remedy of a work stoppage. From capital's perspective, the case served to encourage investment in new industries, by preventing labor from using any monopoly power to leverage a larger share of the pie from the owners. While not surprising that the courts analyzed the case from a contracts perspective (there was as yet no language of labor law in which to analyze the case), certainly contract law provided no ready-made tools ideally fashioned for regulating on-going labor relations. Indeed, as relational contracts theorists are fond of pointing out, the classical contract doctrine does a poor job of regulating any kind of long-term, on-going contract, labor or otherwise.[36] Thus, as Professor Snyder argues, *Alaska Packers'* can be thought of as "a kind of poster child for the problems" you get when you analyze employment issues under a contracts framework.[37]

In the next section, I examine the case's impact on contract doctrine and, in particular, investigate whether the labor context of the case served in any way to distort the development of contract doctrine.

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31. There is some indication in his background that he might be sympathetic to labor, but there is nothing specific in the record to support this hypothesis.

32. Alaska Packers' Ass'n v. Domenico, 117 F. 99, 105 (9th Cir. 1902).

33. *See id.* at 102–05.

34. *Id.* at 105.

35. Threedy, *supra* note 1, at 195–96.

36. *See, e.g.*, Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 496–508.

37. Snyder, *supra* note 3, at 35.

III. Some Complications to Professor Snyder's "Pernicious Effect" Theory

In his paper, Professor Snyder proposes a provocative theory: that the use of contract doctrine to resolve labor disputes tends to distort the development of contract law.[38] He analogizes using contract law to resolve labor issues to using a square peg to fill a round hole: the square peg of contract law does not do a very good job of filling the labor problem hole, and forcing the contract peg into the labor hole tends to bend and deform the peg.[39]

In applying Professor Snyder's insight to *Alaska Packers'*, I encounter complications that in no way negate his theory but do suggest the process may be more complex than it initially appears. The "uncomplicated" version of the theory would suggest that, due to the labor context of the case, contract law underwent a change, a deformation, that had unintended and deleterious consequences for contract law. At first glance, this theory seems accurate.

The Ninth Circuit decided the case in favor of the cannery owners on the basis of the pre-existing duty rule.[40] That rule states that a modification of a contract, in which one party agrees to do only what the original contract required while the other party agrees to a performance that is somehow different, lacks consideration. Because the first party is only doing what it was under a pre-existing contractual duty to do, there is no available consideration coming from the first party to support the new duty assumed by the second party.

There is no question whatsoever but that, in the opinion of many, this is an unfortunate rule.[41] Among other critics, Judge Posner, who approaches legal problems from a law and economics perspective, has provided a trenchant critique of the rule—which as we will see is particularly interesting because he is currently the number one fan of the *Alaska Packers'* case. He argues that using the pre-existing duty rule to police contract modifications is both over-inclusive and under-inclusive:

> [T]he former because most modifications are not coercive and should be enforceable whether or not there is fresh consideration, the latter because, since common law courts inquire only into the existence and not the adequacy of consideration, a requirement of fresh consideration has little bite. B might give A a peppercorn, a

38. *Id.*

39. *Id.* at 36.

40. *See* Alaska Packers' Ass'n v. Domenico, 117 F. 99, 102–05 (9th Cir. 1902).

41. *See, e.g.*, Robert A. Hillman, *Policing Contract Modifications Under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 Iowa L. Rev. 849, 852 (1979) ("Because the pre-existing duty rule is a roadblock to the free adjustment of contracts, the rule lost favor with courts and commentators.").

kitten, or a robe in exchange for A's agreeing to reduce the contract price, and then the modification would be enforceable . . . .[42]

Posner, as well as the draftsmen of the Uniform Commercial Code, tend to agree that the concept of economic duress does a far better job of policing opportunistic forced modifications by the party with the superior bargaining power.[43]

Accordingly, it could be argued that, because *Alaska Packers'* is a labor case, it is the labor relations context that results in this unfortunate rule, and that it took contract doctrine another fifty years to recognize its error and "correct" the rule.

There are two complications with this narrative, however. First, *Alaska Packers'* was not the first manifestation of the pre-existing duty rule. Earlier cases had involved a construction contract[44] and repayment of a debt.[45] In the construction case, one party agreed to build something for a set price and then part way through the construction process demanded an additional amount.[46] The landowner agreed, but after the project was completed, refused to pay the additional amount.[47] In the debt case, the debtor offered to pay the creditor less than the original debt, to which the creditor initially agreed, but then later sued for the original debt.[48] Thus, it is not fair to say that the labor context of *Alaska Packers'* is what caused the unfortunate turn of events in contract law; that had happened before the case arose.

Second, although the Ninth Circuit's rhetoric strongly suggests the court was thinking duress,[49] at the time of the case, that doctrine was not obviously suited to the facts of *Alaska Packers'*. At common law, the original concept of "duress" as a ground for invalidating a contract was limited to situations where the party was actually imprisoned or threatened with death or severe bodily harm.[50] At equity, however, there existed the doctrine of "undue influence," which was not limited to situations where a party feared the wrongful actions of another, but was broad enough to encompass such situations.[51] Over time, the two doctrines tended to merge; although at the time of the *Alaska Packers'* opinions, this broader concept of duress was not completely accepted.[52]

42. Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1285 (7th Cir. 1986).
43. *Id.* at 1285–86.
44. Lingenfelder v. Wainwright Brewery Co., 15 S.W. 844, 846–47 (Mo. 1891).
45. Foakes v. Beer, 9 App. Cas. 605, 611–12 (H.L. 1884) (appeal taken from Eng. C.A.).
46. *See Lingenfelder*, 15 S.W. at 846.
47. *Id.*
48. *Foakes*, 9 App. Cas. at 605–06.
49. *See* Alaska Packers' Ass'n v. Domenico, 117 F. 99 *passim* (9th Cir. 1902).
50. SAMUEL WILLISTON, III THE LAW OF CONTRACTS § 1601 (1920).
51. *Id.* at § 1602.
52. "[S]ome jurisdictions are less ready than others to treat the defence of duress at law as having been enlarged to this extent by borrowing from equity." *Id.* at § 1603.

The expanded conception of duress that was percolating in the courts in the early years of the twentieth century, however, did not encompass the modern conception of "economic duress." It was not until the 1940s that courts generally started to recognize the defense of economic duress.[53] If that newer concept were around in 1902, my guess is that the appellate court would have used it. In other words, the lack of a fully developed concept of duress (rather than the labor context of the case) may have driven the appellate court to use the pre-existing duty rule to police the contract modification and justify ruling against the fishermen.

These complications, however, do not negate Professor Snyder's basic insight so much as suggest some possible refinements to it. The case continues to be relevant to discussions of both contract and labor law. The specialization of labor law to resolve labor disputes has not rendered *Alaska Packers'* obsolete in the labor law context. Similarly, the growth of economic duress as a tool for policing contract modifications has not rendered the pre-existing duty rule obsolete in contract law. If the case did not originate the deformation of contract law caused by the use of the latter to police contract modifications, it has certainly continued and reinforced that distortion.

IV. *ALASKA PACKERS'* TODAY: THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

Although the Ninth Circuit never held that *Alaska Packers'* involved duress, scholars and jurists since have gone that far and further, labeling *Alaska Packers'* "a classic case of duress."[54] Judge Richard Posner in particular seems rather fond of the case. In the last twenty years, *Alaska Packers'* has been cited thirteen times: twelve of those citations appeared in cases decided by the Seventh Circuit, and Judge Posner authored eight of those Seventh Circuit decisions.[55]

53. *See, e.g.*, Cal. Elec. Power Co. v. United States, 60 F. Supp. 344, 359–60 (Ct. Cl. 1945).

54. *See* Trompler, Inc. v. NLRB, 338 F.3d 747, 751 (7th Cir. 2003) (Posner, J.).

55. The following Seventh Circuit opinions were authored by Judge Posner: *Trompler Inc.*, 338 F.3d at 748, 751; Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc., 313 F.3d 385, 390 (7th Cir. 2002); Prof'l Serv. Network, Inc. v. Am. Alliance Holding Co., 238 F.3d 897, 900–01 (7th Cir. 2001); Herremans v. Carrera Designs, Inc., 157 F.3d 1118, 1120, 1122 (7th Cir. 1998); Oxxford Clothes XX, Inc. v. Expeditors Int'l of Wash., Inc., 127 F.3d 574, 579 (7th Cir. 1997); United States v. Stump Home Specialities Mfg., Inc., 905 F.2d 1117, 1118, 1122 (7th Cir. 1990); Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1285 (7th Cir. 1986); Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 926–27 (7th Cir. 1983). The following Seventh Circuit opinions were not authored by Judge Posner: Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co., 310 F.3d 537, 539–40 (7th Cir. 2002) (Easterbrook, J.); Contempo Design, Inc. v. Chicago & Northeast Ill. Dist. Council of Carpenters, 226 F.3d 535, 549 (7th Cir. 2000) (Ripple, J.); Rissman v. Rissman, 213 F.3d 381, 382, 387 (7th Cir. 2000) (Easterbrook, J.); Indus. Representatives v. CP Clare Corp., 74 F.3d 128, 129–130 (7th Cir. 1996) (Easterbrook, J.). Note that three of these opinions were authored by Judge Posner's law and economics colleague,

Clearly, something about *Alaska Packers'* has caught and held Judge Posner's attention.

Recall that Posner is critical of the Ninth Circuit's reasoning in *Alaska Packers'*, specifically its use of the pre-existing duty rule to police contract modifications.[56] Nevertheless, he believes the case was correctly decided.[57] Accordingly, he has recast the case as one of economic duress.[58] According to Posner, *Alaska Packers'* is an example of "the situation in which one person obtains a temporary monopoly that it tries to use to obtain a benefit to which it is not entitled."[59]

In Posner's narrative, once the fishermen arrive in Alaska, they realize that they have "an effective albeit temporary monopoly of the labor supply" and use that monopoly power to obtain additional wages.[60] The fact of the remote location and the fact of the short salmon fishing season, combined, result in the conclusion that it was impossible to sail to San Francisco and back with new fishermen during the season.[61] This conclusion then leads to the assumption that there is no other way for the cannery to get fish to can, and thus that it will lose an entire season, if it does not cave in to the workers' demands.[62] In sum, Posner sees the case as an archetypical case of economic duress: one party exploiting the other's temporary market vulnerability with a bad faith refusal to perform.

Moreover, Posner also shows us that *Alaska Packers'* has continuing relevance to labor disputes and gives us an explanation why. *Trompler, Inc. v. NLRB*, the most recent Posner decision to cite *Alaska Packers'*, is a case involving a labor dispute, specifically, a work stoppage by nonunion employees.[63] In his opinion, Posner notes that the National Labor Relations Act[64] now governs the right of workers to engage in work stoppages.[65] He goes on to say:

Judge Easterbrook. The final case is Burlington Ins. Co. v. Trygg-Hansa Ins. Co. AB, No. 00-1373, 2001 U.S. App. LEXIS 10625, at *9 (4th Cir. May 23, 2001) (per curiam) (not designated for publication).

56. *See Wis. Knife Works*, 781 F.2d at 1285.

57. *See id.* at 1286.

58. *See Trompler, Inc.*, 338 F.3d at 751; *Zapata Hermanos Sucesores, S.A.*, 313 F.3d at 390; *Prof'l Serv. Network, Inc.*, 238 F.3d at 900–01; *Oxxford Clothes XX Inc.*, 127 F.3d at 579; *Stump Home Specialties Mfg., Inc.*, 905 F.2d at 1121–22; *Selmer Co.*, 704 F.2d at 927.

59. *Prof'l Serv. Network, Inc.*, 283 F.3d at 900.

60. *Id.* at 900–01.

61. *See id.*

62. Oddly enough, while the question of whether the nets were serviceable cannot be determined from this temporal distance, the historical record compellingly indicates that these assumptions were false: each season the Pyramid Harbor cannery purchased between 25% and 40% of its fish from the local Native American tribes. *See* Threedy, *supra* note 1, at 212.

63. *Trompler, Inc.*, 338 F.3d at 748.

64. 29 U.S.C. §§ 151–169 (2000).

65. *Trompler, Inc.*, 338 F.3d at 748; *see* 29 U.S.C. § 157.

> The National Labor Relations Act models labor relations as tests of strength between workers and management. Workers withhold or threaten to withhold their labor in order to impose costs on management that will induce management to improve the workers' terms or conditions of employment, and employers if they don't want to knuckle under to the workers' demands can try to impose costs on the workers by locking them out, laying them off, and hiring permanent replacements . . . . This [is a] "combat" model of labor relations . . . .[66]

Posner then discusses how economic duress is a limitation on the workers' right to strike, but the concept must not be defined too broadly, as then "no strike would be protected activity, since the entire purpose of a strike is to exert economic pressure on the employer by withholding labor services that he needs."[67] He uses his idea of "the exploitation of temporary monopolies"[68]as marking the line between legitimate economic pressure and illegitimate economic duress. He distinguishes *Trompler* from *Alaska Packers'* on this basis, as he sees no evidence of a temporary monopoly on the part of the striking workers in the case before him.[69]

Thus, we see that *Alaska Packers'* is alive and well in the context of labor disputes, even if its relevance has shifted from the pre-existing duty rule to the doctrine of economic duress. "The combat model of labor relations" was certainly the operative model in 1900, and Posner suggests it continues to be the model today.[70] In such a model, the law provides the combatants with the "rules of engagement" and the doctrine of economic duress is one such rule.

But lest it appear that *Alaska Packers'* is now relevant only on the question of economic duress and that the pre-existing duty rule is a thing of the past, I will close with a discussion of yet another recent Seventh Circuit opinion, also involving a labor dispute and citing to *Alaska Packers'*.

In *Contempo Design, Inc. v. Chicago & Northeast Illinois District Council of Carpenters*,[71] the company and the union were subject to a self-renewing collective bargaining agreement.[72] Believing that the agreement had expired, the union threatened to call a strike unless the company agreed to a new agreement providing for higher wages.[73] The Seventh Circuit first determined that the original agreement was

66. *Trompler, Inc.*, 338 F.3d at 750 (citation omitted).
67. *Id.* at 751.
68. *Id.*
69. And of course, my argument is that if all the relevant facts had been put before the court in *Alaska Packers'*, there would likewise have been no evidence of a temporary monopoly by the striking fishermen.
70. *Trompler, Inc.*, 338 F.3d at 750.
71. 226 F.3d 535 (7th Cir. 2000).
72. *Id.* at 541.
73. *Id.*

in force.[74] Having found the original agreement to be still effective, the court then determined that the new agreement was unenforceable—using the pre-existing duty rule![75]

For a final twist, four judges dissented, arguing that the case should be decided under the doctrine of economic duress.[76] They argued that the majority erred "by disguising what really is a finding of duress in lack-of-consideration's clothing."[77] Applying the doctrine of economic duress, the dissenting judges did find that "the Union had Contempo over a barrel" as "the Union struck just as Contempo was negotiating a multiyear, multimillion-dollar contract."[78] The dissent, however, distinguished the present case from *Alaska Packers'* because the Union was under a good faith, albeit mistaken, belief that the original agreement had expired and that they were free to negotiate a new contract.[79] Conversely, according to the dissenting judges, "[in] *Alaska Packers'* there was no doubt that a valid contract was in place and there was no doubt that the employees had acted in bad faith."[80] Ironically, if the trial court in *Alaska Packers'* had ruled, as it well may have, that the fishermen had a good faith, albeit mistaken, belief that the nets were inadequate, the dissent's reasoning would have upheld the renegotiated contract.

V. Conclusion

Professor Snyder's provocative theory about the mutually deleterious interaction between labor disputes and contract doctrine is mostly validated by an examination of the labor dispute at the heart of *Alaska Packers'*, one of the canonical first year contracts cases, with one reservation. The pre-existing duty rule, the contract doctrine involved in that case, did not allow the striking workers to renegotiate the terms of their employment contract. Moreover, the pre-existing duty rule has been roundly criticized for doing a poor job of policing contract modifications, whether in the employment context or more generally. The problem for Professor Snyder's theory is that the rule predated the case, so the case cannot fairly be said to have caused the unfortunate rule.

Nevertheless, *Alaska Packers'* has probably done as much as any case to keep the doctrine alive, and the memorable facts of the labor dispute in the case—the shortness of the salmon season and the re-

74. *Id.* at 548.

75. *Id.* at 551–52. Judge Posner voted with the majority and did not even write a concurring opinion. *See id.* at 540, 555.

76. *See id.* at 555 (Evans, J., dissenting).

77. *Id.* (Evans, J., dissenting).

78. *Id.* at 556 (Evans, J., dissenting).

79. *Id.* (Evans, J., dissenting).

80. *Id.* Of course, I argue that, as regards the nets, there is a high likelihood that the fishermen had a good faith belief that the nets were inadequate, even if in fact they were mistaken. *See* Threedy, *supra* note 1, at 206–07.

mote Alaskan location—no doubt have contributed to the case's continuing popularity. In sum, one hundred years after *Alaska Packers'* was decided, it continues to be relevant to labor disputes, and it continues to muddy the doctrinal waters.

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