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Contract Modification in Iowa-Recker v. Gustafson and the Resurrection of the Preexisting Duty Doctrine

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Finding the proper balance between protecting flexibility and ensuring stability in contractual arrangements is the challenge of contractual modification law.[1] Contracting parties often seek to adjust their contractual arrangements to respond to changes in the economic climate, to changes in the law, or to changes of mind.[2] Contract law should enforce those resulting alterations that are freely made by the contracting parties in order to encourage the formation of contracts, which is good for the economy, and to support the notion of freedom of contract.[3] Law that precludes freely made adjustments—that would lock parties into agreements that each party desired to change—might deter some parties from entering into contractual arrangements.[4]

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1. *See generally* Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978). Early cases involving the enforceability of contract modifications arose in England in the late eighteenth and early nineteenth centuries. *See* Stilk v. Myrick, 170 Eng. Rep. 1168, 1169 (1809); Harris v. Watson, 170 Eng. Rep. 94, 94 (1791). Early American cases also dealt with this issue. *See* Munroe v. Perkins, 26 Mass. 303, 307, 9 Pick. 298, 303 (1830); Frye v. Hubbell, 74 N.H. 358, 376-77, 68 A. 325, 334 (1907).

A contract modification will be defined for purposes of the discussion that follows as an agreement that alters a prior executory or partially executory contract performance. *See* Recker v. Gustafson, 279 N.W.2d 744, 754-55 (Iowa 1979) (citing Meginnes v. McChesney, 179 Iowa 563, 566-67, 160 N.W. 50, 54-55 (1916)); Ayres v. Chicago, Rock Island & Pac. R.R., 52 Iowa 478, 487-88, *aff'd on rehearing*, 52 Iowa 491, 3 N.W. 522 (1879). In Iowa contract modification must be contrasted with contract rescission and replacement. *See* text accompanying notes 62-72 *infra*.

2. *See, e.g.*, J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 1-5, at 37 (1972); 2 S. WILLISTON, SALES § 12-4, at 8 (4th ed. A. Squillante & J. Fonesca 1974); Levie, *The Interpretation of Contracts in New York Under the Uniform Commercial Code*, 10 N.Y.L.F. 350, 357 (1964).

3. Society is benefited by the specialization and efficiencies that are the products of contractual arrangements. *See* Hartzler, *The Business and Economic Functions of the Law of Contract Damages*, 6 AM. BUS. L.J. 387, 392 (1968); Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854, 862 (1978). *See also* Fuller & Perdue, *The Reliance Interest in Contract Damages* pt. 1, 46 YALE L.J. 52, 61 (1936).

4. *Cf.* Hartzler, *The Business and Economic Functions of the Law of Contract Damages*, 6 AM. BUS. L.J. 387, 392 (1968) (allowing damages that go beyond the parties' expectations deters contract making).

Although contracting parties should have flexibility to adapt to change, they also must be assured that if they do not desire to modify their agreements, they cannot be required to do so. Stability in contractual arrangements is necessary to enable parties to plan their affairs in reliance on their contracts.[5] If parties cannot rely on their contracts, they may be discouraged from entering into them.

Unfortunately, contract law has not been very successful in responding to the challenge of harmonizing the need for both flexibility and stability in contractual arrangements. Essentially, the problem is to distinguish between freely made modifications and those modifications that are the result of coercion. Enforcing only those modifications that are voluntarily made protects the parties' freedom to adapt to change while maintaining stability in contractual arrangements.[6] Instead of focusing on whether a modification was formed voluntarily, however, contract law has emphasized doctrine that only indirectly, if at all, considers the issue of voluntariness.

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5. *See generally* Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law,* 72 NW. U.L. REV. 854 (1978).

6. *See* Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress,* 64 IOWA L. REV. 849, 880 & n.152 (1979). The approach stated in the text will suggest that consideration should not be required to enforce a modification. By advocating this approach, I am not suggesting that the consideration doctrine should be replaced in nonmodification situations—that all promises should be enforced even in the absence of a bargained-for exchange. To the extent that the consideration doctrine aids in demonstrating that the parties seriously and voluntarily intended to enter into an agreement, *see generally* Fuller, *Consideration and Form,* 41 COLUM. L. REV. 799 (1941), and serves to protect parties by ensuring some return for a promise, the consideration requirement probably serves a useful function in contract law. The controversy over the role of consideration in modern contract law, *see* G. GILMORE, THE DEATH OF CONTRACT 18-34 (1974), can be avoided here on two grounds. First, to the extent that consideration is important to prove that the parties seriously intended to enter into a contract, that function is served in contract modification circumstances by the bargaining that produced the original contract. Courts have long enforced, without new consideration, promises that renew obligations that are barred by bankruptcy or the statute of limitations, because the bargaining that produced the original obligation ensured that the obligation had been seriously incurred. *See* Mills v. Wyman, 20 Mass. 225, 228-29, 3 Pick. 207, 211 (1825) (dictum). Second, to the extent that the presence of consideration helps to demonstrate the fairness and voluntariness of the exchange, at least in the contract modification context, the doctrine of economic duress more adequately serves that function. *See* notes 94-104 *infra* and accompanying text. Thus, the need for consideration in the context of contract modification is a problem wholly separable from that of basic promise enforceability:

> In common understanding there is, importantly, a wide divergence between a bare promise and a promise in adjustment of a contractual promise already outstanding. A promise with no supporting consideration would upset well and long-established human interrelations if the law did not treat it as a vain thing. But parties to a valid contract generally understand that it is subject to any mutual action they may take in its performance. Changes to meet changes in circumstances and conditions should be valid if the law is to carry out its function and service by rules conformable with reasonable practices and understandings in matters of business and commerce.

Watkins & Son, Inc. v. Carrig, 91 N.H. 459, 462, 21 A.2d 591, 593 (1941).

The recent Iowa Supreme Court case of *Recker v. Gustafson*[7] is an excellent example of the difficulties courts have experienced with contract modifications. The court held, *inter alia,* that contract modifications are unenforceable in the absence of additional consideration[8] and overruled previous precedent in Iowa that suggested that Iowa had displaced the consideration requirement in modification cases.[9] The purpose of this Essay is to suggest that the decision in *Recker* to bar enforcement of the modification may have been correct, but that the case should not have been decided on consideration grounds. The court should have focused on the voluntariness of the modification instead of resurrecting doctrine that has proved ineffective in Iowa and elsewhere.

I begin this Essay by tracing the responses of courts and legislatures to the requirement of consideration in the modification context.[10] I then compare that general development to the response in Iowa, discuss the approach of the court in *Recker,* and criticize that approach.[11] Finally, I make some suggestions on how Iowa courts could better proceed in the future.[12]

I.

The traditional response of contract law to the problem of modification enforceability is the preexisting duty doctrine.[13] That doctrine provides that a promise to give additional consideration to, or to accept a partial performance from, the other contracting party in return for a performance that the other contracting party was already contractually bound to perform is unenforceable for lack of consideration.[14] Suppose, for example, that an employee enters into an agreement to perform certain work for $100 per week. When it becomes clear that the employer has relied on the availability of the employee, the employee demands a salary increase from the employer before beginning work. The employer agrees to pay the employee $110 per week to do the same work. Under the preexisting duty doctrine, the employer's promise to pay the extra ten dollars per week would be unenforceable for lack of consideration since the employee promised the employer nothing in return for the promise of the additional ten dollars.

The preexisting duty doctrine is an unsatisfactory approach to the problem of contract modification. The employee in the above

7. 279 N.W.2d 744 (Iowa 1979).
8. *Id.* at 759; *see* notes 13-14 *infra* and accompanying text.
9. *See* cases cited at notes 43-44 *infra.*
10. *See* notes 13-38 *infra* and accompanying text.
11. *See* notes 39-81 *infra* and accompanying text.
12. *See* notes 82-114 *infra* and accompanying text.
13. *See* Rye v. Phillips, 203 Minn. 567, 569-70, 282 N.W. 459, 460 (1938). *See generally* G. GILMORE, THE DEATH OF CONTRACT 22-28 (1974); Patterson, *An Apology for Consideration,* 58 COLUM. L. REV. 929, 936 (1958).
14. *See* Patterson, *An Apology for Consideration,* 58 COLUM. L. REV. 929, 936 (1958).

hypothetical may have extracted the modification by the use of duress,[15] because the employer had relied on the availability of the employee and may have had no other alternative but to agree to the employee's new demands. Thus, the preexisting duty doctrine produces the correct result in the hypothetical—the modification should not be enforceable. If the facts are changed slightly, however, a different result might be proper. Suppose after entering into the contract both parties become aware that the employee can command a much greater salary elsewhere, and to keep the employee content, the employer offers an additional ten dollars per week for the period agreed on by the parties. These facts suggest a freely made modification that should be enforceable. Application of the preexisting duty doctrine, however, would produce the same result as before. The employer's promise to pay more would be unenforceable for lack of consideration.

Courts began to formulate a number of "theories" to avoid the preexisting duty doctrine when they perceived that the doctrine produced an undesirable result. The "mutual rescission" theory suggested that contracting parties are free to rescind the original contract and thereby expunge the preexisting duty. The new promise in the second agreement to give additional consideration or to accept less consideration would then be supported by the other party's promise, even though the promise would be exactly the same as in the original "rescinded" contract.[16] In the second hypothetical, for example, some courts would enforce the employer's promise to pay $110 on the theory that the original contract was mutually rescinded, and the employee's promise to perform the same work as had been originally agreed on was, therefore, good consideration for the promise to pay the extra money. Closely analogous to the "mutual rescission" theory were other theories for expunging the preexisting duty. Some courts theorized that the preexisting duty was expunged not by a rescission, but by the employer's gift, waiver, or release of the employee's duty to perform for $100.[17]

The mutual rescission, gift, waiver, and release theories all suffered from the same infirmity. The theories are premised on the fiction that the promisor (the employer in the hypotheticals) intends to release the promisee (the employee in the hypotheticals)[18] from the obligation to perform the original contract before the second agreement is formed. As courts and writers have pointed out, however, neither party intends the

15. *See* notes 94-97 *infra* and accompanying text.

16. *See* Watkins & Son, Inc. v. Carrig, 91 N.H. 459, 460-63, 21 A.2d 591, 592-93 (1941); Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 203-05, 131 N.E. 887, 889-90 (1921). *But see* Linz v. Schuck, 106 Md. 220, 228-32, 67 A. 286, 287-89 (1920).

17. *See* Watkins & Son, Inc. v. Carrig, 91 N.H. 459, 464, 21 A.2d 591, 594 (1941); Meech v. City of Buffalo, 29 N.Y. 198, 218-19 (1864) (separate opinion).

18. Unless otherwise indicated, throughout this Essay "promisor" will refer to the party opposing enforcement of the modification, and "promisee" will refer to the party seeking to enforce the modification.

other to have a right to avoid the contract completely.[19] A careful analysis of the cases employing these theories suggests that often no mutual rescission, gift, waiver, or release actually occurred. Instead, the courts ultimately enforced the modified agreements, not because of a mutual rescission, but because the courts were convinced that the modified agreements were made voluntarily.[20]

Still other theories were concocted to avoid the preexisting duty doctrine when the doctrine produced undesirable results. Some courts held that the promisee's agreement not to breach and pay damages was additional consideration that supported the promisor's new performance.[21] These courts would interpret the employee's agreement in the second hypothetical to perform at $110 rather than to breach and pay damages as consideration to support the employer's promise to pay the extra ten dollars. Other courts examined the modified agreement to determine whether the promisee's promised performance was identical to the originally promised performance.[22] If the employee agreed to perform one additional hour of work, for example, the second agreement to pay more would then be enforceable.

These theories, which are based on finding additional consideration to support the modified promise, highlight additional weaknesses of the preexisting duty doctrine. The doctrine is ill-suited to avoid unfair modifications in jurisdictions that applied these additional consideration theories. If additional consideration were found in the promisee's promise not to breach, then seemingly *no* modification could be declared unenforceable by virture of the preexisting duty doctrine, because a promise not to breach could be implied in each case of contract modification. If additional consideration could be found in small alterations of the promisee's performance, then the promisee would be free to avoid the preexisting duty doctrine by the use of sham consideration—cosmetic changes in the agreement that are brought about only to defeat the preexisting duty attack. Thus, the employee in the first hypothetical, who is in a good position to unfairly extract additional compensation from the employer, could require a cosmetic change in his or her own performance that would render the modification enforceable even under the preexisting duty rule.

Many courts and legal scholars realized that efforts to avoid the preexisting duty doctrine were confusing, cumbersome, and camouflaged

19. *See* Schwartzreich v. Bauman-Basch, Inc., 105 Misc. 214, 219, 172 N.Y.S. 683, 686 (Sup. Ct. 1918) (Mullan, J., dissenting); Note, *Principles Underlying Modifications of Contracts in Iowa,* 44 IOWA L. REV. 693, 697-98 (1959).

20. *See* Watkins & Son, Inc., v. Carrig, 91 N.H. 459, 465, 21 A.2d 591, 594 (1941); Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 203, 205, 131 N.E. 887, 890 (1921).

21. *See* Swartz v. Lieberman, 323 Mass. 109, 112, 80 N.E.2d 5, 6 (1948); Munroe v. Perkins, 26 Mass. 303, 307, 9 Pick. 298, 303 (1830).

22. *See* J. MURRAY, CONTRACTS § 86, at 176 & nn.93-96 (1974) and cases cited therein.

the real issue—the voluntariness of the modification.[23] These courts and scholars began to suggest a more direct approach to the problem. In *Angel v. Murray,*[24] for example, the Supreme Court of Rhode Island enforced a promise by the City of Newport to pay additional money for refuse collection service, because the agreement to pay more was voluntary.[25] The decision applied section 89D(a) of the *Restatement (Second) of Contracts* to the problem and cited the following rule for the enforcement of modifications.

> [T]he parties [must] voluntarily agree and . . . (1) the promise modifying the original contract [must be] made before the contract [is] fully performed on either side, (2) the underlying circumstances which prompted the modification [must be] unanticipated by the parties and (3) the modification [must be] fair and equitable.[26]

By focusing on the voluntariness and fairness of the modification, the decision is progress out of the morass of the preexisting duty approach. Unhappily, the decision does not explain adequately how to determine whether a modification is voluntarily made or is "fair and equitable." The court merely recited the facts of the case and concluded that the agreement was voluntary and fair.

The decision of the New York Court of Appeals in *Austin Instrument, Inc. v. Loral Corp.*[27] is a more satisfactory response to the problem of distinguishing voluntary and coerced modifications. In that case Loral entered into a contract with the Navy to produce radar sets and awarded Austin a subcontract to supply certain parts.[28] Subsequently, after some deliveries had been made, Austin notified Loral that it would not make further deliveries unless Loral agreed to substantial price increases for parts already delivered and to be delivered later.[29] Austin then stopped delivery. Because it could not get the parts elsewhere in time to meet its commitments to the Navy, Loral agreed to Austin's demands.[30] After Austin's last delivery, Loral notified Austin that Loral would seek recovery of the price increases.

The court applied the doctrine of economic duress to determine whether Loral was bound to pay at the higher price.[31] The court noted that Loral's promise to pay more would not be enforceable if Austin had

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23. *See, e.g.,* Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 131-33, 272 N.E.2d 533, 536-37, 324 N.Y.S.2d 22, 26-28 (1971); Angel v. Murray 113 R.I. 482, 494-95, 322 A.2d 630, 637 (1974); J. CALAMARI & J. PERILLO, CONTRACTS § 4-8, at 146-48 (2d ed. 1977).
24. 113 R.I. 482, 322 A.2d 630 (1974).
25. *Id.* at 492-95, 322 A.2d at 636-37.
26. *Id.* at 494-95, 322 A.2d at 637.
27. 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971).
28. *Id.* at 128-29, 272 N.E.2d at 534, 324 N.Y.S.2d at 24.
29. *Id.* at 129, 272 N.E.2d at 534, 324 N.Y.S.2d at 24.
30. *Id.* at 129, 272 N.E.2d at 534-35, 324 N.Y.S.2d at 24.
31. *Id.* at 130-34, 272 N.E.2d at 535-37, 324 N.Y.S.2d at 25-28.

threatened to breach by withholding goods, if Loral could not obtain the goods elsewhere, and if Loral's remedy for breach of contract was inadequate.[32] The court held that Loral had met its burden of proof with respect to each of these three particulars.[33]

Recent legislative responses to contract modification enforceability also confront more directly the voluntariness of modifications.[34] The Uniform Commercial Code in section 2-209(1), for example, states that "[a]n agreement modifying a contract . . . needs no consideration to be binding."[35] Official Comment 1 to section 2-209 explains that the reason for the rule is to "make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."[36] Comment 2 then suggests that modifications produced by coercion will be unenforceable under the Code by virtue of the breach of the section 1-203 requirement of good faith performance.[37] Because of the difficulties in distinguishing between good faith and bad faith modifications, it is hardly surprising that the Code test of good faith has not been very effective in policing unfair modifications.[38] Nevertheless, the Code response is at least helpful in moving away from the more confusing and ineffective preexisting duty rule.

II.

Prior to *Recker v. Gustafson,*[39] the Iowa Supreme Court struggled with the problem of contract modification and produced conflicting decisions on the subject.[40] The cases, for the most part, mirrored the decisions of other jurisdictions and the development of the law traced above. Early Iowa cases recognized and applied the preexisting duty doctrine without hesitancy by refusing to enforce modifications that did not contain additional consideration supplied by the promisee.[41] In at least some of these decisions it appears that the modifications were voluntarily made and should have been enforceable.[42] A second group

32. *See id.* at 130, 272 N.E.2d at 535-36, 324 N.Y.S.2d at 25-26.
33. *Id.* at 131-33, 272 N.E.2d at 536-37, 324 N.Y.S.2d at 26-28.
34. *See* U.C.C. § 2-209(1). *See also* Timbie, *Modification of Written Contracts in California,* 23 HASTINGS L.J. 1549, 1568-75 (1972); Comment, *Modification of a Contract in New York: Criteria for Enforcement,* 35 U. CHI. L. REV. 173, 186-88 (1967).
35. U.C.C. § 2-209(1).
36. *Id.,* Comment 1.
37. *Id.,* Comment 2.
38. *See generally* Hillman, *Policing Contract Modification under the UCC: Good Faith and the Doctrine of Economic Duress,* 64 IOWA L. REV. 849 (1979).
39. 279 N.W.2d 744 (Iowa 1979).
40. *See id.* at 753-59 and cases cited therein.
41. *E.g.,* Meginnes v. McChesney, 179 Iowa 563, 576, 160 N.W. 50, 54 (1916); Ayres v. Chicago, Rock Island & Pac. R.R., 52 Iowa 478, 488, *aff'd on rehearing,* 52 Iowa 491, 3 N.W. 522 (1879).
42. For example, in Ayres v. Chicago, Rock Island & Pac. R.R., 52 Iowa 478, *aff'd on rehearing,* 52 Iowa 491, 3 N.W. 522 (1879), the promisee, a subcontractor on a railroad construction project, was losing money and needed financial aid from the con-

of decisions followed in which the modifications again appear to have been voluntarily made. In these decisions the court began to resort to mutual rescission and related theories to avoid the preexisting duty rule and to uphold the modifications.[43]

Probably as a result of the host of cases that enforced modifications, the court in some cases began to state a more general rule that no new consideration was required to support a modification.[44] Regrettably, even in these cases little attempt was made to emphasize the issue of voluntariness of the modification even though that issue was probably a controlling factor in the court's decisionmaking.[45]

Against this backdrop, *Recker*[46] was decided by the Iowa Supreme Court on May 30, 1979. The Gustafsons, owners of a 160-acre farm, negotiated with the Reckers for the sale of the farm.[47] At the time of the negotiations, Mr. Gustafson had been a licensed real estate broker for twenty years and was seventy-two years of age, while Mr. Recker was twenty-three years of age.[48] On August 30, 1976, in the office of the Gustafsons' attorney, the parties reached an oral agreement on terms for the sale of a 155-acre tract to the Reckers for $290,000 (the August 30 agreement).[49] The Reckers were not represented by an

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tractor to finish the project. *Id.* at 482-83. The evidence suggested that the subcontractor *could not perform* without that aid. *Id.* The court refused to enforce the contractor's promise to render the aid on the basis of the failure of consideration to support the promise. *Id.* at 490. The promise to render the aid did not appear to have been made because of duress even if the contractor had little choice but to render aid. The subcontractor's inability to perform probably did not constitute improper conduct that is necessary for a finding of duress. *Id.; see* notes 96-97 *infra* and accompanying text.

43. *See, e.g.,* O'Dell v. O'Dell, 238 Iowa 434, 460-61, 26 N.W.2d 401, 414-15 (1947); Williams v. Cassidy, 237 Iowa 1042, 1050-51, 23 N.W.2d 423, 428 (1946); *In re* Estate of Lamb v. Morrow, 140 Iowa 89, 97, 117 N.W. 1118, 1122 (1908). The courts did not expressly state that no consideration was required to support a modification. Rather, the courts stated that the mutual rescission or release was itself sufficient consideration to support the new agreement.

44. *See, e.g.,* Siebring Mfg. Co. v. Carlson Hybrid Corn Co., 246 Iowa 923, 928, 70 N.W.2d 149, 152 (1955); Strahn v. Johnson, 197 Iowa 1324, 1332, 196 N.W. 731, 734 (1924).

45. In Siebring Mfg. Co. v. Carlson Hybrid Corn Co., 246 Iowa 923, 70 N.W.2d 149 (1955), for example, the parties agreed to an increased purchase price for corn crib roofs because the price of steel had risen as a result of a steel strike. *Id.* at 925-26, 70 N.W.2d at 150-51. An event such as a strike may often lead to a willingness by reasonable commercial buyers, who desire to continue doing business with their sellers in the future or to maintain good will, to agree to modifications. The court noted that the buyer "indicated a willingness" to accept the modification, but reached that conclusion because the buyer accepted some deliveries at an increased price. *Id.* at 931, 70 N.W.2d at 153. That approach ignores the possibility that the buyer's acceptance of deliveries might have been the result of duress—if the buyer needed the crib roofs and could not get them elsewhere. *See also,* Hillman, *Policing Contract Modification under the UCC: Good Faith and the Doctrine of Economic Duress,* 64 IOWA L. REV. 849, 889-90 (1979).

46. 279 N.W.2d 774 (Iowa 1979).

47. *Id.* at 746.

48. *Id.*

49. *Id.* The parties also agreed that the Reckers would have the right to purchase an additional five acres, which contained some buildings, for $30,000 plus the cost of improvements, when the Gustafsons "provided a notice of sale." *Id.* This agreement,

attorney.[50] The parties agreed that the terms of their agreement would be reduced to a writing, and the Reckers tendered to the Gustafsons a check for $5000 as earnest money.[51]

At the request of the Gustafsons' attorney, another meeting was held at his office on September 20. At that meeting, the Reckers, again unrepresented, were told by the Gustafsons' attorney that the Gustafsons were "willing to go to court to get out of the August 30 agreement and that litigation was expensive," but that the Gustafsons would go through with a second agreement that would require the Reckers to agree to pay an additional $10,000 for the 155 acres.[52] The Reckers then agreed to pay the additional $10,000 (the September 20 agreement).[53]

On September 28, 1976, the Reckers were notified in a letter that the Gustafsons would not perform at all and were given a check for $5,000. The Reckers then sought specific performance of the August 30 agreement for the sale of the 155 acres for $290,000.[54] The district court for Fayette County held that the Reckers were not entitled to specific performance of the August 30 agreement, but were entitled to specific performance of the September 20 agreement, which set forth a price of $300,000.[55] Both sides appealed, the Gustafsons claiming that no enforceable contract had been made on either date, and the Reckers contending that the trial court should have ordered specific performance of the August 30 agreement at a price of $290,000.[56]

The brief submitted to the supreme court by the Reckers urged that the September 20 agreement was not enforceable for three reasons. First, the Reckers argued that the negotiations leading to the modification "reek[ed] so badly of overreaching and unfairness that [the modification] ought not" be enforced.[57] Second, they argued in the alternative that the second contract was merely an accord executory that, when breached by the Gustafsons, permitted the Reckers to seek specific performance of the original agreement.[58] Finally, the Reckers

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modified on September 20, to give the Reckers the right of first refusal to the land at whatever price the Gustafsons decided to ask for it in the event that they decided to sell, was determined by the court to be unenforceable for lack of writing under IOWA CODE § 561.13 (1977). 279 N.W.2d at 751-53.

50. 279 N.W.2d at 746.

51. *Id.* at 747.

52. *Id.*

53. The September 20 agreement also modified an earlier agreement on the sale of an additional five acres. *See* note 49 *supra.*

54. 279 N.W.2d at 748.

55. *Id.* at 747-48.

56. *Id.* at 748.

57. Brief for the Appellee at 45.

58. *Id.* at 49. An accord executory is a contract modification that precludes enforcement of the original contract only when the accord executory is performed. *See* L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 220 (3d. ed. 1972). The Reckers' brief did not employ the "accord executory" terminology, but their intent was to argue that the modification, if made at all, barred enforcement of the original contract only upon performance of the modification, *i.e.*, that the modification was an accord executory.

The Reckers were probably correct that the September 20 agreement was only an

argued that the second agreement was unenforceable for lack of consideration.[59]

The Iowa Supreme Court reversed the district court and held that the Reckers were entitled to specific performance of the original agreement of August 30, which contained a purchase price of $290,000 for the 155 acres at issue.[60] The court seized upon the lack of consideration in the second agreement of September 20 as the basis for refusing to enforce the second agreement—the Gustafsons supplied no new consideration for the Reckers' promise to pay an additional $10,000—and failed to consider both the accord executory and the overreaching arguments.[61]

In discussing the need for new consideration to support a contract modification, the decision in *Recker* emphasized the distinction between the modification of a contract and the rescission and replacement of a contract.[62] Only in the latter situation, the court noted, is new consideration not required.[63] The court correctly recognized that the rescission-replacement approach in previous Iowa cases had been extended to situations in which the approach did not properly apply—where the rescission and replacement contracts were formed instantaneously.[64] The court criticized these earlier cases for failing to distinguish between true rescission-replacement situations, in which no new consideration is required,[65] and modification situations like *Recker,* in which additional consideration is required.[66] Unfortunately, while hinging its opinion on the distinction between the two situations, the court is not very instructive on *how* to distinguish them.

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accord executory, which, when breached, permitted them to enforce the original contract. The presumption is generally entertained that a contract made to satisfy an undisputed preexisting duty discharges the preexisting duty only when the contract is executed, on the theory that a contracting party would not sacrifice rights for merely another promise to perform. *See* RESTATEMENT OF CONTRACTS § 419 (1932). The court found that an enforceable agreement was made on August 30 for the sale of 155 acres for $290,000, 279 N.W.2d at 759-60; it should be presumed that the Reckers promised to pay an additional $10,000 for the 155 acres on September 20 and to release the Gustafsons from the original contract, only in return for actual performance. The court did not address this issue, however.

59. Brief for the Appellee at 47-48.

60. 279 N.W.2d at 759-60.

61. The court stated:

> Because we believe the facts show no rescission of the August 30 contract but, instead, a modification of its terms, we find new consideration was necessary to support the September 20 agreement. Since consideration is neither shown nor claimed, the September 20 agreement to raise the purchase price on the 155 acres by $10,000 is not binding.

Id. at 759.

62. *Id.* at 755-59.

63. *Id.* at 755.

64. *Id.; see* O'Dell v. O'Dell, 238 Iowa 434, 454-58, 26 N.W.2d 401, 412-13 (1947); Williams v. Cassidy, 237 Iowa 1042, 1050-51, 23 N.W.2d 423, 428 (1946).

65. For true rescission-replacement situations, see Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 524 (Iowa 1974); Morse v. Slocum, 192 Iowa 1080, 1094, 186 N.W. 22, 28 (1922).

66. 279 N.W.2d at 759.

Only some hints on how to distinguish rescission-replacement situations from modification situations can be gleaned from the opinion. The court cited with approval the approach of the Iowa Supreme Court in the 1917 decision of *Awe v. Gadd.*[67] *Awe* also involved alteration of the terms of a contract for the sale of real estate that benefited the seller.[68] The decision in *Recker* quoted language in *Awe* that compared a "modification of a *previous* written contract" with a "complete setting aside . . . or a complete substitution" of a new contract.[69] In addition, the court in *Recker* cited other cases supporting the proposition that rescission-replacement situations require no new consideration.[70] In each of those cases a period of time separated the rescission of the first agreement and the formation of the second.[71] The passage of time suggests, perhaps, that the parties released each other from the first agreement, rethought their requirements, and decided to enter into a new contract. The court in *Recker* thus intimated that in order to find a rescission and replacement of a new agreement, instead of a modification, hard evidence must be presented that the intent of the parties was to set aside and release themselves from all obligations to each other and then to enter into a new contract later.[72] Only then does the new agreement result from a rescission and replacement and therefore require no new consideration.

III.

By emphasizing the distinction between rescission-replacement and modification, the approach of the Iowa Supreme Court in *Recker* restored vitality to the preexisting duty doctrine, fostered the continued usage of the mutual rescission theory and other legal fictions to avoid the preexisting duty doctrine, and generally failed to focus on the true issue: whether the Reckers voluntarily agreed to pay the additional $10,000 or were coerced into doing so. The court unfortunately failed to discern that by *requiring* new consideration in those cases that *do not* evidence an actual rescission and replacement, the court will impede freely negotiated modifications and will breathe new life into the largely discredited theories that were employed to avoid the preexisting duty doctrine.

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67. 179 Iowa 520, 161 N.W. 671 (1917).

68. *Id.* at 521-23, 161 N.W. at 672-73.

69. 279 N.W.2d at 755-56 (quoting Awe v. Gadd, 179 Iowa 520, 523-24, 161 N.W. 671, 673 (1917)) (emphasis added).

The court in *Recker* referred to the discussion in *Awe* as being apt and clear, *id.*, but it is difficult to agree. Little in the *Awe* opinion, apart from the portions quoted here in text, explains how to determine whether the parties agreed to a modification instead of a "complete setting aside" of the original agreement, *id.* at 756. Even the portions of the opinion that are quoted in text do little more than conclude that a modification needs new consideration to support it, while a rescission followed by a new contract does not.

70. *Id.* at 755-58.

71. *See* Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 524 (Iowa 1974); Morse v. Slocum, 192 Iowa 1080, 1094, 186 N.W. 22, 28 (1922).

72. *See* 279 N.W.2d at 754-59.

After *Recker,* parties apparently cannot alter their agreements by agreeing to additional performance by one of them unless they first release each other from the original agreement or change the performance of the promisee in some respect. Parties simply may be unwilling to give such releases or to make such changes, and they therefore may be thwarted in their attempts to modify their agreements.[73] Even if the parties are willing, such formalities are cumbersome and confusing, and the parties may inadvertently fail to satisfy them. At the time of modification, many contracting parties also will be unaware of the rule of *Recker* and will simply fail to follow the formalities. When the formalities of modification are not followed for any of the above reasons, Iowa courts will be forced to strike the modifications even if they were voluntarily made, or the courts will enforce the modifications under the guise that they were rescissions and replacements or that they contained additional consideration supplied by the promisee. Suppose that after *Recker* an Iowa court is faced with a contract modification that the overwhelming weight of evidence suggests was voluntarily made, but that does not evidence a rescission-replacement or additional consideration. What will the court do? I suggest the court will enforce the modification and will avoid the holding in *Recker* by finding either that a rescission-replacement had occurred, thereby propagating the "mutual rescission" theory and causing the same confusion that existed prior to *Recker,* or by finding additional (but sham) consideration.

The decision in *Recker* also paves the way for the enforcement of modifications, and for that matter rescissions and replacements, that are the result of duress and should not be enforced. After *Recker,* a party in a position to unfairly extract new concessions from the other contracting party will simply structure the modification so that in form it resembles a rescission-replacement, or the party will revert to the use of sham consideration.[74] The victim of duress, already powerless to avoid making the new promise, will also be powerless to attack its form. In addition, even true rescission-replacement situations could be pervaded by duress. A contracting party could be forced to rescind its contract and later be forced to enter into a new one as a result of duress. The rule of *Recker* requires no new consideration for the enforceability of the new contract[75] and nowhere suggests that in rescission-replacement situations the new agreement should be policed for evidence of duress.

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73. *See* note 19 *supra* and accompanying text.

74. Although many courts often announce that adequacy of consideration is not a proper subject of inquiry, a serious deficiency in consideration may "tip-off" the court to examine the agreement more closely. *See, e.g.,* Herbert v. Lankershim, 9 Cal. 2d 409, 471, 71 P.2d 220, 251 (1937). Perhaps on closer examination, the courts in some cases would avoid modifications on the ground of duress when it is clear that the consideration was "sham."

75. *See* 279 N.W.2d at 755.

The preceding discussion of the effect of *Recker* presupposes that it will be possible for courts to distinguish, at least in form, rescission-replacement from modification. The failure of *Recker* to provide sufficient guidance on this point[76] suggests that the distinction will cause needless confusion in the future. The failure of the approach both in Iowa and elsewhere should have made the court wary of resurrecting it. The *Recker* court simply failed to appreciate that the distinction between rescission-replacement and modification for purposes of determining the need for new consideration to support a new agreement is largely unworkable.[77]

The Iowa Supreme Court's resurrection of the preexisting duty doctrine in *Recker* is curious in light of some of the discussion in the case. The court highlights facts that suggest that the Reckers may have been the victims of overreaching. The relative youth and inexperience of the Reckers as compared with the maturity and experience of the Gustafsons in the real estate area, the representation of the Gustafsons by an attorney while the Reckers did not have an attorney, the ultimatum presented to the Reckers at the September 20 meeting that the Gustafsons were "willing to go to court to get out of the August 30 agreement" and that "litigation was expensive," and the assertion that the Gustafsons would perform for an additional $10,000 suggest that sufficient evidence existed to deny enforcement of the second agreement on overreaching grounds.[78] Nevertheless, apart from mentioning these facts, the court ignored them and decided the issue of enforceability of the September 20 agreement to pay an additional $10,000 solely on consideration grounds.[79] The court apparently was attempting to clarify its approach in previous cases and to restore vitality to the new consideration requirement in true modification cases, a requirement that inadvertently had been ignored or misinterpreted.[80] The court failed, however, to consider whether an approach superior to the preexisting duty doctrine was available for determining the enforceability of contract modifications.[81]

IV.

To clear up the confusion created by previous Iowa case law, to

76. *See* notes 67-72 *supra* and accompanying text.

77. *See* Schwartzreich v. Bauman-Basch, Inc., 105 Misc. 214, 220, 172 N.Y.S. 683, 686 (Sup. Ct. 1918) (Mullan, J., dissenting); Note, *Principles Underlying Modification of Contracts in Iowa*, 44 IOWA L. REV. 693, 697-98 (1959).

78. *See* 279 N.W.2d at 746-47; notes 106-14 *infra* and accompanying text.

79. *See* 279 N.W.2d at 758-59.

80. *See* notes 44-45 *supra* and accompanying text.

81. The Iowa Supreme Court has demonstrated a more progressive approach to contract law issues in a number of recent cases. *See, e.g.*, C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 173-81 (Iowa 1975), *construed in* R. HILLMAN, CONTRACT REMEDIES, EQUITY, AND RESTITUTION IN IOWA 93-104 (1979).

permit parties to modify their agreements freely when done so voluntarily, to police effectively against modifications produced by overreaching, and to provide adequate guidance for the future, the court in *Recker* should have focused on whether the Gustafsons coerced the Reckers into agreeing to the $10,000 additional consideration for the land. The court should have noted the repudiation of the preexisting duty rule in the Uniform Commercial Code,[82] the emphasis on fairness and equity of modifications in the *Restatement (Second) of Contracts,*[83] the criticism of the preexisting duty doctrine in legal literature,[84] and the case law development elsewhere in favor of a more direct approach to the issue of enforceability of modifications[85] and declared that the preexisting duty doctrine does not apply in Iowa to modification situations and that only voluntary modifications will be enforced.

How could the court have determined whether the modification in *Recker* was voluntarily made? The approach adopted by the Uniform Commercial Code,[86] which enforces only good faith modifications, does not provide sufficient guidance to courts. A study of the cases that have dealt with Code good faith in the context of contract modifications demonstrates that courts have not developed a clear definition of good faith,[87] and that some courts have ignored the issue of good faith in modifications[88] or have incorrectly enforced unfair modifications.[89]

The *Restatement* approach of section 89D(a), which enforces modifications that are "fair and equitable in view of circumstances not

82. *See* U.C.C. § 2-209(1); notes 34-38 *supra* and accompanying text. *See also* IOWA CODE § 553.2209(1) (1979).

83. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89D(a) (Tent. Draft Nos. 1-7, 1973). The court in *Recker* intimated that it might follow the *Restatement* approach in the future when unanticipated circumstances have led to the modification. The *Restatement* approach was meant to deny enforceability to those modifications that do not meet the test of § 89D(a)—that were not the result of unanticipated circumstances or were not "fair and equitable." *See* text accompanying notes 25-26 *supra.* Even if Iowa adopted § 89D(a), after *Recker* Iowa courts apparently would enforce unfair or inequitable modifications if additional consideration flowing to the promisor could be found. At least there is nothing in the opinion that suggests that such modifications would not be enforceable. Hence, parties would be encouraged to create sham additional consideration in those situations that would otherwise be suspect on overreaching grounds. Additionally, after *Recker* and the adoption of § 89D(a), the court would be required to deny enforcement to modifications that were voluntarily made, but were not the product of unanticipated circumstances. *See* note 93 *infra* and accompanying text.

84. *See, e.g.,* Patterson, *An Apology for Consideration,* 58 COLUM. L. REV. 929, 936-38 (1958); Timbie, *Modification of Written Contracts in California,* 23 HASTINGS L.J. 1549, 1581-83 (1972).

85. *See* notes 24-33 *supra* and accompanying text.

86. *See* notes 34-38 *supra* and accompanying text.

87. *See* Hillman, *Policing Contract Modification under the UCC: Good Faith and the Doctrine of Economic Duress,* 64 IOWA L. REV. 849, 856-62 (1979).

88. *See, e.g.,* Pirrone v. Monarch Wine Co., 497 F.2d 25, 26-28 (5th Cir. 1974); Cambern v. Hubbling, 307 Minn. 168, 171, 238 N.W.2d 622, 624 (1976); Mott Equity Elevator v. Svihovec, 236 N.W.2d 900, 907 (N.D. 1975).

89. *See* Ruble Forest Prods., Inc. v. Lancer Mobile Homes, Inc., 269 Or. 315, 322, 524 P.2d 1204, 1207 (1974).

anticipated by the parties when the contract was made,"[90] provides more guidance, but probably is not satisfactory either. The "unanticipated circumstances" requirement seems unclear. Must the circumstances that lead to the modification be unforeseeable at the time of contracting so that a case of commercial impracticability of the original contract could be established in favor of the party seeking to enforce the modification?[91] If the "unanticipated circumstances" standard is meant to include some foreseeable circumstances at the time of contracting, how much awareness of the possibility of the circumstances occurring is permitted?[92] Even if it were clear, the "unanticipated circumstances" requirement would preclude enforceability of some modifications that probably should be enforceable. For example, the requirement precludes enforceability of modifications that are voluntarily made but are not the result of "unanticipated circumstances." Assume the evidence had been clear in *Recker* that the Reckers voluntarily agreed to the price increase because they believed that they had struck a very good deal (assume the market value of the land was much greater than $300,000) and wanted to maintain good relations with the Gustafsons. Under the *Restatement,* such a modification would be unenforceable because of the absence of unanticipated circumstances leading to the modification.[93]

The principles of economic duress, long applied to the issue of free assent in contract formation, are more helpful in analyzing free assent in contract modification.[94] Economic duress requires a finding that a promisor was forced to make a promise as a result of wrongful conduct

90. RESTATEMENT (SECOND) OF CONTRACTS § 89D(a) (Tent. Drafts Nos. 1-7, 1973).

91. The doctrine of commercial impracticability excuses contract performance if performance has been made impracticable by an unforeseen event. *See, e.g.*, U.C.C. § 2-615 & Comment 1. A finding of commercial impracticability should negate any presumption that a promisee's refusal to perform the original contract constitutes duress, because the promisee has the right not to perform the original contract.

92. Comment b to § 89D(a) gives some guidance. The comment indicates that circumstances "not anticipated" could be "foreseen as a remote possibility." The comment suggests that events that would not trigger a finding of commercial impracticability of the original contract, because foreseen, could be grounds for enforceability of a modification if "foreseen as a remote possibility" and if the modification were "fair and equitable." RESTATEMENT (SECOND) OF CONTRACTS § 89D(a), Comment b (Tent. Draft Nos. 1-7, 1973). It is submitted that the "foreseen as a remote possibility" and "fair and equitable" standards will not be very helpful in practice. *See* discussion of *Angel v. Murray* at text accompanying notes 25-26 *supra*.

93. Indeed, the court stated that under the facts of *Recker, Restatement* § 89D(a) would not apply to render the modification enforceable because the modification did not result from unanticipated circumstances. 279 N.W.2d at 758-59. It is submitted that the decision to bar enforcement of the modification under the actual facts of *Recker* may have been correct, not because circumstances that led to the modification were anticipated, but because the modification probably resulted from overreaching.

94. For a detailed analysis of economic duress as it applies to contract modification, see Hillman, *Policing Contract Modification under the UCC: Good Faith and the Doctrine of Economic Duress,* 64 IOWA L. REV. 849, 880-99 (1979). *See also* Dalzell, *Duress By Economic Pressure* pt. 1, 20 N.C.L. REV. 237, 237-46 (1942); Dawson, *Economic Duress—An Essay in Perspective,* 45 MICH. L. REV. 253, 282-88 (1947).

precluding the exercise of free will.[95] The basic inquiries in economic duress cases include whether the promisor received an adequate return for the promise, whether the promisor had a viable choice or alternative to making the promise, and whether the means employed by the other party were wrongful.[96] Inadequacy of return consideration, while not alone conclusive, serves as a flag that the circumstances must be closely scrutinized by examining the choice and means questions. Economic duress requires a finding both that the promisor had no choice *and* that the means employed by the other party in achieving the promise were improper.[97]

Applying these rules in the context of contract modification necessitates first an examination of the amount the promisor is giving up or adding to its burdens under the modification and the amount, if anything, received by the promisor in return. In an earlier article I suggested that this initial inquiry—how costly the modification is to the promisor—should determine the burden of persuasion in the case.[98] If the modification causes a material net loss[99] to the promisor, the presumption should arise that the modification was a product of duress. If the modification causes only an immaterial net loss to the promisor, the presumption should arise that the modification is enforceable. These presumptions are based on the theory that people do not often voluntarily give up something for nothing, and the more value they give up, the more likely they were coerced into doing so.[100] The line could be drawn between those modifications that should be suspect—that involve material net losses—and those that should not, by employing the approach of the common-law material breach doctrine.[101] The inquiry

95. Austin Investment, Inc. v. Loral Corp., 29 N.Y.2d 124, 130, 272 N.E.2d 533, 535, 324 N.Y.S.2d 22, 25 (1971).

96. Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress,* 64 IOWA L. REV. 849, 882-83 (1979).

97. *Id.* at 883-84. For example, if the promisor (the party seeking to avoid the modification) had other reasonable market alternatives and still chose to make the promise, the promise was not a result of coercion even if the promisee (the party seeking to enforce the modification) were attempting to coerce the promisor. Similarly, if the promisee's conduct is proper, even if the promisor has no market alternatives, the decision to make the promise results from free market pressures and should not be unenforceable on the basis of coercion. *See id.*

98. *Id.* at 885-88.

99. The "net loss" terminology is used to make it clear that the presumption of economic duress might arise not only when the promisor receives no new consideration, but also when the promisor does receive some new consideration, but it is greatly outweighed by the additional consideration supplied or sacrificed by the promisor. Since enforceability of the modification will not depend on the presence or absence of the promisee's consideration—duress might arise when the promisor receives no new consideration *or* when the new consideration received by the promisor is greatly outweighed by the promisor's new performance—those modifications that contain new "sham" consideration by the promisee can be stricken as unenforceable. *See id.* at 886 n.173.

100. *Id.* at 885. Modifications resulting from overreaching will occur frequently. *See id.* at 886 n.174.

101. At common law, if the injured party does not receive substantially what was bargained for under the contract, the breach is material and the injured party is discharged from performance. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 265-266

in modification cases should be whether the promisor, after the modification, would receive substantially what was bargained for under the original contract. If not, the presumption should arise that the modification was a result of duress, and the party seeking to enforce the modification should have the burden of persuading the trier of fact that the modification was not a product of duress.

Because the presumption of unenforceability of a material net loss modification is based on the assumption that people do not often give up something of value for nothing in return, if the party seeking to enforce the modification demonstrates that it *was* reasonable under the circumstances for the promisor to sacrifice rights or to take on additional burdens, the presumption of duress would be rebutted. Evidence tending to show the reasonableness of such action would include the desire to maintain a profitable relationship with the promisee in the future or the ability to pass the losses on the contract to others.[102] If reasonableness of the modification were demonstrated, the presumption of duress would be rebutted, but the party seeking to enforce the modification would not automatically prevail. The burden of going forward with evidence would shift to the promisor who would be required to show the presence of duress.[103]

If the presumption of unenforceability of the modification arises, and the party seeking to enforce the modification cannot demonstrate its reasonableness, the party seeking to enforce the modification could still attempt to demonstrate that the promisor had other viable choices or that the means employed in achieving the modification were lawful and proper. If the presumption of enforceability of the modification arises because the modification was immaterial, the party claiming duress would have the burden of persuading the trier of fact that the modification was a product of duress. This could be accomplished by demonstrating that the promisor had no viable alternatives to agreeing to the modification *and* that the means employed in achieving the modification were improper.[104]

The district court in *Recker* did not apply the economic duress approach suggested here, and, accordingly, many of the facts necessary to determine whether the modification was a product of duress may not

(Tent. Draft No. 8, 1973); Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts,* 47 U. COLO. L. REV. 553, 562 (1976).

102. For a more detailed analysis of this type of pertinent evidence, see Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress,* 64 IOWA L. REV. 849, 889-90 (1979).

103. This could be accomplished by demonstrating the absence of choice and presence of improper means in achieving the modification. *See* note 104 *infra* and accompanying text.

104. A contracting party could be the victim of duress in situations where only an immaterial modification is made. *See* Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress,* 64 IOWA L. REV. 849, 890 (1979). A party may enter into an immaterial modification, for example, only because the costs of pursuing legal remedies outweigh the gains of such action. *Id.* at 889.

have been sufficiently developed. If the supreme court had moved to the economic duress approach, an appropriate decision of the court might have been to remand to the trial court for factual determinations of whether the modification was material, whether the Reckers had viable alternative choices, and whether the Gustafsons had used proper means in achieving the modification.[105] Nevertheless, even the limited facts supplied by the supreme court's opinion permit some thoughts on how the model would be applied to the facts of *Recker*.

The initial inquiry would concern the costliness of the modification to the Reckers. The Reckers agreed to pay $10,000 more than originally agreed on for the same 155 acres of land. In addition, the Reckers also agreed to give up the right to purchase the remaining five acres of the 160-acre farm for $30,000 plus the cost of improvements when the Gustafsons provided a notice of sale to the Reckers. Under the modification, the Reckers had the right of first refusal at whatever price the Gustafsons desired to set if the Gustafsons decided to sell the five acres.[106] In determining whether a presumption should arise that the modification was unenforceable, the issue would be whether the Reckers would receive in the modified contract substantially what was bargained for in the original contract. The facts suggest that the modification constituted a material net loss of rights to the Reckers. Even without considering the additional agreement with respect to the remaining five acres (which was unenforceable for lack of a writing[107]), the modification may have been material. Although $10,000 was only about three percent of the original asking price of $290,000, if the fair market value of the 155 acres was near or below $290,000, the additional $10,000 increase in the price of the land would seem to be a material change in

105. Whether a remand was appropriate would depend on how the record below was developed by the parties on the issue of duress under the law existing at the time of trial. Although duress was available to the Reckers as a defense to the enforceability of the September 20 modification and, in fact, was raised by the Reckers in their brief to the supreme court, Brief for Appellee at 42-50, the court itself pointed out that the law on enforceability of modifications was far from clear at the time of trial. 279 N.W.2d at 754-59. Accordingly, the parties probably should have had the opportunity on remand to develop the facts more fully on the question of whether the modification was pervaded by duress.

Interestingly, in a brief supporting a petition for rehearing, the Gustafsons argued that they did not fully present their arguments that consideration to support the modification existed because of their "reliance" on what seemed to be the settled State of Iowa law prior to the instant decision. Brief for Appellants on Petition for Rehearing at 1.

106. 279 N.W.2d at 746-47, 753. Whether, under the agreement of August 30, the Gustafsons could decline to sell the remaining five acres to the Reckers is unclear from the supreme court opinion. In their brief to the supreme court, however, the Reckers conceded that in the original agreement "there was no requirement that the Gustafsons ever offer the Reckers the chance to purchase the five-acre tract." Brief for Appellees at 7. At any rate, the court found that the agreement pertaining to the additional five acres and its modification were unenforceable under IOWA CODE § 561.13 (1977) for lack of a writing. 279 N.W.2d at 751-53; *see* note 49 *supra*.

107. *See* note 106 *supra*.

the terms of the Reckers' contract.[108] If the modification constituted a material net loss to the Reckers, the Gustafsons would be required to demonstrate the absence of duress by showing that the modification was reasonable, that the Reckers had reasonable alternative choices to agreeing to the modification, or that the Gustafsons had used proper means in achieving the modification.

It is unlikely that the Gustafsons could meet their burden of proof. First, the facts presented by the supreme court do not suggest that the modification was reasonable under the circumstances. For example, no evidence was presented that the parties enjoyed an ongoing commercial relationship that the Reckers would want to continue in the future or that the Reckers could pass the extra $10,000 cost on to others.[109] Second, on the question of the Reckers' alternative choices, the court noted that real estate is considered unique.[110] That assumption probably would preclude a finding that the Reckers had available land purchase alternatives, unless, perhaps, it could be shown that the Reckers desired to purchase the Gustafsons' land for speculative purposes only, in which case the purchase of other land might be a suitable alternative.[111] Finally, the Gustafsons could avoid a finding of duress by demonstrating that the means employed by them in achieving the modification were proper. The present state of the evidence probably does not support such a finding. It appears that through threats of costly litigation, their superior experience, and their legal representation, they were able to take unfair advantage of the Reckers.[112] However, if the Gustafsons could demonstrate that they were not merely attempting to extract con-

108. The determination of whether the modification was material is made for purposes of assigning the burden of proof only. Accordingly, even though the issue may be a close one, its determination will not be fatal to either the enforceability or lack of enforceability of the modification. The materiality inquiry is merely to ascertain whether it is likely that the Reckers voluntarily agreed to the demand for $10,000 additional consideration, or whether it is likely that they were coerced into agreeing to the demand.

109. *See* notes 102-03 *supra* and accompanying text.

110. 279 N.W.2d at 759 (quoting Moser v. Thorp Sales Corp., 256 N.W.2d 900, 907 (Iowa 1977)).

111. For a detailed analysis of the "choice" question in modification cases, see Hillman, *Policing Contract Modification under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 890-93 (1979) (concluding that availability of legal remedies should not preclude a finding that the promisor had no viable choices).

112. The court noted that "the price hike, apparently, was motivated by a desire for more money." 279 N.W.2d at 758. While such a motive is not bad in and of itself, when considered in conjunction with the other evidence that suggests that the Gustafsons sought to take advantage of the situation, the motive is suspect. *See* text accompanying note 78 *supra*.

It is not surprising that the briefs of the Reckers and Gustafsons differ on whether litigation was threatened by the Gustafsons. The Gustafsons claimed that they had never "threatened a lawsuit." Brief for Appellants at 41-42. The Reckers, on the other hand, claimed that the Gustafsons' attorney told them that "the Gustafsons were prepared to sue the Reckers to avoid the agreement and that a lawsuit could be avoided by the Reckers consenting to an increase in the purchase price of the 155 acres . . . ." Brief for Appellees at 44-45.

cessions unfairly from the Reckers at the September 20 meeting, but had some legitimate excuse for their inability to perform for $290,000, the presumption of duress would be rebutted and the modification would be enforceable.[113]

The court in *Recker* was aware of the facts that suggested duress.[114] It is not surprising, therefore, that the court reached a result in favor of the unenforceability of the modification. Regrettably, the court failed to decide the case expressly on the basis of duress, but instead clung to the preexisting duty doctrine. As a result, the law of contract modification in Iowa remains confusing and unpredictable.

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113. For a detailed discussion of the "means" question in modification cases, see Hillman, *Policing Contract Modification under the UCC: Good Faith and the Doctrine of Economic Duress,* 64 IOWA L. REV. 849, 894-98 (1979).

114. *See* note 78 *supra* and accompanying text.