Cornell Law Review

Volume 67
Issue 4 *April 1982*

Article 4

Contract Modification Under the Restatement (Second) of Contracts

Robert A. Hillman

CONTRACT MODIFICATION UNDER THE RESTATEMENT (SECOND) OF CONTRACTS

Robert A. Hillman†

The challenge of effective rulemaking is to formulate clear rules that are consistent with the goals and policy considerations of the subject area and that achieve the "proper" result when applied to specific factual settings.[1] Often, however, this challenge is not met. Rules may be unclear, ambiguous, or too broad or narrow to achieve the desired goals.[2]

The rules governing contract modification exemplify the problem of ineffective rule drafting. Neither the courts nor the drafters of the Uniform Commercial Code and the Restatement (Second) of Contracts have successfully promulgated coherent rules to further the policies of modification law.[3] This Essay will examine the *Restatement Second*'s approach to modification law.[4] I will highlight the problems of interpretation in the approach, and will demonstrate that, even if clarified, the *Restatement Second* may not successfully accomplish the goals of modification law.

Part I discusses the goals and policies of modification law and methods for implementing these goals. It also presents an overview of the various responses of courts and drafters to problems of modification enforceability. Part II evaluates the *Restatement Second*'s approach to the law of contract modification in light of the discussion in Part I.

---

† Professor of Law, University of Iowa College of Law. A.B. 1969, University of Rochester; J.D. 1972, Cornell Law School. I wish to thank David Vernon for reviewing an earlier draft of this Essay.

1 *See* Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140, 147-49 (1981). *See also* Hillman, *Construction of the Uniform Commercial Code: U.C.C. Section 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COM. L. REV. 655, 655-60 (1977).

2 *See* Gordley, *supra* note 1, at 147. *See also* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689-97 (1976).

3 The UCC approach to modification law is discussed in Hillman, *A Study of Uniform Commercial Code Methodology: Contract Modification Under Article 2*, 59 N.C.L. REV. 335 (1981).

4 This Essay will not discuss statute of frauds problems or § 89(b) of the *Restatement Second*, which provides that "[a] promise modifying a duty under a contract . . . is binding . . . to the extent provided by statute." RESTATEMENT (SECOND) OF CONTRACTS § 89(b) (1979); *see* U.C.C. § 2-209(1); Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979).

I

WHICH MODIFICATIONS SHOULD BE ENFORCED

A. *The Goals of Contract Modification Law*

The fundamental goal of contract modification law is to promote enforcement of freely-made alterations of existing contractual arrangements[5] and to deny enforcement of coerced modifications.[6] Enforcing voluntary modifications supports the policy of freedom of contract and facilitates economic growth. Contracting parties often desire to alter their agreements in response to changes in circumstances or of mind.[7] Because people are free to contract on whatever terms they choose, logically they should also be free to alter their contracts however they choose.[8] Rules that preclude adjustment of contract terms in spite of parties' desires to change their agreements could discourage some from entering into contractual relationships.[9] In view of the frequency of contract alteration, such laws also could impede rather than facilitate actual commercial practices.[10]

Although contracting parties should be free to alter their agreements voluntarily, they also must be able to plan for the future in reli-

---

5 Professor Dalzell has pointed out that contracting parties always have a choice—to enter the agreement or face the threatened consequences. Dalzell, *Duress by Economic Pressure I*, 20 N.C.L. REV. 237, 238-39 (1942). In fact, the more unpleasant the alternatives, the more genuine the consent to the agreement. *Id.* at 240. Thus, for Dalzell, the real test is whether consent would have been given but for the "unpleasant alternative." *Id.* at 238. Even Dalzell's formulation is inadequate, however, because some "unpleasant alternatives" are the result of "hard bargaining" and have society's sanction while others, which result from unfair or illegal conduct, do not. The task of the courts is to distinguish between them.

6 *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS § 89, Comment b (1979). All of the usual policing doctrines of contract law also should apply to modification agreements. For example, if fraud or excusable mistake produces a modification agreement, it should be unenforceable. Problems such as fraud and mistake, however, arise much less frequently than coercion, and the latter is the central problem of modification law. *See id.* § 73, Comment a: "Because of the likelihood that the promise was obtained by an express or implied threat to withhold performance of a legal duty, the promise does not have the presumptive social utility normally found in a bargain." *See also* Angel v. Murray, 113 R.I. 482, 490-95, 322 A.2d 630, 635-36 (1974).

7 *See, e.g.,* Ashland-Warren, Inc. v. Sanford, 497 F. Supp. 374, 378 (M.D. Ala. 1980); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1-5, at 42-49 (2d ed. 1980). *See also* Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854, 873-74 (1978).

8 *See, e.g.,* Angel v. Murray, 113 R.I. 482, 322 A.2d 630 (1974); Knapp, *Reliance in the Revised* Restatement: *The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 72 (1981).

9 One goal of contract law is to encourage parties to enter contracts because of the beneficial effects of specialization in our economy. *See* Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 61-62 (1936); Hartzler, *The Business and Economic Functions of the Law of Contract Damages*, 6 AM. BUS. L.J. 387, 388-92 (1968); Macneil, *supra* note 7, at 862.

10 Because parties often modify their agreements, the law should facilitate the practice, not impede it. *See also* U.C.C. § 1-102(2)(b).

ance on their contracts if they choose not to change them.[11] The contracting process should enable parties to make and rely on commitments based on their predictions of the future. A party who has made plans in reliance on contractual commitments, however, may become vulnerable to coercion.[12] Such planning may limit future choices and thus increase the likelihood that a party will be forced to agree to a request for modification if faced with the threat of nonperformance.[13]

Evaluation of the voluntariness of a contract modification, then, is crucial to determining whether or not it ought to be enforced. Literally hundreds of cases deciding the enforceability of contract modifications[14] confirm that this is the paramount, although rarely articulated, concern of courts facing the question.[15] The challenge of modification law is to prescribe workable rules that take into account this issue of voluntariness.

B. *Methodology for Enforcing Voluntary and Precluding Coerced Modifications*

For discussion consider the following problem. A contractor agrees to construct a drive-in theatre for a stated sum. The work requires clearing the site. The contractor agrees to provide all of the fill necessary for the job. After performance has begun, the contractor discovers that the amount of fill needed for the site is greater than was contemplated by the parties. The owner agrees to pay additional compensation for the extra fill.[16]

More information is needed to determine whether the agreement to provide extra compensation is voluntary. For example, if the amount of additional compensation involved is very small, most likely the owner was willing to pay it to get the job done without any additional difficulties.[17] Still, economically rational persons do not give up something for

---

11 Macneil, *supra* note 7, at 859-61, 887.

12 *E.g.*, J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 4-8, at 146-47 (2d ed. 1977); *id.* §§ 5-15, at 195; R. NORDSTROM, LAW OF SALES § 43, at 121 (1970).

13 For example, a franchisee may expend a large amount of resources creating a market for the franchisor's product. Such a franchisee may be forced to choose between losing its investment (or engaging in protracted ligitation to recover it), or agreeing to an unfavorable modification.

14 *See, e.g.*, cases collected in Annot., 85 A.L.R. 3d 259 (1978); Annot., 12 A.L.R. 2d 78 (1950); Annot., 138 A.L.R. 136 (1942); Annot., 25 A.L.R. 1450 (1923).

15 *See, e.g.*, Savage Arms Corp. v. United States, 266 U.S. 217, 221 (1924); Alaska Packers' Ass'n v. Domenico, 117 F. 99, 102 (9th Cir. 1902); Lingenfelder v. Wainwright Brewery Co., 103 Mo. 578, 593-95, 15 S.W. 844, 848 (1891); Angel v. Murray, 113 R.I. 482, 48-92, 322 A.2d 630, 635 (1975). *See also* Brody, *Performance of a Pre-existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation*, 52 DENV. L.J. 433, 446-50 (1975).

16 The hypothetical is loosely based on the facts of Brian Constr. & Dev. Co. v. Brighenti, 176 Conn. 162, 405 A.2d 72 (1978).

17 *See also* Ashland-Warren, Inc. v. Sanford, 497 F. Supp. 374, 378 (M.D. Ala. 1980); Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U.L. REV. 1018, 1048 (1981).

nothing,[18] and thus if a large amount of additional compensation was involved, the situation must be examined further. How much extra fill was required to complete the job? What was the relationship of the parties? Were the parties engaged in many other projects together? If a working relationship did exist, perhaps the owner agreed to the modification expecting a return on some future contract.[19]

Other circumstances also would be relevant to determine whether the modification was voluntary. What alternatives to the modification were open to the owner? Were other contractors available to perform the job at the original price? Evidence that the owner had reasonable alternatives suggests that the modification was voluntary. In addition, what was the contractor's situation? What was its negotiating posture? If the required additional fill legally would have entitled the contractor to cease performance, or if the contractor did not refuse to negotiate, the modification was probably agreed to voluntarily.[20]

All these factors—and more—are probative of the voluntariness of the modification. As Part II shows, the *Restatement Second*'s approach to enforcement of modifications deals directly with only a few of these issues, and at best only indirectly and vaguely with others. The rules of economic duress, on the other hand, encompass all of these issues that help to distinguish voluntary and coerced modifications.

Economic duress exists when a party's assent results from an "improper threat" that leaves the party with no reasonable alternative but to assent.[21] An inquiry to determine the presence of duress should include examination of the net change in wealth of the promisor-owner[22] as a result of the modification, the relationship of the parties, the choices or alternatives open to the promisor, and the means employed by the

---

18 *See* Hillman, *supra* note 4, at 885-86.

19 There are many reasons why a party might agree to a substantial increase in the gains to the other party without a concomitant immediate increase in the first party's wealth. For example, a promisor who is a principal supplier or customer might voluntarily agree to such a modification out of a desire to maintain the ongoing relationship. The promisor gambles that favorable contracts or revisions in the future will compensate for the unfavorable contract at hand. Hillman, *supra* note 4, at 889-90; Levie, *The Interpretation of Contracts in New York Under the Uniform Commercial Code*, 10 N.Y.L.F. 350, 357 (1964). As Professor Macneil points out:

> If there is anything plain in the real economic world it is that seldom do participants in contractual relations go for the jugular when trouble arises. . . . [A] huge residue of nonassertiveness remains explainable only by the willingness to sacrifice immediate exchange-gains to increase relational security.

Macneil, *supra* note 17, at 1048. *See also* notes 25 & 119-20 and accompanying text *infra*.

20 For further discussion of these factors, see Hillman, *supra* note 4, at 888-98.

21 *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1979).

22 "Promisor" in this Article refers to the party opposing enforcement of the modification agreement. The "promisee" is the party seeking enforcement of the modification agreement.

promisee in achieving the modification.[23] Because economically rational parties do not give up something for nothing or for very little in return, under a duress analysis the promisee should have the burden of proving that the modification was not the product of duress when the promisor suffers a material net loss in wealth as a result of the modification.[24] To meet that burden the promisee could show that it was reasonable for the promisor to give up substantial wealth in the particular circumstances. Evidence probative of the point would include the promisor's desire to maintain a profitable relationship in the future, the desire to avoid driving the promisee into bankruptcy, or the promisor's ability to pass on the costs to others.[25] The promisee also could demonstrate the availability to the promisor of alternative courses of action, or the absence of unlawful conduct on the promisee's part. The promisee might show the latter, for example, by demonstrating its right not to perform the original contract, its willingness to negotiate, or its inability to perform without additional compensation.[26]

Applying duress analysis to modification law no doubt will require courts to engage in difficult line-drawing between extortionate modifications and those that are merely the product of "hard" but fair bargaining.[27] Nevertheless, alternative approaches, including the *Restatement Second*'s, require line drawing as well, but are more obscure and fail to focus on all of the pertinent issues.

C. *Overview of Responses to the Problem of Contract Modification*

The common-law response to the problem of modification enforceability is the preexisting-duty doctrine. Under this doctrine, a promise

---

23 *See generally* Hillman, *supra* note 4; *see also* RESTATEMENT (SECOND) OF CONTRACTS §§ 175 & 176 and especially § 175, Comment b and § 176, Comments a & e (1979).

24 Hillman, *supra* note 4, at 883-88.

25 *Id.* at 888-90. For additional reasons see Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 533 (1981); Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 421-25 (1977).

26 Hillman, *supra* note 4, at 890-98. The initial point of inquiry in the hypothetical is the amount of additional compensation the owner has promised the contractor. If it is a material amount, the contractor must rebut the presumption of duress. The contractor might demonstrate, for example, that the owner enjoyed a continuing beneficial relationship with it, that the owner had reasonable alternatives to the modification (*e.g.*, other contractors available to continue the construction), or that the contractor's negotiating position was not unlawful (*e.g.*, the absence of threats to cease performance if the modification were not achieved, or the availability of a defense to performance based on commercial impracticability or some other doctrine).

Section 176 of the *Restatement Second* deals with the problem of threats that coerce parties to make promises. Regrettably, § 176(1)(d) defines improper threats of breach only as breaches of the duty of good faith and fair dealing, and Comment e merely refers to Comment 2 to U.C.C. § 2-209, which indicates that "extortion" is a violation of good faith. A more elaborate discussion of the types of conduct that would constitute improper threats would have been preferable. *See generally* Hillman, *supra* note 4, at 894-98.

27 *See* RESTATEMENT (SECOND) OF CONTRACTS § 176, Comment f (1979).

of additional consideration, or acceptance of partial performance in return for a performance that is already a contractual obligation of the promisee, is unenforceable for want of additional consideration.[28] In the hypothetical, the owner's promise to pay more would be unenforceable because the contractor already had promised to supply all of the fill needed for the project.

Although its application is clear, the preexisting-duty rule suffers from being both too broad and too narrow to achieve the goal of permitting voluntary modifications and excluding coerced ones. Parties may agree freely to an alteration of only one party's performance, but under the preexisting-duty rule, the modification agreement would be unenforceable for lack of consideration.[29] Conversely, a party coerced into agreeing to a modification of its performance may be coerced into accepting a token change in the return performance as well, thereby avoiding the additional consideration hurdle.[30] In the first case the preexisting-duty rule is overinclusive; in the latter, it is underinclusive. In each case, the preexisting-duty rule produces the wrong result. Predictably, courts have formulated "exceptions" to the rule in order to reach the right results.[31]

The "mutual rescission" theory, perhaps the most frequently invoked exception to the preexisting-duty rule, avoids the rule by suggesting that parties are free to rescind their earlier agreement, and thus eliminate the preexisting duty to perform. The new promise is then supported by the other party's promise, even though the latter is exactly the same as in the original "rescinded" contract.[32] Other theories "find" additional consideration in the promisee's agreement not to breach and pay damages,[33] or in that "unanticipated circumstances" make performance of the contract different from what was originally contemplated.[34] For the most part, courts reach for these theories when the modification

---

28 *See, e.g.,* Lingenfelder v. Wainwright Brewery Co., 103 Mo. 578, 592-95, 15 S.W. 844, 847-48 (1890); Vanderbilt v. Schreyer, 91 N.Y. 392, 400-02 (1883); Queen City Constr. Co. v. City of Seattle, 3 Wash. 2d 6, 17-18, 99 P.2d 407, 411-12 (1940); RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979). *See also* G. GILMORE, THE DEATH OF CONTRACT 22-28 (1974); Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 936 (1958).

29 *E.g.,* Ruffin v. Mercury Record Prods., 513 F.2d 222 (6th Cir. 1975); Shanks v. Fisher, 126 Ind. App. 402, 130 N.E.2d 231 (1956); Ayers v. Chicago, Rock Island & Pac. R.R., 52 Iowa 478, 488, 3 N.W. 522, *aff'd on rehearing*, 52 Iowa 491, 3 N.W. 522 (1879); Creamery Package Mfg. Co. v. Russell, 84 Vt. 80, 78 A. 718 (1911).

30 *See, e.g.,* J. MURRAY, CONTRACTS § 86, at 176 (2d ed. 1974).

31 *See generally* Brody, *supra* note 15.

32 *See, e.g.,* Watkins & Son v. Carrig, 91 N.H. 459, 460-63, 21 A.2d 591, 593-94 (1941); Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 203-05, 131 N.E. 887-89 (1921); Evans v. Or. & W.R. Co., 58 Wash. 429, 431-33, 108 P. 1095, 1095-96 (1910).

33 *E.g.,* Swartz v. Lieberman, 323 Mass. 109, 80 N.E.2d 5 (1948); Munroe v. Perkins, 26 Mass. 298 (1830). This approach makes it difficult for the promisor to claim duress because it legitimizes the promisee's refusal to perform.

34 Linz v. Schuck, 106 Md. 220, 67 A. 286 (1907); King v. Duluth, M. & N. Ry. Co., 61 Minn. 482, 63 N.W. 1105 (1895). *See also* Annot., 85 A.L.R.3d 259 (1978).

agreement appears voluntary, but not when the modification seems coerced.

Regrettably, the reforms of both the Uniform Commercial Code and the Restatement (Second) of Contracts have been off the mark. UCC section 2-209(1) repudiates the preexisting-duty rule, but offers no guidance on which modifications should be enforced. Comment 2 to section 2-209 requires that contract modifications be policed according to an "overriding principle of good faith."[35] Nevertheless, because of the "cloudiness"[36] of the good-faith doctrine in the context of contract modification, the Code's approach has not been very successful in supporting voluntary modifications or in precluding coerced ones.[37]

The *Restatement Second*'s approach to the problem of enforcement of modifications may be even less successful. It retains the preexisting-duty rule in section 73 on the theory that modifications without additional consideration by the promisee are likely to be the product of "an express or implied threat to withhold performance of a legal duty."[38] Under section 73, then, a presumption of coercion arises in the absence of additional consideration from the promisee. To avoid the problem of sham consideration rendering a modification enforceable, section 73 also requires that additional consideration reflect "more than a pretense of bargain."[39]

Section 73 and section 74[40] also provide that forbearing from asserting a defense constitutes consideration if the defense is doubtful because of factual or legal uncertainty, or if the forbearing party honestly believes it to be valid.[41] Thus, modifications are enforceable if they result from circumstances that render uncertain a promisee's duty to perform

---

35 U.C.C. § 2-209, Comment 2.

36 This term is borrowed from Gordley, *supra* note 1, at 147-49.

37 *See generally* Hillman, *supra* note 4.

38 RESTATEMENT (SECOND) OF CONTRACTS § 73, Comment a (1979). *See also id.* § 89, Comment b. Section 73 provides:

> Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.

39 *Id.* § 73.

40 Section 74 provides:

> (1) Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless (a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or (b) the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid.
>
> (2) The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.

Id. § 74.

41 *Id.*

the original contract or that cause the promisee honestly to believe that performance of the original contract is not required.[42]

Section 89 of the *Restatement Second* offers a vehicle for rebutting section 73's presumption that in the absence of additional consideration supplied by the promisee, a modification is the result of coercion. Section 89 provides that "(a) promise modifying a duty . . . is binding . . . if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made . . . ."[43] Comment b suggests that application of section 89 will avoid incorrect adherence to the preexisting-duty rule in cases in which there was no unfair pressure.[44] Comment b also points out that the absence of coercion is not alone sufficient to render a modification enforceable—the "fair and equitable" language "goes beyond absence of coercion and requires an objectively demonstrable reason for seeking a modification."[45] The "objectively demonstrable reason" language of the Comment and the status of section 89 as an exception to the preexisting-duty rule suggest that in the absence of consideration, the burden of proving that a modification is enforceable is on the promisee,[46] who must demonstrate the existence of unanticipated circumstances and the objective fairness of the modification in light of those circumstances.

The success of the *Restatement Second*'s approach to contract-modification issues is problematical for many reasons. First, the drafters were relatively unsuccessful in formulating precise rules. For example, courts will face major obstacles in defining and applying the "unanticipated circumstances" and "fair and equitable" language of section 89,[47] and the "pretense of bargain" language of section 73.[48] In addition, the relationship of section 89 to sections 73 and 74 is unclear and confusing.[49]

Second, even if clarified the approach could produce the wrong result in many cases. Because sections 73 and 74 provide that forbearance from asserting an honestly held defense constitutes consideration, presumably courts could enforce modifications resulting from a negligent or unreasonable belief in the validity of a defense to performance, even when the promisor had no choice but to agree to the modification.[50] Furthermore, the presumption of coercion in modified contracts lacking

---

42 *See* notes 59-72 and accompanying text *infra*.

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

44 *Id.*, Comment b. Most of the criticism of the preexisting-duty rule arises from its application to situations devoid of coercion. *See, e.g.,* Shanks v. Fisher, 126 Ind. App. 402, 130 N.E.2d 231 (1956) (court refuses to enforce owner's oral promise to pay extra construction costs because evidence insufficient to overcome preexisting-duty doctrine).

45 RESTATEMENT (SECOND) OF CONTRACTS § 89, Comment b (1979).

46 *See, e.g.,* Knapp, *supra* note 8, at 73-74.

47 *See* notes 75-115 and accompanying text *infra*.

48 *See* notes 57-58 and accompanying text *infra*.

49 *See* notes 75-83 and accompanying text *infra*.

50 *See* notes 67-68 and accompanying text *infra*.

additional consideration is suspect in view of the realities of the modern business world in which parties frequently engage in unilateral modification of agreements.[51] Thus, erecting barriers to the enforceability of modifications based on the technical requirement of additional consideration is ill-advised.[52] These same realities suggest that the presence or absence of "unanticipated circumstances" is also not always a good indication of the voluntariness of modifications.[53] As a result, the *Restatement Second*'s approach to contract modification inevitably will lead to the enforcement of some coerced modifications and the denial of some voluntary ones.

II
THE *RESTATEMENT SECOND*'S APPROACH TO CONTRACT MODIFICATION—A DETAILED ANALYSIS

The *Restatement Second* approach to policing modifications is confusing because the rules are only partially responsive to, and in some ways run counter to, the goal of contract modification law: enforcing voluntary modifications and precluding coerced ones, in order to foster the policies of freedom to adapt to change and of stability to facilitate planning.

A. *Sections 73 and 74*

1. *Section 73: The Preexisting Duty Rule of the* Restatement Second

In the hypothetical involving construction of the drive-in theatre, the modification clearly would be enforceable if the contractor promised to do additional work not provided for in the original contract because the promise of additional compensation would be supported by additional consideration. If the contractor did not perform additional work, the modification would be presumptively invalid under the preexisting-duty rule of section 73. Section 73 provides: "Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of

---

51 *See* notes 118-22 and accompanying text *infra*.

52 Besides the need to police against coercion, other rationales for requiring consideration to support modifications are: that consideration demonstrates the serious intent of the parties; that it demonstrates that the promise it supports is worthy of society's concern, *see* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 814-24 (1941); and that it offers some certainty for determining which modifications the courts should enforce. Patterson, *supra* note 28, at 936. In modification situations, however, the great majority of cases dealing with enforceability of the modifications are not concerned with promises made without sufficient deliberation. Thus, it seems spurious to bar modifications because the lack of additional consideration might indicate that the parties have acted foolishly or in jest. In addition, the frequency of unilateral modification suggests that enforcing voluntary modifications is a worthy societal concern. Finally, numerous exceptions have eroded any certainty that the preexisting-duty rule might have offered. *See* notes 31-34 and accompanying text *supra*. *See also* Patterson, *supra* note 28, at 937.

53 *See* notes 116-23 and accompanying text *infra*.

honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain."[54] The purpose of including the preexisting-duty doctrine in the *Restatement Second*, according to the drafters, was that modifications without additional consideration are presumptively the product of coercion.[55] Thus consideration, according to the *Restatement Second*, ensures the voluntariness of the modification. As the previous discussion of economic duress in the context of contract modification demonstrates, however, the mere presence or absence of additional consideration is not a reliable indicator of coercion.[56] Other equally significant factors include the net amount given up by the promisor, the nature of the relationship of the parties, the alternatives available to the promisor, and the means employed by the promisee in achieving the modification.

The drafters did recognize that additional consideration would not invariably signify voluntary modification and therefore required in section 73 that the additional consideration consist of "more than a pretense of a bargain."[57] Determining whether an exchange is merely "a pretense of bargain" designed to circumvent the preexisting-duty bar, however, will require nothing more than examining the elements of duress already described. Suppose, for example, the contractor in our hypothetical agreed to work one additional day. Whether that work amounts to a mere "pretcnse of bargain" will depend on the presence or absence of evidence that the contractor extorted thc modification and included the additional day's work merely to avoid the preexisting-duty rule. Evidence such as the value of the day's work, the amount of additional compensation to the contractor (which together determine the net change in wealth of the owner-promisor as a result of the modification), the alternatives available to the owner, and the bargaining approach of the contractor will all be relevant in determining whether there was more than a "pretense of bargain." Assuming the presence of additional consideration (at least in form), the section 73 preexisting-duty rule accomplishes little because ultimatcly the factors relating to duress should guide the determination of whether there was "more than a pretense of bargain," and hence of whether the modification is enforceable.[58]

---

54 RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979).

55 *Id.*, Comment a. *See also id.* § 278, Comment c (need for consideration to support acceptance of substituted performance); *id.* § 279, Comment b (need for consideration to support substituted contraet); *id.* § 74(2) (written surrender of defense is consideration if bargained for).

56 *See* notes 16-27 and accompanying text *supra*. *See also* notes 116-23 *infra*.

57 RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979). Modifications containing additional consideration are also subject to the constraints of §§ 175 and 176 of the *Restatement Second*. *See* notes 109 & 111 and accompanying text *infra*.

58 An additional shortcoming of § 73 is that voluntary modifications in the absence of additional consideration are barred from enforcement. Section 89(a), which is an exception

2. *Sections 73 and 74: Forbearance to Assert A Defense As Consideration*

Even if our hypothetical contractor did not promise to perform additional work, the modification could still be enforceable under section 73 if the contractor's performance were excused by operation of law,[59] or under sections 73 and 74 if a defense to performance were doubtful or honestly held. Section 73 infers that performance of a duty that is "doubtful" or "the subject of honest dispute" is consideration. Section 74(1), which elaborates on the approach of section 73,[60] states that "[f]orbearance to assert or the surrender of a . . . defense" constitutes consideration if the defense was "doubtful because of uncertainty as to the facts or the law," or the "forebearing or surrendering party believes that the . . . defense may be fairly determined to be valid."[61] The requirement of "doubtfulness" of the defense suggests an objective test: Was it reasonable for the promisee to believe in the defense? The requirement that the forebearing party believe that the defense may be valid suggests a subjective test of the honesty or good faith of that party.[62] Thus, if a party reasonably *or* honestly (in good faith)[63] believes that an event or condition would entitle him to cease performance, and then is offered additional consideration for continued performance, that offer of additional consideration is supported by the forbearance to assert the legal defense.

Surrender of a "doubtful" defense may prove in application too broad a ground for assessing enforceability of a modification. Although their boundaries have never been clear, the excuse doctrines—mistake, impossibility, impracticability, and frustration—are expanding in scope.[64] The proliferation of litigation on these issues[65] suggests that

---

to § 73, leads the court to enforce such modifications only upon a finding of "unanticipated circumstances." *See* notes 73-123 and accompanying text *infra*.

59 If, for example, the contractor were excused from performance because of mistake, commercial impracticability, or frustration, its duty to perform would be both doubtful and subject to honest dispute. *See* notes 60-72 *supra*.

60 RESTATEMENT (SECOND) OF CONTRACTS § 74, Comment a (1979).

61 *Id.* § 74(1).

62 The test of the honesty of a party is a subjective one. *See, e.g.,* Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 812 (1958).

63 *See* RESTATEMENT (SECOND) OF CONTRACTS § 74, Comment b (1979).

64 *See generally* RESTATEMENT (SECOND) OF CONTRACTS ch. 11, Intro. (Tent. Drafts Nos. 9, 1974, and 10, 1975); G. GILMORE, *supra* note 28, at 80-82; Brody, *supra* note 15, at 465; Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 83-88 (1977); Speziale, *The Turn of the Twentieth Century as the Dawn of Contract "Interpretation": Reflections in Theories of Impossibility*, 17 DUQ. L. REV. 555 (1979); Note, *U.C.C. § 2-615: Excusing the Impracticable*, 60 B.U.L. REV. 575 (1980); *see also* Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U.L. REV. 739 (1981).

65 *E.g.,* Shear v. National Rifle Ass'n of America, 606 F.2d 1251 (D.C. Cir. 1979) (mistake); Leasco Corp. v. Taussig, 473 F.2d 777 (2d Cir. 1972) (mistake); Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (impracticability); Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980) (impracticability, mistake, impos-

when the contract fails to provide for events that make it worthwhile for the promisee to seek an alteration of the contract, at least a "doubtful" defense to performance usually would be available.[66] The broad applicability of the "doubtfulness" standard may prompt promisees to employ the approach unfairly to gain advantage in negotiations. For example, our contractor may have a "doubtful" defense to performance because of a general shortage of fill, but actually may have little difficulty procuring the necessary fill because of a favorable long-term supply contract with a third party who is willing to perform. Under sections 73 and 74, the contractor possibly could assert the "doubtful" defense approach to extract concessions from the owner.

The subjective test of an honest belief in a defense also appears too broad and may permit the enforcement of unfair modifications. Suppose that the hypothetical contractor adopted a take-it-or-leave-it negotiating posture based on its negligent or foolish belief in a defense, and that the owner acceded to the proposal because there were no available alternatives. That modification would be enforceable because one who is negligent can still be honest.[67] The unfairness of enforcing the modification suggests that at least in the context of modification, the honesty approach of sections 73 and 74 is too broad.[68] In addition, as noted above, section 89(a) permits the enforcement of modifications that result from "unanticipated circumstances."[69] If the subjective test of the eval-

---

sibility, and frustration); Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978) (impracticability); Jennie-O Foods, Inc. v. United States, 580 F.2d 400 (Ct. Cl. 1978) (impracticability); Mohave County v. Mohave-Kingman Estates, 120 Ariz. 417, 586 P.2d 978 (1978) (frustration); Maracovich Land Corp. v. J.J. Newberry Co., —— Ind. App. ——, 413 N.E.2d 935 (1980) (impossibility); Nora Springs Coop Co. v. Brandau, 247 N.W.2d 744 (Iowa 1976) (impossibility). *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 151, 152 (mistake), 261, 266 (impracticability) & 265 (frustration) (1979).

66 All of the doctrines excuse a party from performing when failure of a basic assumption of the parties causes a material imbalance in the values of the exchange. *See* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 70 (W.D. Pa. 1980); RESTATEMENT (SECOND) OF CONTRACTS, Introductory Notes §§ 286 & 294 (Tent. Drafts Nos. 9, 1974, and 10, 1975). In most instances, it will be difficult to determine whether there has been such a failure, thus making a claim of excuse at least "doubtful." As one court stated, "matters involving impossibility or impracticability of performance of contract are concededly vexing and difficult. One is even urged on the allocation of such risks to pray for the 'wisdom of Solomon.'" American Trading & Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939, 944 (2d Cir. 1972) (citing 6 A. CORBIN, CONTRACTS § 1333 (2d ed. 1962)). *See also* Posner & Rosenfield, *supra* note 64, at 100 ("The foreseeability test . . . is nonoperational, for it fails to indicate which contracting party is the superior bearer of the foreseeable risk.").

67 *See* RESTATEMENT (SECOND) OF CONTRACTS § 74, Illustration 1 (1979). *See also* Hillman, *supra* note 4, at 858-59.

68 Comment b to § 74 does indicate, however, that if the invalidity of a defense were obvious, then that alone "may indicate that it was known." Thus, the more irrational the promisee's belief, the more likely that a court would find that the promisee knew it to be invalid.

69 *See* notes 43-46 and accompanying text *supra*. *See also* notes 73-123 and accompanying text *infra*.

uation of a defense in sections 73 and 74 is applied, little is left of the "unanticipated circumstances" ground for enforceability of modifications under section 89(a), because virtually any event may give rise to a subjective belief in a defense to performance and therefore render enforceable the modification under sections 73 and 74.[70] In the hypothetical, for example, the test of whether the amount of fill needed was an "unanticipated circumstance" would be irrelevant if the contractor honestly believed that neither party anticipated the amount of fill needed and, thus, that performance of the original contract was excused.

Like the "pretense of bargain" language of section 73, the "honesty" test of sections 73 and 74 which, according to Comment b to section 74, requires evaluation of the good faith of the promisee, presumably will broaden the enforceability inquiry to include all of the issues of duress.[71] For example, under the "honesty" approach, the primary issue would be whether the contractor in the hypothetical acted in good faith because it honestly believed in the availability of a defense to performance, or simply was attempting to extort in bad faith a favorable modification. In light of the need to investigate the issues of duress under sections 73 and 74, perhaps the drafters should have treated modification enforceability more directly by invoking the rules of economic duress specifically.[72]

B. *Section 89(a)*

Under section 89(a), a modification agreement without additional consideration from the promisee is enforceable if it is "fair and equitable in view of circumstances not anticipated by the parties when the contract was made."[73] Application of section 89(a) rebuts the presumption of coercion arising under section 73. The theory of section 89(a) is that if a party performs additional duties as a result of an "unanticipated" condition or event, then that party is entitled to additional compensation for the performance. Therefore, a promise of additional compensation under such circumstances is presumptively devoid of mistake or unfair pressure.[74] Unfortunately, section 89(a) is both unclear and inadequate to produce results that support the policies and goals of modification law.

---

70 *See also* note 78 *infra*.

71 If that is the case, surely it is preferable to frame the modification issue as one of the presence or absence of duress, instead of making vague reference to the "honesty" of the promisee.

72 *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 175 & 176 (1979). *See also* notes 22-27 and accompanying text *supra*. The drafters could have reserved the present § 74 for settlement of claims and defenses that do not involve defenses to executory performances based on legal excuse doctrines. *See id.* § 74, Illustrations 2-5, 7-9.

73 *Id.* § 89(a).

74 *Id.* § 89, Comment b.

1. *The "Cloudiness" of the "Unanticipated Circumstances" Language*

a. *The Relationship of Sections 73 and 74 to Section 89(a).* The "unanticipated circumstances" requirement of section 89(a) seems unclear. One possibility is that the section means to include only those circumstances rendering the original contract unenforceable because of a legal excuse. If the original contract were unenforceable, then the promisee would have the *right* not to perform. This would eliminate the possibility of unfair pressure based on threats of nonperformance.[75] Nevertheless, Comment b to section 89(a) suggests that "unanticipated circumstances" include some situations in which the circumstances are not so unforeseeable that one of the excuse doctrines would apply:[76] "a frustrating event may be unanticipated . . . if it was not adequately covered, even though it was foreseen as a remote possibility."[77]

One way of defining "unanticipated circumstances" in situations in which no excuse doctrine applies is by reference to the approach in sections 73 and 74.[78] "Unanticipated circumstances" might mean nothing more than circumstances that create a reasonable or honest belief that the promisee can cease performance. As already noted, the difficulty with this approach to section 89(a) is that it eliminates the need to inquire about "unanticipated circumstances." Because virtually any circumstances can lead to a negligent or foolish, yet honest, belief in the right to cease performance,[79] the need to define "unanticipated circumstances" never arises. Instead, questions of modification enforceability under sections 73 and 74 turn on a determination of whether the promisee honestly believes in the legitimacy of a particular defense to performance.[80]

---

75 This was the position of the first Restatement of Contracts. *See* RESTATEMENT OF CONTRACTS § 76, Illustration 8; *id.*, Comment c (1932); Whittier, *The Restatement of Contracts and Consideration*, 18 CALIF. L. REV. 611, 620 (1930).

76 Technically, the events at issue need not be "unforeseeable" for the mistake doctrine to apply; rather, the parties must not have "contemplated" the existing circumstances at the time of contracting. *But see* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 70-71 (W.D. Pa. 1980) (repudiating the distinction between mistake and other excuse doctrines based on the time when the circumstances complained of arose).

77 RESTATEMENT (SECOND) OF CONTRACTS § 89, Comment b (1979). *See also* Muris, *supra* note 25, at 538 n.37; Annot., 85 A.L.R.3d 259 (1978). Some decisions on impracticability, however, require not unforeseeability but only that the circumstances were unanticipated. *See, e.g.,* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966) (dictum).

78 Brody, *supra* note 15, at 465. Under such an approach, those cases meeting the "unanticipated circumstances" test would include many in which events were insufficient to create a legal excuse from performance but were sufficient to create an honest or reasonable belief that performance was excused. *E.g.,* Lange v. United States, 120 F.2d 886, 890 (4th Cir. 1941); United Steel Co. v. Casey, 262 F. 889, 893-94 (6th Cir. 1920); Michaud v. MacGregor, 61 Minn. 198, 201-02, 63 N.W. 479, 480-81 (1895).

79 *See* notes 69-70 and accompanying text *supra*.

80 This will, in turn, raise the issues of duress. *See* notes 71-72 and accompanying text *supra*.

The drafters presumably intended section 89(a) to have an independent function. Furthermore, because modifications enforceable under section 89(a) must be "fair and equitable"[81] and because Comment b to section 89 suggests that section 89(a) "requires an objectively demonstrable reason for seeking a modification,"[82] an honest belief that the promisee could cease performance is not sufficient under section 89(a). Suppose, however, that our contractor honestly believes that the additional amount of fill needed does not make out a defense of legal excuse, and the defense is not even doubtful. The parties nevertheless did not anticipate the need for the extra fill. A resulting modification could be enforceable under section 89(a) although it would not be enforceable under sections 73 and 74. Of course, we still face the problem of defining "unanticipated circumstances," but at least we have divined an independent purpose for section 89(a).[83]

b. *The Meaning of "Unanticipated Circumstances."* How are the courts to determine whether circumstances are "unanticipated" in situations in which sections 73 and 74 would not apply? Perhaps such "unanticipated circumstances" are simply those that are insufficient to raise a doubtful or honest defense to performance—thus, the risk of the circumstances rests on the party seeking to modify the contract—but which the parties did not contemplate occurring.[84] Such an approach suffers from the same infirmities that have caused confusion in applying the excuse doctrines—the sometimes insurmountable task of ascertaining the intent of the parties at the time of contract formation.[85] For example, no doubt the parties in our hypothetical contemplated some approximate amount of fill that would be required. Nonetheless, because the contractor agreed to provide all of the fill necessary to complete the job, the parties may not have expressly discussed that amount. Absent evidence of specific bargaining on the point, it will be difficult for a court to determine whether the amount of fill actually required was contemplated by the parties. To compound the problem further, the "unanticipated

---

81 RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1979).

82 *Id.*, Comment b.

83 The broadening of the availability of excuse doctrines suggests that such § 89(a) cases will be very few in number. *See* note 64 and accompanying text *supra*.

84 Parties may fail to bargain concerning foreseeable risks for a number of reasons. For example, they may fail to focus on them because of time constraints or because they see such risks as unlikely.

Professor Muris believes that the parties' "need to have allocated the risk for the circumstances" during negotiations before the circumstances would be anticipated. Muris, *supra* note 25, at 538 n.37. This formulation seems too broad—in effect it would require contracting parties expressly to allocate all foreseeable risks or be faced with the claimed right to modify on the basis of unanticipated circumstances. The "fair and equitable" requirement could close the floodgates, but that language simply invokes the rules of economic duress. *See* notes 107-11 and accompanying text *infra*.

85 *See* notes 64-66 and accompanying text *supra*. *See also* 3 A. CORBIN, CONTRACTS § 598 (2d ed. 1960); Farnsworth, *Omission in Contracts*, 68 COLUM. L. REV. 860 (1968).

circumstances" test requires not only an evaluation of what was not anticipated, but according to Comment b, also of what was foreseen only "as a remote possibility."[86] The "contemplation of the parties" approach to "unanticipated circumstances" also suffers from its breadth. It will require parties to provide for all eventualities in their contracts in order to avoid the claimed right to modify on the basis of unanticipated eventualities.[87]

The "contemplation of the parties" approach thus has shortcomings; yet in the absence of concluding that "unanticipated circumstances" includes all events that were not contemplated by the parties, the term seems bereft of meaning in the context of section 89(a). Neither the Illustrations to section 89(a) nor the cases that have dealt with the "unanticipated circumstances" exception are very helpful in ascribing meaning to the language. Illustrations 1 through 3 to section 89(a) are inapposite.[88] In Illustration 4, a manufacturer and buyer agree to a price increase because a threatened strike has elevated the cost of materials. The buyer takes some of the goods and pays the increased price "without protest." According to the *Restatement Second*, the modification is enforceable.[89] The modification in Illustration 5, in which a manufacturer "notifies" its buyer of a price increase prompted by increased metal costs, is not enforceable, according to the *Restatement Second*.[90] Because both price increases could be either anticipated or unanticipated, the Illustrations are not helpful in sorting out anticipated from unanticipated circumstances.

Although the strike in Illustration 4 was a specific event explaining the increased costs to the manufacturer, while no such specific event is mentioned as causing the increase in metal costs in Illustration 5, the availability of an explanation for increased costs should not of itself make a modification enforceable.[91] Nothing in either Illustration affirmatively ties the occurrence of the strike in Illustration 4 to a voluntary modification, or the absence of an explanation for the increased metal costs in Illustration 5 to coercion. Coercion is suggested in Illustration 5 and not in Illustration 4 only because the drafters couched the hypotheticals in those terms. For example, in Illustration 4, the manufacturer and supplier "agree" to the price increase and the supplier takes

---

86 RESTATEMENT (SECOND) OF CONTRACTS § 89, Comment b (1979).

87 The "fair and equitable" language of § 89(a) might close the floodgates. *See* note 84 *supra*.

88 Illustration 1, involving an excavator who encounters solid rock and requires nine times the original compensation, is a case of impracticability and therefore does not help to define unanticipated circumstances that are insufficient to excuse performance. Illustration 2 involves mistake and therefore is not helpful for the same reason. Illustration 3 is discussed in text accompanying notes 116-17 *infra*.

89 RESTATEMENT (SECOND) OF CONTRACTS § 89, Illustration 4 (1979).

90 *Id.*, Illustration 5.

91 Nor should the absence of an explanation alone make a modification unenforceable.

and pays for the goods "without protest." In Illustration 5, however, the manufacturer unilaterally "notifies" the buyer of the price increase, and the buyer, who has made commitments in reliance on the contract, cannot get the goods elsewhere in time and "protests." That the Illustrations are framed in these terms simply suggests that section 89(a) should have focused on the issue of coercion instead of on whether "unanticipated circumstances" have arisen.[92]

An analysis of common-law cases that discuss the meaning of "unanticipated circumstances" confirms the inutility of attempting to sort "unanticipated" from "anticipated" events. Even in reviewing similar events in similar settings, courts often have reached different conclusions about whether circumstances were anticipated.[93] Many of the cases involving "unanticipated circumstances" discuss numerous other exceptions to the preexisting-duty doctrine, and it is often difficult to discern on what ground the court based its decision.[94] Not surprisingly, modifications generally are enforced when the factual situations would support a finding that the modification was voluntary.[95]

The common-law development of the "unanticipated circumstances" approach typically involved construction contracts in which the contractor encountered difficulties in performance. One representative case is *King v. Duluth, Missabe & Northern Railway*.[96] There the contractor, encountering frozen ground during efforts to construct a roadbed for a railroad, demanded and received a promise of additional compensation. The court stated that when a party refuses to perform because of "unforeseen and substantial difficulties . . . which were not known or anticipated by the parties . . . and which cast upon [the contractor] an additional burden not contemplated," a promise to pay more is presumptively voluntary.[97]

The "unforeseen and substantial difficulties" and the "additional

---

92 The Illustrations highlight the importance of the "fair and equitable" language. *See* notes 107-11 and accompanying text *infra*.

93 *See* Annot., 85 A.L.R.3d 259 (1978). *Compare* Blakeslee v. Board of Water Comm'rs, 106 Conn. 642, 645, 139 A. 106, 107 (1927) (parties did not contemplate U.S. involvement in war although it was already raging in Europe) *with* McGovern v. City of New York, 234 N.Y. 377, 391, 138 N.E. 26, 32 (1923) (war imminent when the contract was made and "the certainty of soaring prices was foreseen").

94 *E.g.*, Blakeslee v. Board of Water Comm'rs, 106 Conn. 642, 139 A. 106 (1927); Linz v. Schuck, 106 Md. 220, 67 A. 286 (1907); Curry v. Boeckeler Lumber Co., 224 Mo. App. 336, 27 S.W.2d 473 (1930). *See also* Watkins & Son v. Carrig, 91 N.H. 459, 21 A.2d 591 (1941).

95 Pittsburgh Testing Lab. v. Farnsworth & Chambers Co., 251 F.2d 77 (10th Cir. 1958); United States v. I.B. Miller, Inc., 81 F.2d 8 (2d Cir. 1936); Siebring Mfg. Co. v. Carlson Hybrid Corn Co., 246 Iowa 923, 70 N.W.2d 149 (1955); John King Co. v. Louisville & Nashville R.R., 131 Ky. 46, 114 S.W. 308 (1908); Martiniello v. Bamel, 255 Mass. 25, 150 N.E. 838 (1926); Curry v. Boeckeler Lumber Co., 224 Mo. App. 336, 27 S.W.2d 473 (1930); Watkins & Son. v. Carrig, 91 N.H. 459, 21 A.2d 591 (1941); Meech v. City of Buffalo, 29 N.Y. 198 (1864).

96 61 Minn. 482, 63 N.W. 1105 (1895).

97 *Id.* at 487, 63 N.W. at 1107.

burden not contemplated" language of *King*, strikingly similar to the test employed in cases involving legal excuse,[98] suggests only that the court would enforce the railroad's promise to pay additional compensation in situations in which the contractor would be excused from performing the original contract. In such situations, a promise to pay the contractor additional consideration would be supported by the contractor's promise to perform. Many other cases invoking the "unanticipated circumstances" doctrine also employ terminology suggesting that the "unanticipated circumstances" must constitute grounds for excuse from performance.[99] According to the *King* court, however, the circumstances that cause the modification "need not be such as would legally justify the party in his refusal to perform [or] justify a court of equity in relieving him from the contract."[100] Instead, all that is required are circumstances that "rebut all inference that [the contractor] is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation."[101] The court's reasoning is circular: a modification is characterizable as voluntary when there are unanticipated circumstances, and circumstances are correctly characterized as unanticipated when the modification is not coerced.

To cloud its reasoning further, the court in *King* engaged in one final volley: "Inadequacy of the contract price which is the result of an error of judgment, and not of . . . *excusable* mistake of fact, is not sufficient."[102] The court's terminology highlights the primary difficulty with the section 89(a) "unanticipated circumstances" approach. The approach was intended to validate modifications resulting from circumstances that would not legally excuse the promisee's performance whenever the promisee, in fairness, *should* be excused from performing

---

98 Recent cases involving impracticability, for example, have followed the language of U.C.C. § 2-615, Comment 4: "Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance." *See* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 319 n.15 (D.C. Cir. 1966); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 438 (S.D. Fla. 1975). *See generally* sources cited in note 64.

99 *E.g.,* Bailey v. Breetwor, 206 Cal. App. 2d 287, 23 Cal. Rptr. 740 (1962); John King Co. v. Louisville & Nashville R.R., 131 Ky. 46, 114 S.W. 308 (1908); Creamery Package Mfg. Co. v. Russell, 84 Vt. 80, 78 A. 718 (1911).

Professor Whittier criticized the first *Restatement* for barring modifications resulting from "unanticipated circumstances" that do not excuse performance. He believed that if there were no "danger of extortion," the preexisting-duty rule should not apply. Whittier, *supra* note 75, at 621. However, the presence or absence of "unanticipated circumstances" is only one factor in determining coercion and should not compel a finding either way on the question of the enforceability of the modification.

100 61 Minn. 482, 488, 63 N.W. 1105, 1107 (1895).

101 *Id.*

102 *Id.* (emphasis added).

the original contract.[103] Nevertheless, what triggers the right to be excused under the approach is not legal recognition that the circumstances constitute an excuse from performance—because they *do not* constitute an excuse from performance—but the promisor's *agreement* to permit the alteration.[104] This suggests, however, that the real issue under section 89(a) is the voluntariness of the agreement to modify and "unanticipated circumstances" is only one of a host of elements that are probative of that issue.[105] For example, if the contractor in *King* did not have the right to cease performance, evidence of his negotiating posture (the presence or absence of a take-it-or-leave-it approach), his ability to perform the work at the original contract rate (cash flow problems, etc.), his relationship to the railroad (short or long term), the railroad's access to substitute labor, and the railroad's need to finish the project on time, all would be probative of the voluntariness of the railroad's agreement to pay more.[106]

Perhaps the "fair and equitable" requirement of section 89(a) is meant to encompass all these additional factors. Indeed, Comment b to section 89 indicates that the "fair and equitable" language "goes beyond" the absence of coercion by requiring objective evidence of the reason for seeking the modification.[107] Comment b cites the relative financial situation of the parties, the formalities of the modification process, and the extent of reliance or performance as probative evidence of the presence or absence of "imposition or unfair surprise."[108] Although these inquiries may not be specific enough to elicit adequate proof of voluntariness—for example, the question of the promisor's alternatives is only addressed indirectly by the reference to the financial situation of

---

103 *See, e.g.*, Ballantine, *Is the Doctrine of Consideration Senseless and Illogical?*, 11 MICH. L. REV. 423, 433-34 (1913) (emphasis added):

> In some cases of untoward difficulties supervening, either unknown or unforseen [*sic*] when the contract was made, (*which, if our law were more liberal and just, would excuse performance*), the contractor may be equitably or morally justified in a demand for more pay for the additional burden not contemplated by the parties, and a contract to that effect should be enforced.

104 According to *King*, the existence of "unanticipated circumstances" suggested that the promisor waived the promisee's original duty to perform. 61 Minn. 482, 487, 63 N.W. 1105, 1107 (1895).

105 *See* notes 17-27 and accompanying text *supra*; notes 118-293 and accompanying text *infra*.

106 *See* notes 17-27 and accompanying text *supra*. The cases in the Reporter's Notes to § 89 also shed little light on the nature of "unanticipated circumstances." Some of the cases do not rely on unanticipated circumstances to support their holdings. *E.g.*, San Gabriel Valley Ready-Mixt v. Casillas, 142 Cal. App. 2d 137, 298 P.2d 76 (1956); Siebring Mfg. Co. v. Carlson Hybrid Corn Co., 246 Iowa 923, 70 N.W.2d 149 (1955); Swartz v. Lieberman, 323 Mass. 109, 80 N.E.2d 5 (1948). Other cases mention the doctrine only in passing. *E.g.*, Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 131 N.E. 887 (1921). Other cases seem not to involve unanticipated circumstances at all. *E.g.*, Lange v. United States, 120 F.2d 886 (4th Cir. 1941).

107 RESTATEMENT (SECOND) OF CONTRACTS § 89, Comment b (1979).

108 *Id.*

the parties and the extent of reliance—at least they tend to broaden the inquiry to encompass more than a mere search for "unanticipated circumstances."[109] Nevertheless, the failure of "good faith" to police contract modifications adequately in the context of the Uniform Commercial Code[110] suggests that the overly broad "fair and equitable" language of section 89(a) may be equally insufficient in non-Code situations, and that the drafters should have employed the doctrine of duress for policing contract modifications directly.[111]

Although section 89(a) has not yet been the subject of much litigation, the cases that have construed it have failed, not surprisingly, to develop a workable standard for finding "unanticipated circumstances." In *Angel v. Murray*,[112] for example, the court applied section 89(a) to uphold a contract modification that increased the price of refuse collection, but did not adequately explain how to determine what constitutes "unanticipated circumstances" or "fair and equitable" modifications.[113] The court also required that the modification be "voluntary,"[114] however, and thus acknowledged that the real issue was the presence or absence of coercion and recognized implicitly that a modification could be coerced even when "unanticipated circumstances" exist.[115]

2. *The Inadequacy of Section 89(a)*

Perhaps the greatest shortcoming of section 89(a) is not its ambigu-

---

109 Circumstances suggesting duress can also be investigated pursuant to § 175 of the *Restatement Second*. *See id.* § 176, Comment e; note 111 *infra*.

110 *See generally* Hillman, *supra* note 4.

111 Illustrations 3-7 to § 175 and Illustrations 8-11 to § 176 of the *Restatement Second* give examples of duress in modification situations. Section 175, Comment b discusses the availability of alternatives and § 176, Comment e, discusses making improper threats to breach in order to effect a modification. These could have been the core of a direct approach to the problem of contract modification, which would have eliminated the need for §§ 73 & 89(a).

112 113 R.I. 482, 322 A.2d 630 (1974).

113 *Id.* at 495-96, 322 A.2d at 637-38. The court merely concluded that the city council vote to increase the compensation was voluntary, that the increase in refuse-generating dwelling units "went beyond any previous expectation," and that due to the increase, the additional compensation was "fair and equitable." *Id.* *See also* Brian Constr. & Dev. Co. v. Brighenti, 176 Conn. 162, 405 A.2d 72 (1978).

114 Angel v. Murray, 113 R.I. 482, 493-94, 322 A.2d 630, 636-37 (1974).

115 Although the court in Recker v. Gustafson, 279 N.W.2d 744 (Iowa 1979) found § 89 inapplicable because there were no unanticipated circumstances, Professor Muris cites that case for the proposition that there has been "some judicial recognition of the persuasiveness of the *Restatement Second* position." Muris, *supra* note 25, at 540 n.43. I have criticized *Recker* elsewhere for "resurrecting" the preexisting-duty doctrine in Iowa. *See* Hillman, *Contract Modification in Iowa*—Recker v. Gustafson *and the Resurrection of the Preexsiting Duty Doctrine*, 65 IOWA L. REV. 343 (1980). In my analysis of *Recker* I suggest that similarly situated parties might agree voluntarily to a modification in the absence of additional consideration *or* of unanticipated circumstances. Professor Muris recognizes that reasons for voluntary modification exist in such situations, *see* Muris, *supra* note 25, at 533; nevertheless, he still shows substantial support for both the *Restatement Second* and *Recker* approaches, which require either consideration or "unanticipated circumstances." *Id.* at 540 n.43.

ity but its underinclusiveness. As an exception to the preexisting-duty rule of section 73, section 89(a) simply may not extend to many situations in which modifications, because they are voluntary, should be enforced. As noted earlier, despite the presence of the "unanticipated circumstances" test, the real thrust of section 89(a) may involve an application of the "fair and equitable" requirement to determine whether a modification was voluntarily made. Nevertheless, the "in view of" connective phrase between "fair and equitable" and "unanticipated circumstances" indicates that some "unanticipated circumstance" must be found before the court can proceed to the voluntariness issue. A host of reasons exist, however, for voluntarily agreeing to a modification in the absence of any unanticipated event. For example, in Illustration 3 to section 89(a), loosely based on *Schwartzreich v. Bauman-Basch, Inc.*,[116] a promise to increase an employee's salary is enforceable when a third party has made the employee a better offer. In *Schwartzreich*, the court did not rest its decision to enforce the modification on the basis of "unanticipated circumstances"; perhaps it did not believe that the third-party offer constituted "unanticipated circumstances."[117] Instead, it found that a rescission-replacement had occurred. Nevertheless, the court's enforcement of the modification does suggest a belief that the modification was "fair and equitable" under the circumstances.

Requiring either additional consideration or an "unanticipated" event to validate modifications presupposes that contracting parties always act with economic rationality in relation to a particular transaction. This assumption simply is not accurate because a particular contract may be only one part of a much more extensive relationship between the parties.[118] When such a complex relationship exists, there may be excellent reasons for one party to give up something in the short term with the expectation of a return in the future.[119] The party actually may be acting with perfect economic rationality, but only a much broader examination of the overall relationship of the parties will make such a conclusion possible.[120]

---

116 231 N.Y. 196, 131 N.E. 887 (1921).

117 Evaluation of whether the third-party offer of employment constituted "unanticipated circumstances" would have required investigation of the type of labor being performed, the relative notoriety of the employee, the availability of other labor, and the contract wage.

118 *See generally* Macneil, *supra* note 17. I advocate entertaining a presumption of duress if the individual modification results in a material net loss to the promisor, but this presumption should be rebuttable upon a showing that the modified contract is only a small component of the relationship between the parties and that the promisor agreed to the modification to enhance the overall relationship. *See* Hillman, *supra* note 4, at 889-90.

119 For example, the maintenance of good will, the expectation of further dealing on a more profitable level, the tendency of contracting parties to attempt to accommodate each other, *see* Macneil, *supra* note 17, at 1048, or the need to maintain trust, *id.* at 1047, may result in "irrational" modifications. The promisor's lack of information about market conditions may also make him willing to engage in economically irrational modifications. *See id.* at 1043.

120 *See id.* at 1047-48.

Because most modern contracts may be only fragments of more complex relationships,[121] the *Restatement Second*'s section 89(a) exception to the preexisting-duty rule is simply too narrow.[122] In fact, because of the perceived need to avoid the "unanticipated circumstances" requirement, one commentator has felt compelled to read "fair and equitable" as an independent ground for enforcing modifications even in the absence of "unanticipated circumstances," so that voluntary modifications in the absence of such circumstances can be enforced.[123]

C. *Section 89(c)*

Section 89(c) provides that a promise modifying a contractual duty is binding "to the extent that justice requires enforcement in view of material change of position in reliance on the promise."[124] Section 89(c) imports the doctrine of promissory estoppel into contract-modification law.[125]

One purpose of the requirement of "justice" in section 89(c)[126] is presumably to ensure that a promisee who relies on an unfairly procured modification may not secure its enforcement. Thus, the allusion to "justice" in this context compels an investigation of the duress issues to determine whether reliance would entitle a party to enforcement. Once it is determined that the modification was not coerced, however, little reason exists for denying enforcement, even without reliance. To illustrate, if it is determined that our hypothetical contractor coerced the owner into agreeing to pay for the extra fill, reliance by the contractor should not render the modification enforceable. Conversely, absent coercion, it seems appropriate to enforce the promise whether or not there was reliance. Thus, reliance seems a false issue in this context if the goal of modification law is to enforce voluntary modifications and deny coerced

---

121 *See id.* at 1051.

122 Expected gains in the future for the promisor could be viewed technically as consideration so that the preexisting-duty doctrine would not apply. However, if the gains were insufficiently specific, or did not constitute binding commitments on the part of the promisee, such an approach would constitute merely another "fiction" for avoiding the preexisting-duty rule.

123 Brody, *supra* note 15, at 482. *See also* J. MURRAY, *supra* note 30, § 88, at 183 (Dean Murray fears that a contrary interpretation—*i.e.*, that the modification must be fair and equitable *and* result from unanticipated circumstances—may develop).

124 RESTATEMENT (SECOND) OF CONTRACTS § 89(c) (1979). Comment d to § 89 states that the language of § 89(c) is "adapted from" UCC § 2-209. *Id.*, Comment d. U.C.C. § 2-209(5) provides that a "waiver affecting an executory portion of the contract" may be retracted unless "retraction would be unjust in view of a material change of position in reliance of the waiver." U.C.C. § 2-209(5); *see* Hillman, *supra* note 3, at 372-73. The *Restatement Second* retains this dual test by requiring both that the promisee materially change its position and that "justice" compel enforcement.

125 *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

126 Presumably other purposes are to enable courts to apply remedies flexibly and to test the reasonableness of the reliance.

ones.[127]

To the extent that section 89(a) bars enforcement of voluntary modifications not precipitated by "unanticipated circumstances," at least section 89(c) will help to fill the void. Thus, if our contractor and owner voluntarily agree on the modification in the absence of any "unanticipated" event, and the contractor relies on the promise, the modification will be enforceable to the extent that "justice requires." To what extent "justice requires" is unclear from the section. Perhaps the contractor will be entitled only to its reliance loss rather than its expectation interest under the modification. If that is the case, the *Restatement Second* is not wholly effective in enforcing voluntary modifications that are relied upon.

In addition to "cloudiness" about the extent of enforcement, the *Restatement Second* is unclear about the kind of reliance that section 89(c) requires.[128] Although performance of a preexisting obligation does not constitute consideration, perhaps it should suffice to constitute reliance under section 89(c).[129] This would make sense when a voluntary modification was not the result of "unanticipated circumstances" because it would increase the instances in which such modifications would be enforced. Short of performance, the reliance necessary to ensure enforcement of a modification presumably will be modeled on section 90 of the *Restatement Second*, which concerns promissory estoppel.[130]

CONCLUSION

The approach of the Restatement (Second) of Contracts to modification enforceability suffers from a lack of clarity and fails to reflect the goals of contract-modification law. The weaknesses of the approach stem both from adherence to the preexisting-duty doctrine—a doctrine which, most commentators agree, has outlived its usefulness[131]—and from failure to apply the doctrine of economic duress directly to the modification problem.

Under the *Restatement Second*'s approach, modifications are enforceable in the following situations: when the promisee has grounds for ceasing performance under an excuse doctrine (sections 73 and 89(a)); when the promisee reasonably believes that grounds for ceasing per-

---

127 *See* notes 5-15 and accompanying text *supra*.

128 *See* Knapp, *supra* note 8, at 75-76. For a collection of cases see Brody, *supra* note 15, at 474-78.

129 *But see* Knapp, *supra* note 8, at 75-76.

130 *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979); Knapp, *supra* note 8.

131 Criticisms of the preexisting-duty rule appear in 1 A. CORBIN, CORBIN ON CONTRACTS § 184, at 148-49 (2d ed. 1963); G. GILMORE, *supra* note 28, at 22-28, 76-77; Patterson, *supra* note 28, at 936-38. *See generally* Wright, *Ought the Doctrine of Consideration to Be Abolished from the Common Law?*, 49 HARV. L. REV. 1225, 1251 (1936); *see also* Rye v. Phillips, 203 Minn. 567, 569-70, 282 N.W. 459, 460 (1938).

formance exist (sections 73 and 74); when the promisee honestly believes that grounds for ceasing performance exist (sections 73 and 74); when "unanticipated circumstances" have made the modification "fair and equitable" (section 89(a)); and when the promisee has materially relied on the modification (section 89(c)).[132]

The *Restatement Second* approach suffers from lack of clarity because of the difficulties of defining "unanticipated circumstances" and the broadness of the "fair and equitable," "honesty" and "justice requires" terminology. In addition, in light of the goals of contract modification law, the approach wrongly bars the enforcement of voluntary modification in the absence of consideration, "unanticipated circumstances," or material reliance (unless the promisee reasonably or honestly believes in a defense to performance). The approach is also potentially harmful because the occurrence of "unanticipated circumstances" does not ensure the voluntariness of a modification and because the "fair and equitable" and "pretense of a bargain" language may be insufficient to direct courts to the issue of economic duress.

Proper application of each of the sections of the *Restatement Second* examined here (sections 73, 74, 89(a), and 89(c)) ultimately requires reference to the issues of duress. Accordingly, to cut through the morass of technical and unclear rules of the past, the duress doctrine[133] should be applied to the problem of contract modification directly. Duress is a superior vehicle for analyzing the voluntariness of a modification because it requires inquiry into all of the factual elements that are probative of the issue. Undoubtedly, courts will face difficult decisions in weighing the various factors involved in the duress inquiry. Nevertheless, even if terms such as "unanticipated circumstances" were capable of clear definition and increased predictability of results, use of such tests would come at the expense of the appropriate broader inquiry—the voluntariness of modifications.

132 *See also* RESTATEMENT (SECOND) OF CONTRACTS § 89(b) (1979).

133 *See id.* §§ 175 & 176.