

Duress and Modification

In this section we will discuss some of the legal issues related to contract modification. Why do parties modify their contracts? Consider the following two hypotheticals: Alice is a general contractor, and Bob is a painter and one of her subcontractors. The agreement between the two provides that Bob will complete a certain painting job by May 1. On April 15, Bob approaches Alice and tells her that he is running behind schedule, and while he can pay his team overtime to finish the work on time, he wonders if Alice would agree to a one-week delay in the completion date. Alice checks with her other subcontractors, concludes that while the delay isn't ideal, it will also not be too disruptive to the project as a whole, and, partly to maintain good relationships with Bob going forward, she agrees to let him complete the work by May 8. But what if Bob, when noticing he is running late, approaches Alice and tells her that she must agree to a delay in completion or else Bob and his team would walk away from the project? Both Bob and Alice know that replacing Bob's team will delay the work for many weeks, and therefore, Alice agrees to let Bob complete the work by May 8, even though that delay would seriously disrupt the project as a whole.

While the modification in those two scenarios is identical, they seem very different. The first hypothetical demonstrates that parties often find it desirable to modify their original understandings. Things might happen during performance that make the original contract unsuitable, or at least not ideal, in handling the current situation. Therefore, the law should allow the parties to change course mutually. But the second hypothetical teaches us that parties who are already performing their agreement depend on one another and that such dependency, at times, is an opening for abuse (in fact, as we explain elsewhere, that is one of the reasons for imposing the duty of good faith during performance). The question is how to distinguish the two scenarios. When should the law enforce the modification, and when should it reject it, thus holding the parties bound by their original understandings?

We will explore two main doctrines the law uses to separate enforceable from unenforceable modifications. The first of the two, consideration, is familiar, although its application in this context raises unique questions. We will, however, start our discussion with the second doctrine: the formation defense of duress.

Austin Instrument, Inc. v. Loral Corp.

29 N.Y.2d 124, 272 N.E.2d 533 (Court of Appeals of New York, 1971)

FULD, Chief Judge.

The defendant, Loral Corporation, seeks to recover payment for goods delivered under a contract which it had with the plaintiff Austin Instrument, Inc., on the ground that the evidence establishes, as a matter of law, that it was forced to agree to an increase in price on the items in question under circumstances amounting to economic duress.

In July of 1965, Loral was awarded a \$6,000,000 contract by the Navy for the production of radar sets. The contract contained a schedule of deliveries, a liquidated damages clause applying to late deliveries and a cancellation clause in case of default by Loral. The latter thereupon solicited bids for some 40 precision gear components needed to produce the radar sets, and awarded Austin a subcontract to supply 23 such parts. That party commenced delivery in early 1966.

In May, 1966, Loral was awarded a second Navy contract for the production of more radar sets and again went about soliciting bids. Austin bid on all 40 gear components but, on July 15, a representative from Loral informed Austin's president, Mr. Krauss, that his company would be awarded the subcontract only for those items on which it was low bidder. The Austin officer refused to accept an order for less than all 40 of the gear parts and on the next day he told Loral that Austin would cease deliveries of the parts due under the existing subcontract unless Loral consented to substantial increases in the prices provided for by that agreement—both retroactively for parts already delivered and prospectively on those not yet shipped—and placed with Austin the order for all 40 parts needed under Loral's second Navy contract. Shortly thereafter, Austin did, indeed, stop delivery. After contacting 10 manufacturers of precision gears and finding none who could produce the parts in time to meet its commitments to the Navy,¹ Loral acceded to Austin's demands; in a letter dated July 22, Loral wrote to Austin that 'We have feverishly surveyed other sources of supply and find that because of the prevailing military exigencies, were they to start from scratch as would have to be the case, they could not even remotely begin to deliver on time to meet the delivery requirements established by the Government. * * * Accordingly, we are left with no choice or alternative but to meet your conditions.'

Loral thereupon consented to the price increases insisted upon by Austin under the first subcontract and the latter was awarded a second subcontract making it the supplier of all 40

¹ The best reply Loral received was from a vendor who stated he could commence deliveries sometime in October.

gear parts for Loral's second contract with the Navy.² Although Austin was granted until September to resume deliveries, Loral did, in fact, receive parts in August and was able to produce the radar sets in time to meet its commitments to the Navy on both contracts. After Austin's last delivery under the second subcontract in July, 1967, Loral notified it of its intention to seek recovery of the price increases.

On September 15, 1967, Austin instituted this action against Loral to recover an amount in excess of \$17,750 which was still due on the second subcontract. On the same day, Loral commenced an action against Austin claiming damages of some \$22,250—the aggregate of the price increases under the first subcontract—on the ground of economic duress. The two actions were consolidated and, following a trial, Austin was awarded the sum it requested and Loral's complaint against Austin was dismissed on the ground that it was not shown that 'it could not have obtained the items in question from other sources in time to meet its commitment to the Navy under the first contract.' A closely divided Appellate Division affirmed....

The applicable law is clear and, indeed, is not disputed by the parties. A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will. The existence of economic duress or business compulsion is demonstrated by proof that 'immediate possession of needful goods is threatened' or, more particularly, in cases such as the one before us, by proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand. However, a mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that he threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate.

We find without any support in the record the conclusion reached by the courts below that Loral failed to establish that it was the victim of economic duress. On the contrary, the evidence makes out a classic case, as a matter of law, of such duress.⁵

² Loral makes no claim in this action on the second subcontract.

⁵ The suggestion advanced that we are precluded from reaching this determination because the trial court's findings of fact have been affirmed by the Appellate Division ignores the question to be decided. That question, undoubtedly one of law, is, accepting the facts found, did the courts below properly apply the law to them.

It is manifest that Austin's threat—to stop deliveries unless the prices were increased—deprived Loral of its free will. As bearing on this, Loral's relationship with the Government is most significant. As mentioned above, its contract called for staggered monthly deliveries of the radar sets, with clauses calling for liquidated damages and possible cancellation on default. Because of its production schedule, Loral was, in July, 1966, concerned with meeting its delivery requirements in September, October and November, and it was for the sets to be delivered in those months that the withheld gears were needed. Loral had to plan ahead, and the substantial liquidated damages for which it would be liable, plus the threat of default, were genuine possibilities. Moreover, Loral did a substantial portion of its business with the Government, and it feared that a failure to deliver as agreed upon would jeopardize its chances for future contracts. These genuine concerns do not merit the label "self-imposed, undisclosed and subjective" which the Appellate Division majority placed upon them. It was perfectly reasonable for Loral, or any other party similarly placed, to consider itself in an emergency, duress situation.

Austin, however, claims that the fact that Loral extended its time to resume deliveries until September negates its alleged dire need for the parts. A Loral official testified on this point that Austin's president told him he could deliver some parts in August and that the extension of deliveries was a formality. In any event, the parts necessary for production of the radar sets to be delivered in September were delivered to Loral on September 1, and the parts needed for the October schedule were delivered in late August and early September. Even so, Loral had to 'work * * * around the clock' to meet its commitments. Considering that the best offer Loral received from the other vendors it contacted was commencement of delivery sometime in October, which, as the record shows, would have made it late in its deliveries to the Navy in both September and October, Loral's claim that it had no choice but to accede to Austin's demands is conclusively demonstrated.

We find unconvincing Austin's contention that Loral, in order to meet its burden, should have contacted the Government and asked for an extension of its delivery dates so as to enable it to purchase the parts from another vendor. Aside from the consideration that Loral was anxious to perform well in the Government's eyes, it could not be sure when it would obtain enough parts from a substitute vendor to meet its commitments. The only promise which it received from the companies it contacted was for commencement of deliveries, not full supply, and, with vendor delay common in this field, it would have been nearly impossible to know the length of the extension it should request. It must be remembered that Loral was producing a needed item of military hardware. Moreover, there is authority for Loral's position that nonperformance by a subcontractor is not an excuse for default in the main contract. In

light of all this, Loral's claim should not be held insufficiently supported because it did not request an extension from the Government.

Loral, as indicated above, also had the burden of demonstrating that it could not obtain the parts elsewhere within a reasonable time, and there can be no doubt that it met this burden. The 10 manufacturers whom Loral contacted comprised its entire list of 'approved vendors' for precision gears, and none was able to commence delivery soon enough.⁶ As Loral was producing a highly sophisticated item of military machinery requiring parts made to the strictest engineering standards, it would be unreasonable to hold that Loral should have gone to other vendors, with whom it was either unfamiliar or dissatisfied, to procure the needed parts. As Justice Steuer noted in his dissent, Loral 'contacted all the manufacturers whom it believed capable of making these parts', and this was all the law requires.

It is hardly necessary to add that Loral's normal legal remedy of accepting Austin's breach of the contract and then suing for damages would have been inadequate under the circumstances, as Loral would still have had to obtain the gears elsewhere with all the concomitant consequences mentioned above. In other words, Loral actually had no choice, when the prices were raised by Austin, except to take the gears at the 'coerced' prices and then sue to get the excess back.

Austin's final argument is that Loral, even if it did enter into the contract under duress, lost any rights it had to a refund of money by waiting until July, 1967, long after the termination date of the contract, to disaffirm it. It is true that one who would recover moneys allegedly paid under duress must act promptly to make his claim known. In this case, Loral delayed making its demand for a refund until three days after Austin's last delivery on the second subcontract. Loral's reason—for waiting until that time—is that it feared another stoppage of deliveries which would again put it in an untenable situation. Considering Austin's conduct in the past, this was perfectly reasonable, as the possibility of an application by Austin of further business compulsion still existed until all of the parts were delivered.

In sum, the record before us demonstrates that Loral agreed to the price increases in consequence of the economic duress employed by Austin. Accordingly, the matter should be remanded to the trial court for a computation of its damages.

⁶ Loral, as do many manufacturers, maintains a list of 'approved vendors,' that is, vendors whose products, facilities, techniques and performance have been inspected and found satisfactory.

The order appealed from should be modified, with costs, by reversing so much thereof as affirms the dismissal of defendant Loral Corporation's claim and, except as so modified, affirmed.

BERGAN, Judge (dissenting).

Whether acts charged as constituting economic duress produce or do not produce the damaging effect attributed to them is normally a routine type of factual issue.

Here the fact question was resolved against Loral both by the Special Term and by the affirmance at the Appellate Division. It should not be open for different resolution here....

On this appeal it is needful to look at the facts resolved in favor of Austin most favorably to that party. Austin's version of events was that a threat was not made but rather a request to accommodate the closing of its plant for a customary vacation period in accordance with the general understanding of the parties.

Moreover . . . the availability of practical alternatives was a highly controverted issue of fact. On that issue of fact the explicit findings made by the Special Referee were affirmed by the Appellate Division. . . .

Austin asserted and Loral admitted on cross-examination that there were many suppliers listed in a trade registry but that Loral chose to rely only on those who had in the past come to them for orders and with whom they were familiar. It was, therefore, at least a fair issue of fact whether under the circumstances such conduct was reasonable and made what might otherwise have been a commercially understandable renegotiation an exercise of duress.

Judges Burke, Scileppi and Gibson concur with Chief Judge Fuld; Judge Bergan dissents and votes to affirm in a separate opinion in which Judges Breitel and Jasen concur.

Notes and Questions

1. Duress is a formation defense that deals with severe threats. When one party tells the other, "unless you accept this deal, this will happen to you," and when the threatened consequences of refusal are severe enough to overcome the other party's free will and coerce its acceptance, the contract might be voidable for duress. As the Restatement explains, "[i]f a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim." Restatement (Second) of Contracts § 175(1). In extreme (and rare) cases,

which will not be further explored in this section, when a party is physically forced to take an action that would normally be considered acceptance (e.g., signing a contract), the law would consider the contract void, meaning that it was never formed. Restatement (Second) of Contracts § 174.

2. Historically, duress was limited to threats of death, loss of limb, and imprisonment. However, over time, the notion of an “improper threat” was significantly expanded, and nowadays, it can include any wrongful act that overcomes the mind or will of the other party. As the Oklahoma Supreme Court explained: “The key factor [] must be the fact that the threatened action is an unreasonable alternative to an injurious contractual demand in a bargaining situation. The wrongfulness of the coercer’s conduct must be related to the unreasonableness of the alternatives which he presents to the weaker party.” *Centric Corp. v. Morrison-Knudsen Co.*, 731 P.2d 411, 419 (Okl. 1986).

Moreover, while older caselaw often evaluate the severity of the threat from the perspective of “a brave man” or one of “ordinary firmness” (did you notice a similar objective standard used in *Loral*?), the modern approach is to use a purely subjective approach. In other words, the question is whether the threat of a wrongful act overcame the free will of the specific party raising the duress defense. The rationale for this approach is that those especially susceptible to threats should be granted greater legal protection. Despite those expansions, the burden of proving duress, as is the case with all formation defenses, is of the party raising it, and courts do not often accept it.

3. Undue influence is another formation defense that is often lumped together with duress. Developed by the courts of equity, undue influence might make a contract voidable when intense pressure coerces the other party to accept the terms of a contract. It is typically found when the parties are in a situation where the law expects them to trust and have confidence in one another. Examples include parents and children, attorneys and clients, and caregivers and patients. See Restatement (Second) of Contracts § 177.
4. While duress deals with many types of threats, including those that happen when a contract is initially reached, “a very common type of duress is the compelled modification.” Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition*, 69 U. COLO. L. REV. 71, 135 (1998). We will focus on that important subset of the duress defense, known as economic duress — a threat to breach an existing contract unless it is modified. A party that accepts the modification under such circumstances may argue that the modification is voidable, which will lead the court to

enforce the original contract and not the modified one. Make sure you understand how the Loral court adapted the requirements of duress (e.g., the requirement in Restatement (Second) of Contracts § 175(1), stated in the first note above) in economic duress situations and how it applied it in the case at bar.

As noted, duress is just one way for the law to separate desirable and undesirable modifications. Consideration is another. The following two cases focus on the consideration needed for modifying a contract (noted, however, that duress is not absent from some of those discussions).

Alaska Packers' Association v. Domenico

117 F. 99 (Ninth Cir., 1902)

ROSS, Circuit Judge.

[During March and April 1900, two groups of workmen entered into written contracts with the Alaska Packers' Association, whereby they agreed to sail from San Francisco to Pyramid Harbor, Alaska, to work as sailors and fishermen. They were promised \$50 to \$60 for the season plus two cents for each red salmon caught.

The workmen sailed to Pyramid Harbor, where Alaska Packers' had invested about \$150,000 in a salmon cannery. A few days after arriving, they stopped working and demanded of the company's superintendent \$100 (plus two cents for each red salmon caught) for their services, stating that otherwise they would stop work entirely and return to San Francisco. It was impossible for Alaska Packers to replace the workmen in a timely manner, so after a few days, the company's superintendent yielded to their demands and executed a contract identical to the original one, except that the \$50 and \$60 payments were replaced with \$100. The superintendent, however, testified that he told the workmen that he was not authorized to alter the contracts made between them and the company. Upon returning to San Francisco at the close of the fishing season, the company refused to pay anything more than agreed upon originally. The workmen sued and won at the trial court. This appeal followed.]

On the trial in the court below, the libelants undertook to show that the fishing nets provided by the respondent were defective, and that it was on that account that they demanded increased wages. On that point, the evidence was substantially conflicting, and the finding of the court was against the libelants

The real questions in the case as brought here are questions of law, and, in the view that we take of the case, it will be necessary to consider but one of those. Assuming that the appellant's superintendent at Pyramid Harbor was authorized to make the alleged contract of May 22d, and that he executed it on behalf of the appellant, was it supported by a sufficient consideration? From the foregoing statement of the case, it will have been seen that the libelants agreed in writing, for certain stated compensation, to render their services to the appellant in remote waters where the season for conducting fishing operations is extremely short, and in which enterprise the appellant had a large amount of money invested; and, after having entered upon the discharge of their contract, and at a time when it was impossible for the appellant to secure other men in their places, the libelants, without any valid cause, absolutely refused to continue the services they were under contract to perform unless the appellant would consent to pay them more money. Consent to such a demand, under such circumstances, if given, was, in our opinion, without consideration, for the reason that it was based solely upon the libelants' agreement to render the exact services, and none other, that they were already under contract to render. The case shows that they willfully and arbitrarily broke that obligation. As a matter of course, they were liable to the appellant in damages, and it is quite probable, as suggested by the court below in its opinion, that they may have been unable to respond in damages....

In *Lingenfelder v. Brewing Co.*, 103 Mo. 578, 15 S.W. 844, the court, in holding void a contract by which the owner of a building agreed to pay its architect an additional sum because of his refusal to otherwise proceed with the contract, said:

It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise, he was not to do anything more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new, that Jungenfeld was bound to tender under the original, contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of five per cent. on the refrigerator plant as the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part.... To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by

their own wrong. That a promise to pay a man for doing that which he is already under contract to do is without consideration is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various states that nothing but the most cogent reasons ought to shake it ... The learned counsel for respondents do not controvert the general proposition. Their contention is, and the circuit court agreed with them, that, when Jungenfeld declined to go further on his contract, the defendant then had the right to sue for damages, and not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract, we do not think it follows that defendant is estopped from showing its promise was made without consideration. ... What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor; and although, by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong.

[The court cites cases from multiple jurisdictions, most of them agreeing with *Lingenfelder*.]

It results from the views above expressed that the judgment must be reversed, and the cause remanded, with directions to the court below to enter judgment for the respondent, with costs. It is so ordered.

Angel v. Murray

322 A.2d 630, 113 R.I. 482 (Supreme Court of Rhode Island, 1974)

ROBERTS, Chief Justice.

This is a civil action brought by Alfred L. Angel and others against John E. Murray, Jr., Director of Finance of the City of Newport, the city of Newport, and James L. Maher, alleging that Maher had illegally been paid the sum of \$20,000 by the Director of Finance and praying that the defendant Maher be ordered to repay the city such sum....

The record discloses that Maher has provided the city of Newport with a refuse-collection service under a series of five-year contracts beginning in 1946. On March 12, 1964, Maher and the city entered into another such contract for a period of five years commencing on July 1,

1964, and terminating on June 30, 1969. The contract provided, among other things, that Maher would receive \$137,000 per year in return for collecting and removing all combustible and noncombustible waste materials generated within the city.

In June of 1967 Maher requested an additional \$10,000 per year from the city council because there had been a substantial increase in the cost of collection due to an unexpected and unanticipated increase of 400 new dwelling units. Maher's testimony, which is uncontradicted, indicates the 1964 contract had been predicated on the fact that since 1946 there had been an average increase of 20 to 25 new dwelling units per year. After a public meeting of the city council where Maher explained in detail the reasons for his request and was questioned by members of the city council, the city council agreed to pay him an additional \$10,000 for the year ending on June 30, 1968. Maher made a similar request again in June of 1968 for the same reasons, and the city council again agreed to pay an additional \$10,000 for the year ending on June 30, 1969....

I.

[The plaintiff first argued that the process that the city council used during the modification process violated its governing documents. The court analyses and rejects that claim.]

II.

Having found that the city council had the power to modify the 1964 contract . . . we are still confronted with the question of whether the additional payments were illegal because they were not supported by consideration.

A

As previously stated, the city council made two \$10,000 payments. The first was made in June of 1967 for the year beginning on July 1, 1967, and ending on June 30, 1968. Thus, by the time this action was commenced in October of 1968, the modification was completely executed. That is, the money had been paid by the city council, and Maher had collected all of the refuse. Since consideration is only a test of the enforceability of executory promises, the presence or absence of consideration for the first payment is unimportant because the city council's agreement to make the first payment was fully executed at the time of the commencement of this action.

B

It is generally held that a modification of a contract is itself a contract, which is unenforceable unless supported by consideration. . . . In *Rose v. Daniels*, 8 R.I. 381 (1866), this court held that an agreement by a debtor with a creditor to discharge a debt for a sum of money less than the amount due is unenforceable because it was not supported by consideration.

Rose is a perfect example of the pre-existing duty rule. Under this rule an agreement modifying a contract is not supported by consideration if one of the parties to the agreement does or promises to do something that he is legally obligated to do or refrains or promises to refrain from doing something he is not legally privileged to do. In *Rose* there was no consideration for the new agreement because the debtor was already legally obligated to repay the full amount of the debt....

The primary purpose of the pre-existing duty rule is to prevent what has been referred to as the 'hold-up game.' A classic example of the 'hold-up game' is found in *Alaska Packers' Ass'n v. Domenico*....

Another example of the 'hold-up game' is found in the area of construction contracts. Frequently, a contractor will refuse to complete work under an unprofitable contract unless he is awarded additional compensation. The courts have generally held that a subsequent agreement to award additional compensation is unenforceable if the contractor is only performing work which would have been required of him under the original contract.

These examples clearly illustrate that the courts will not enforce an agreement that has been procured by coercion or duress and will hold the parties to their original contract regardless of whether it is profitable or unprofitable. However, the courts have been reluctant to apply the pre-existing duty rule when a party to a contract encounters unanticipated difficulties and the other party, not influenced by coercion or duress, voluntarily agrees to pay additional compensation for work already required to be performed under the contract....

Although the pre-existing duty rule has served a useful purpose insofar as it deters parties from using coercion and duress to obtain additional compensation, it has been widely criticized as a general rule of law. With regard to the pre-existing duty rule, [Arthur Corbin] has stated: 'There has been a growing doubt as to the soundness of this doctrine as a matter of social policy. * * * In certain classes of cases, this doubt has influenced courts to refuse to apply the rule, or to ignore it, in their actual decisions.... The result of this is that a court should no longer accept this rule as fully established. It should never use it as the major premise of a

decision, at least without giving careful thought to the circumstances of the particular case, to the moral deserts of the parties, and to the social feelings and interests that are involved. It is certain that the rule, stated in general and all-inclusive terms, is no longer so well-settled that a court must apply it though the heavens fall.’ ...

The modern trend appears to recognize the necessity that courts should enforce agreements modifying contracts when unexpected or unanticipated difficulties arise during the course of the performance of a contract, even though there is no consideration for the modification, as long as the parties agree voluntarily.

Under the Uniform Commercial Code, s 2-209(1), which has been adopted by 49 states, ‘(a)n agreement modifying a contract (for the sale of goods) needs no consideration to be binding.’ Although at first blush this section appears to validate modifications obtained by coercion and duress, the comments to this section indicate that a modification under this section must meet the test of good faith imposed by the Code, and a modification obtained by extortion without a legitimate commercial reason is unenforceable.

The modern trend away from a rigid application of the pre-existing duty rule is reflected by s 89D(a) of the American Law Institute’s Restatement Second of the Law of Contracts, which provides: ‘A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made * * *.’

We believe that s 89D(a) is the proper rule of law and find it applicable to the facts of this case. It not only prohibits modifications obtained by coercion, duress, or extortion but also fulfills society’s expectation that agreements entered into voluntarily will be enforced by the courts.³ Section 89D(a), of course, does not compel a modification of an unprofitable or unfair

³ The drafters of s 89D(a) of the Restatement Second of the Law of Contracts use the following illustrations in comment (b) as examples of how this rule is applied to certain transactions:

‘1. By a written contract A agrees to excavate a cellar for B for a stated price. Solid rock is unexpectedly encountered and A so notifies B. A and B then orally agree that A will remove the rock at a unit price which is reasonable but nine times that used in computing the original price, and A completes the job. B is bound to pay the increased amount.

‘2. A contracts with B to supply for \$300 a laundry chute for a building B has contracted to build for the Government for \$150,000. Later A discovers that he made an error as to the type of material to be used and should have bid \$1,200. A offers to supply the chute for \$1,000, eliminating overhead and profit. After ascertaining that other suppliers would charge more, B agrees. The new agreement is binding.

‘5. A contracts to manufacture and sell to B 100,000 castings for lawn mowers at 50 cents each. After partial delivery and after B has contracted to sell a substantial number of lawn mowers at a fixed price,

contract; it only enforces a modification if the parties voluntarily agree and if (1) the promise modifying the original contract was made before the contract was fully performed on either side, (2) the underlying circumstances which prompted the modification were unanticipated by the parties, and (3) the modification is fair and equitable.

The evidence, which is uncontradicted, reveals that in June of 1968 Maher requested the city council to pay him an additional \$10,000 for the year beginning on July 1, 1968, and ending on June 30, 1969. This request was made at a public meeting of the city council, where Maher explained in detail his reasons for making the request. Thereafter, the city council voted to authorize the Mayor to sign an amendment to the 1964 contract which provided that Maher would receive an additional \$10,000 per year for the duration of the contract. Under such circumstances we have no doubt that the city voluntarily agreed to modify the 1964 contract.

Having determined the voluntariness of this agreement, we turn our attention to the three criteria delineated above. First, the modification was made in June of 1968 at a time when the five-year contract which was made in 1964 had not been fully performed by either party. Second, although the 1964 contract provided that Maher collect all refuse generated within the city, it appears this contract was premised on Maher's past experience that the number of refuse-generating units would increase at a rate of 20 to 25 per year. Furthermore, the evidence is uncontradicted that the 1967-1968 increase of 400 units 'went beyond any previous expectation.' Clearly, the circumstances which prompted the city council to modify the 1964 contract were unanticipated. Third, although the evidence does not indicate what proportion of the total this increase comprised, the evidence does indicate that it was a 'substantial' increase. In light of this, we cannot say that the council's agreement to pay Maher the \$10,000 increase was not fair and equitable in the circumstances.

The judgment appealed from is reversed, and the cause is remanded to the Superior Court for entry of judgment for the defendants.

Notes and Questions

1. The court in *Angel* explains why Murray asked for the modification. However, it does not explore, at least not explicitly, why the city accepted Murray's request. Why would

A notifies B that increased metal costs require that the price be increased to 75 cents. Substitute castings are available at 55 cents, but only after several months delay. B protests but is forced to agree to the new price to keep its plant in operation. The modification is not binding.'

the city (or anyone else, for that matter) agree to a modification that lacks consideration?

2. The *Angel* court explored the three approaches to the consideration needed for modification. The first is the common law's pre-existing duty rule. That rule suggests that "[p]erformance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration..." Restatement (Second) of Contracts § 73. Modern courts, however, accept exceptions to this rule, the most notable of them is states in Restatement (Second) of Contracts § 89(a), noting that "[a] promise modifying a duty under a contract not fully performed on either side is binding if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made." (The *Angel* court relied heavily on an earlier draft of Section 89(a), then 89(D), which is identical to the final version and its comments.) The third approach, also mentioned in *Angel*, set forth in UCC § 2-209(1), stating, "[a]n agreement modifying a contract within this Article needs no consideration to be binding." However, Comment 2 importantly states that "modifications ... must meet the test of good faith." Which of those approaches makes the most sense to you?
3. *Alaska Packers' Ass'n v. Domenico* is a classic example of the use of the pre-existing duty rule that the *Angel* court rejected. How would the decision come out if the Ninth Circuit applied the modern approach, as the *Angel* court did? How would that decision come out if it were subject to the rule set forth in UCC § 2-209(1)? Could duress play a role in such a dispute?
4. You represent Brock Purdy. The San Francisco 49ers picked Purdy in the 2022 NFL draft as the 262nd and last selection that year. NFL fans commonly refer to the player picked last in the draft as Mr. Irrelevant. In the case of Purdy, history was quick to prove them wrong. Starting at the 13th game of his first season, after the 49er's two senior quarterbacks were injured, Purdy was the team's opening quarterback. Under his leadership, the team won seven games in a row and gained a spot in the NFC Conference championship game. Purdy missed most of that game due to an injury, and the team lost. This was one of the greatest seasons in recent memory for a rookie quarterback.

Assume that after the 49ers picked Purdy, he entered a three-year endorsement deal with Nike, stating that the company would pay him \$50,000 a year in return for wearing exclusively Nike athletic gear. Further assume that while this was a reasonable deal for a player picked last, other quarterbacks selected that year in the first round — none of

them has a rookie year as impressive as Purdy — receive about \$500,000 annually in endorsement deals with Nike or comparable companies. In other words, in hindsight, your client is being seriously underpaid.

Purdy asks you the following questions: Do you think Nike would be open to increase my endorsement payment if asked? Can I refuse to continue wearing Nike if the company says no? If Nike agrees to the modification, will a court that applies the modern approach, like the *Angel* court, find my new endorsement contract enforceable?

Purdy also states that he's concerned he might end up before a judge who rejects the modern approach (knowing that practically everyone accepts it now, but still) and insists on the pre-existing duty rule. He asks if there is a way to design the modification transaction so that even that judge enforces it? In other words, Purdy (who suddenly seems to be not only a talented football player but maybe a future law professor) seems to ask you whether the pre-existing duty rule really has teeth. If not, in hindsight, could the workmen from *Alaska Packers'* have circumvented it?

The *Angel* court mentioned *Rose v. Daniels*, where it was held that an agreement by a debtor with a creditor to discharge a debt for a sum of money less than the amount due is unenforceable because it was not supported by consideration. Keep that decision in mind as you read the following opinion.

Wong v. Paisner

14 Mass.App.Ct. 923, 436 N.E.2d 990 (Appeals Court of Massachusetts, 1982)

PER CURIAM

A jury returned a verdict in favor of the plaintiff in his action to recover \$4,400 which he claimed was owed under a contract with the defendant. We agree with the defendant that the judge committed reversible error in failing to instruct the jury on the defense of accord and satisfaction.

The jury could have found that the plaintiff agreed to prepare certain mechanical drawings for the defendant for a lump sum payment of \$1,000. The plaintiff claimed, however, that there was a modification of the agreement by which an hourly rate payment was substituted for the lump sum payment. The defendant denied any such modification but testified that he agreed to an additional lump sum payment of \$500. The plaintiff sent the defendant a bill in the

amount of \$5,400, representing 235 hours of work at \$25 per hour, less the \$500 that had already been paid. The defendant testified that before he received the bill, he sent to the plaintiff a cover letter and a check for \$1,000 bearing the notation “payment in full for services rendered.” The cover letter stated the defendant’s position that their “original deal was for one time work.” The letter reiterated that the defendant’s check for \$1,000 represented payment in full and that the defendant had tendered an additional \$500 in an attempt to “appease” the plaintiff in light of their “misunderstanding” over the terms of the contract. The plaintiff deleted the “payment in full” from the check and deposited it in his account. The defendant requested an instruction on accord and satisfaction, the judge refused and the defendant seasonably objected to the action of the judge.

It is settled that acceptance and deposit of a check offered in full payment of a disputed claim constituted an accord and satisfaction and bars an attempt to collect any balance outstanding under a contract. Whether an accord and satisfaction has been proved is a question of fact on which the defendant has the burden of proof. There was evidence that the parties had a disagreement as to the amount owed by the defendant and that the dispute arose before the defendant sent the \$1,000 check. The notation on the check and the contents of the letter was evidence that the check was being offered in full settlement of the disputed claim. The additional payment of \$500 could have been found to constitute consideration supporting the condition imposed by the defendant; i.e. that the plaintiff’s acceptance of the payment fully discharged the debt. The action of the plaintiff in deleting the words, “payment in full” did not establish, as a matter of law, that there was no accord and satisfaction. Therefore the defendant adequately raised the issue of accord and satisfaction, and the matter should have been dealt with by the judge in his instructions to the jury.

Notes and Questions

1. The parties in *Wong* originally had a contract for a fixed amount. The plaintiff, however, argued—and the jury agreed—that the contract was modified to give him much more generous consideration. With that in mind, and considering the decision in *Rose v. Daniels*, how could the plaintiff lose this case and be denied the higher consideration? Try to answer this question by yourself before reading further.
2. The reason seems to be rooted in a second, and somewhat different form of modification, which was concluded when the plaintiff deposited the defendant’s check. The court classified this as accord and satisfaction.

3. When Alice has a claim against Bob (that claim might—but does not have to be—for a breach of contract), it can be satisfied in multiple ways. Bob can, of course, pay Alice everything she demands. But other options exist.

Assume, for example, that Alice claims she suffered a \$1,000 harm from Bob's breach of contract, which Bob denies. Bob can approach Alice and offers to give her his bicycles in satisfaction of the claim. If Alice accepts and takes possession of the bicycles, Alice's claim is considered satisfied and discharged. The Restatement refers to this option as "*substituted performance*." Restatement (Second) of Contracts § 278.

But what if, instead of an immediate exchange, Bob offers Alice to deliver the bicycles in a week in satisfaction of Alice's claim, and Alice agrees? There are two ways to understand such an agreement. The first, called a "*substituted contract*," perceives the new exchange as substituting the old duty. In other words, once Alice accepts Bob's offer of a substituted contract, her original claim (for \$1,000) is discharged and replaced by the substituted claim (for the bicycles). If Bob fails to perform, Alice can sue him for breaching the promise to deliver the bicycles but not for the original claim.

Alternatively, Bob's promise to deliver the bicycles can be considered *an accord*. An accord does not discharge the original claim but just suspends it. If Bob performs the accord, the original claim and the new one are discharged, which is referred to as "*accord and satisfaction*." If, however, Bob fails to perform its obligations under the accord, Alice can choose to enforce either the original duty or the accord. Restatement (Second) of Contracts § 281(2).

The distinction between a substituted contract and an accord is a question of interpretation. The Restatement suggests that "[i]n resolving doubts in this regard, a court is less likely to conclude that an obligee was willing to accept a mere promise in satisfaction of an original duty that was clear than in satisfaction of one that was doubtful. It will therefore be less likely to find a substituted contract and more likely to find an accord if the original duty was one to pay money, if it was undisputed, if it was liquidated, and if it was matured." Restatement (Second) of Contracts § 279 cmt. c.

A final wrinkle has to do with duties that are clear and undisputed. Satisfying such duties needs to comply with the requirements of consideration (do you understand why consideration is typically irrelevant to disputed duties?). Thus, if it is undoubtful that Bob has a mature debt of \$1,000 to Alice, Bob cannot satisfy it by promising to pay Alice less than \$1,000. Restatement (Second) of Contracts § 273.

4. If the party who has a claim endorses and deposits the other party's check, which was clearly provided to satisfy a claim, those actions will typically be considered accord and satisfaction. Do you see why? The Restatement further notes that "the creditor cannot generally avoid [such] consequences . . . by a declaration that he does not assent to the condition attached by the debtor," meaning that adding statements to the check such as "accepted under protest" is typically meaningless. Section 3-311 was added to the UCC in 1990 to further clarify this point. That section applies to the satisfaction of an unliquidated or disputed debt by a negotiable instrument (such as a check). If that instrument (or another written communication) clearly states that it is in satisfaction of a claim, then subject to minor exceptions, obtaining payment of the instrument (meaning, cashing the check) is considered a full satisfaction of the duty.
5. With that background information, can you explain why the plaintiff in *Wong* lost?