South Carolina Law Review

Volume 33 | Issue 4 Article 3

5-1982

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SOUTH CAROLINA LAW REVIEW

VOLUME 33 1982 NUMBER 4

CONTRACT MODIFICATION UNDER DURESS

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Contracting is a game that permits the players to change the rules while the game is underway. Following contract formation, the parties may modify their contract by mutual consent. A party seeking to enforce a modification in his favor, however, may be met with the defense that the modification is voidable because of duress.

Duress is an elusive concept. It surely involves wrongful coercion, but we encounter difficulty when we try to identify the forms of coercion that are wrongful. The tests provided by contemporary contract law render modifications voidable when coercion clearly assumes an oppressive aspect, but these tests fail to produce determinate results when the moral coloration is not clear. This article offers a new approach to the problem and shows that, in the context of contract modification, duress is not a concept beyond our comprehension.

I. THE NEED FOR A CLEAR DURESS TEST

A. The Pre-existing Duty Rule

In the past, courts often used the pre-existing duty rule to

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The author thanks his research assistants, Sarah Springer Doherty (1979-80), James Hodges (1980-81), and Margaret McClurkin (1981-82), for their able and diligent assistance.

South Carolina Law Review, Vol. 33, Iss. 4 [1982], Art. 3

nullify coercive modifications. A contract modification is itself a contract requiring consideration, and the pre-existing duty rule proclaims that a promise to do what one is already legally obligated to do is not valid consideration.[1] Thus, a buyer's amendatory promise to pay a higher price is unenforceable if, in return, the seller merely promises to render the same performance for which he is obligated under the original contract.[2] Corbin suggests that the reason for refusing to recognize as consideration a promise to perform a pre-existing duty is that such recognition would encourage contractors to play a "holdup" game.[3]

The requirement of new consideration is merely a slight obstacle, however, and not an effective deterrent to duress. A party using duress can easily insert some minimal consideration into the amendment terms. Despite the duress, the pre-existing duty rule does not render such an amendment invalid. Moreover, the absence of consideration renders unenforceable even an amendment that is fair and not obtained by duress. In view of these defects, it is not surprising that the pre-existing duty rule is gen-

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1. Corbin states the pre-existing duty rule as follows: "neither the performance of duty nor the promise to render a performance already required by duty is a sufficient consideration for a return promise." 1A A. CORBIN, CORBIN ON CONTRACTS § 171, at 105 (1963).

2. Two classic cases illustrate the use of the pre-existing duty rule in nullifying coercive amendments. In Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S.W. 844 (1891), a brewing company made an amendatory promise to pay additional compensation to an architect who refused to continue performance. The court held the amendment unenforceable because of the lack of consideration and expressly noted the extortionate nature of the amendment. *Id.* at 592, 15 S.W. at 848. In Alaska Packers' Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902), an employer's amendatory promise to pay additional wages to fishermen employees was held to be without consideration and thus unenforceable. *Id.* at 102. The court obviously regarded the amendment as having been obtained by duress.

A good statement of the pre-existing duty rule in the contract modification context is found in Angel v. Murray, 113 R.I. 482, 489, 322 A.2d 630, 634 (1974)(rejecting the pre-existing duty rule in favor of RESTATEMENT (SECOND) OF CONTRACTS § 89D(a)(Tent. Draft Nos. 1-7, 1973)(designated § 89(a) in the final version adopted in 1981)):

> It is generally held that a modification of a contract is itself a contract, which is unenforceable unless supported by consideration . . . . 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.

Id.

3. 1A A. CORBIN, *supra* note 1, § 184, at 148 (1963). The thesis that prevention of duress is a major function of the pre-existing duty rule is supported in Brody, *Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation*, 52 DEN. L.J. 433 (1975).

erally being replaced by the rules contained in section 2-209(1) of the Uniform Commercial Code (UCC) and section 89(a) of the *Restatement (Second) of Contracts* (*Restatement*).

B. UCC Section 2-209(1)

Section 2-209(1) of the UCC provides that an "agreement modifying a contract within this Article needs no consideration to be binding."[4] Although the statutory text says nothing about duress, Comment 2 to section 2-209 states that the modification "must meet the test of good faith . . . and the extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith."[5]

The Comment seems to require a legitimate commercial reason for the modification. Thus, if the seller obtains a price increase amendment but has no legitimate commercial reason for demanding any increase in the price, the amendment is unenforceable. What if the seller has a legitimate commercial reason for demanding a $100 price increase but is able to extort a $2000 price increase from the buyer? Does section 2-209(1), as interpreted in Comment 2, require merely a legitimate commercial reason for increasing the price, or does it require that the amount of the price increase ($2000) be justified by some legitimate commercial reason?

If the contract modification is to meet the test of good faith, it would seem that the amendment terms (the amount of the price increase) must be fair. This conclusion is suggested by the UCC provisions dealing with good faith. The duty of good faith is created by UCC section 1-203, which provides that every contract governed by the UCC "imposes an obligation of good faith in its performance or enforcement."[6] In the case of a nonmerchant, "good faith" means honesty in fact.[7] But in the case of a merchant engaged in a transaction governed by Article 2 of the UCC, "good faith" means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[8]

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4. U.C.C. § 2-209(1).
5. *Id.* § 2-209, Comment 2.
6. *Id.* § 1-203.
7. *Id.* § 1-201(19).
8. *Id.* § 2-103(1)(b). The term "merchant" is defined in U.C.C. § 2-104(1). Section 2-103 expressly provides a definition of "good faith" only when that term is used in Article

Assuming that the seller is a merchant, he thus has a good faith duty not to extort an amendment that is unfair when viewed in the light of reasonable commercial standards in the trade. Judged by these standards, a price increase amendment might well be unfair if the amount of the price increase grossly exceeds the increase justified by the seller's legitimate commercial reasons.

Section 2-209(1) of the UCC thus appears to impose two requirements, both of which must be met if the amendment is to be enforceable: (1) the party requesting the amendment must have a legitimate commercial reason for requesting an amendment; and (2) the amendment terms must be fair when viewed in the context of that legitimate commercial reason and in light of reasonable commercial standards of fair dealing.[9] Under UCC section 2-209(1), consideration is not required; nor does the presence of technical consideration validate an amendment made in bad faith.[10] Although the UCC approach thus avoids the defects of the pre-existing duty rule, it is difficult to apply, for reasons which will be discussed shortly.[11]

C. Restatement Section 89(a)

Section 89(a) of the *Restatement* states 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."[12] This rule is applied only to modifications lacking consideration.[13] At least one court has stated that it

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2, and the term "good faith" is not used in the text of § 2-209. However, Comment 19 to § 1-201(19), the Comment to § 1-203, and Comment 2 to § 2-209 suggest that the § 2-103(1)(b) definition of good faith applies to a merchant who modifies a contract governed by Article 2.

9. The "fairness" requirement derived from § 2-103(1)(b) does not apply to consumers who seek to enforce contract amendments. Consumers, however, are seldom able to obtain amendments from merchants by means of duress.

10. U.C.C. § 2-209, Comment 2.

11. See notes 27-31 and accompanying text *infra*.

12. RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981)[hereinafter cited as RESTATEMENT]. Section 89 was designated § 89D in the Tentative Draft of 1973.

13. Comment a to § 89 states that paragraph (a) of § 89 "deals with bargains which are without consideration only because of the rule that performance of a legal duty to the promisor is not consideration [the pre-existing duty rule in *Restatement* § 73]." RESTATEMENT, *supra* note 12, § 89, Comment a. Section 89 is designed to overcome the pre-

"prohibits modifications obtained by coercion, duress, or extortion . . . ."[14]

In order for an amendment to be enforceable under section 89(a), two important requirements must be met: (1) the reason for the amendment must relate to circumstances not anticipated when the original contract was formed; and (2) the amendment must be fair and equitable. Each of these requirements needs further interpretation.

What are unanticipated circumstances? At first glance, this would seem to be a narrower category than the "legitimate commercial reasons" required under UCC section 2-209. Conceivably, a legitimate commercial reason might arise from intervening circumstances that were anticipated. But it is not clear how narrow the unanticipated circumstances category is supposed to be. Comment b to section 89 of the *Restatement* indicates that the category includes some foreseen circumstances: an event may be unanticipated "if it was not adequately covered, even though it was foreseen as a remote possibility."[15] What about an event that was not adequately covered and was foreseen, not as a remote possibility, but as a strong possibility? What about an event that was not adequately covered and was foreseen as a probability? Unfortunately, the *Restatement* Comments do not answer these questions, and the extent of disparity between the UCC concept of "legitimate commercial reason" and the *Restatement* concept of "unanticipated circumstances" is uncertain.[16]

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existing duty rule in appropriate situations.

14. Angel v. Murray, 113 R.I. 482, 493, 322 A.2d 630, 636 (1974).

15. RESTATEMENT, *supra* note 12, § 89, Comment b.

16. For a comparison of the U.C.C. and the *Restatement* on this point, see J. MURRAY, MURRAY ON CONTRACTS § 88 (1974).

Under the pre-existing duty rule, courts often recognized an exception to the rule and deemed amendments lacking consideration to be enforceable when "unforeseen circumstances" existed. *See, e.g.*, Grand Trunk W.R.R. v. H.W. Nelson Co., 116 F.2d 823 (6th Cir.), *rehearing denied*, 118 F.2d 252 (1941); Lange v. United States *ex rel.* Wilkinson, 120 F.2d 886 (4th Cir. 1941); Blakeslee v. Board of Water Comm'rs, 106 Conn. 642, 139 A. 106 (1927); Evergreen Amusement Corp. v. Milstead, 206 Md. 610, 112 A.2d 901 (1955); King v. Duluth, Missabe & N. Ry., 61 Minn. 482, 63 N.W. 1105 (1895). In other decisions, however, the exception to the pre-existing duty rule seems limited to situations in which the unforeseen circumstances were not "foreseeable." *See, e.g.*, Pittsburgh Testing Laboratory v. Farnsworth & Chambers Co., 251 F.2d 77 (10th Cir. 1958); Dahl v. Edwin Moss & Son, 136 Conn. 147, 69 A.2d 562 (1949); Linz v. Schuck, 106 Md. 220, 67 A. 286 (1907). "Unforeseen circumstances" are not necessarily "circumstances not fore-

How is it determined whether an amendment is "fair and equitable"? Presumably, the amendment terms must be fair. Comment b to section 89 indicates that the "fair and equitable" limitation "goes beyond absence of coercion and requires an objectively demonstrable reason for seeking a modification."[17] The use of the indefinite article "a," rather than "the," might suggest that the particular amendment is not to be scrutinized for fairness, so long as the circumstances justified a request for *some* amendment. If the circumstances justify only a $100 price increase, however, it is difficult to see how a $2000 price increase can be regarded as "fair and equitable in view of circumstances not anticipated by the parties when the contract was made." It would thus appear that the amendment terms must be fair when viewed in the context of the reason for the amendment and in light of the standards of fairness applied by the court.

The two requirements of section 89 can therefore be reformulated as follows: (1) the reason for the amendment must relate to circumstances not anticipated (whatever that means) when the original contract was formed; and (2) the amendment terms must be fair and equitable when viewed in the context of the reason for the amendment and in light of applicable standards of fairness. So reformulated, the *Restatement* section 89(a) test bears a striking resemblance to that derived from section 2-209(1) of the UCC.

D. Duress by Wrongful Threat

Section 89(a) of the *Restatement* makes some amendments enforceable despite the lack of consideration. When dealing with the duress issue, sections 175 and 176, which are intended as a restatement of the case law on duress by wrongful threat, should also be consulted. Similarly, when deciding a case governed by Article 2 of the UCC, section 2-209(1) is not the only avenue to a resolution of the duress issue;[18] the case law concerning duress

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seeable"; a circumstance can be unforeseen but foreseeable. Because any circumstance is "foreseeable" in the sense of being susceptible to mental contemplation, when a judge uses the term "not foreseeable," he presumably means "not reasonably foreseeable."

Because the *Restatement* § 89(a) test does not even require that the circumstances be unforeseen, it is more liberal in enforcing amendments than either of the exceptions to the pre-existing duty rule.

17. RESTATEMENT, *supra* note 12, § 89, Comment b.

18. Like *Restatement* § 89, U.C.C. § 2-209(1) was designed primarily to overcome

should also be consulted.[19]

The case law concept of duress by wrongful threat is indeed relevant in the contract modification context. Duress by wrongful threat exists if *A* assents to an agreement because of *B*'s wrongful threat and *A* has no reasonable alternative.[20] In the words of section 175(1) of the *Restatement*, "If 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."[21] In the contract modification context, allegations of duress are usually based upon one party's threat to breach the contract if the other party does not agree to the amendment. The existence of duress depends upon whether the threat was wrongful and whether the threatened party had a reasonable alternative.

Although earlier decisions held that a threat to breach a contract is generally not wrongful, the recent trend is to regard a threat to breach as wrongful in the absence of circumstances justifying the threat.[22] According to section 176(1)(d) of the *Restatement*, a threat to breach a contract is "improper" if "the threat is a breach of the duty of good faith and fair dealing

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the pre-existing duty rule in appropriate contract modification situations. Subsection (1) contains but one brief sentence: "An agreement modifying a contract within this Article needs no consideration to be binding." Comment 1 to § 2-209 states that "[t]his section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."

19. U.C.C. § 1-103 states that the statutory provisions of the U.C.C. are supplemented by "the principles of law and equity, including . . . the law relative to . . . duress . . . . "

20. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 9-2 (2d ed. 1977) and cases cited therein; Dalzell, *Duress by Economic Pressure* (pts. I, II), 20 N.C.L. REV. 237, 341 (1942), and cases cited therein. The test for duress by wrongful threat was applied to a contract modification in Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971):

> 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 . . . . 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 the 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.

Id. at 130-31, 272 N.E.2d at 535, 324 N.Y.S.2d at 25-26.

21. RESTATEMENT, *supra* note 12, § 175(1).

22. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 9-6 and cases cited therein.

under a contract with the recipient."[23] Good faith under the *Restatement* requires "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."[24] The *Restatement* concept of good faith is further explicated by references to the UCC in the comments to section 205 and in Comment e to section 176.[25] As noted above, the UCC standard of good faith for a merchant seems to require amendment terms that are fair when viewed in the context of the reason for the contract modification and in light of reasonable commercial standards of fair dealing.

Thus, in the contract modification context, the contemporary notion of duress by wrongful threat can be summarized as follows: an amendment is voidable by *A* on the ground of duress if (1) *B* wrongfully threatened to breach the original contract if *A* did not agree to the amendment, and if (2) *A* agreed to the amendment because she had no reasonable alternative; *B*'s threat was wrongful if the amendment terms are unfair when viewed in the context of the reason for the threat and in light of community standards of fairness. This concept of duress is similar to those derived from section 2-209(1) of the UCC and section 89(a) of the *Restatement*. A major difference is that the concept of duress by wrongful threat focuses on the situation of the party alleging duress and requires a finding that she had no reasonable alternative to the amendment. The UCC and the *Restatement* section 89(a) tests do not explicitly focus on this element.[26] Each of the three contemporary tests, however, seems to

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23. RESTATEMENT, *supra* note 12, § 176(1). "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.* § 205.

24. *Id.* § 205, Comment a.

25. One sentence in Comment e to *Restatement* § 176 incorporates most of Comment 2 to U.C.C. § 2-209. *See also* RESTATEMENT, *supra* note 12, § 205, Comment a.

26. It should also be noted that the *Restatement* duress by wrongful threat test does not expressly utilize the "unanticipated circumstances" requirement found in *Restatement* § 89(a). Comment e to § 176 does, however, incorporate the U.C.C. requirement of "legitimate commercial reason."

Comment e to § 176 presents an interesting little puzzle; it suggests, without explanation, a difference between the § 176(1)(d) test and the § 89(a) test. Consider the first few sentences in Comment e:

> A threat by a party to a contract not to perform his contractual duty is not, of itself, improper. Indeed, a modification induced by such a threat may be binding, even in the absence of consideration, if it is fair and equitable in view of

require a judgment about the fairness of the amendment terms.

E. The Vagueness of "Fairness"

A major problem with these tests is the uncertainty created by the word "fair." The word suffers from vagueness, and the concept of fairness is incorrigibly subjective.

Little is gained by the UCC reference to "reasonable commercial standards of fair dealing in the trade"[27] or the *Restatement* reference to "community standards of decency, fairness or reasonableness."[28] Ascertaining trade standards or community standards is often a hopeless task; many persons do not have any relevant standards, persons who do have standards seldom articulate them, and the standards that have been articulated are hardly uniform. Ascertaining the majority (or plurality) view would require extensive opinion surveys conducted by social

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unanticipated circumstances. See § 89. The mere fact that the modification induced by the threat fails to meet this test does not mean that the threat is necessarily improper. However, the threat is improper if it amounts to a breach of the duty of good faith and fair dealing imposed by the contract. See § 205.

Id. § 176, Comment e. The sentence beginning with the words "[t]he mere fact" suggests that a modification might fail to meet the § 89(a) test and yet not be the product of an "improper" threat under § 176(1)(d). The enforceability of such an amendment apparently depends upon the presence of consideration. If there is consideration, the amendment is enforceable, since it is not voidable on the ground of duress under §§ 176(1)(d) and 175(1). If there is no consideration, the amendment is unenforceable, since it is not enforceable under § 89(a)(this assumes, of course, that the amendment is not enforceable under § 89(b) or (c)).

A modification could fail to meet the § 89(a) test and yet not be the product of an improper threat under § 176(1)(d) if the § 89(a) "fair and equitable" standard is a higher standard than the § 176(1)(d) "good faith and fair dealing" standard, but this is unlikely. After all, what is fair is fair. Another possibility is that a modification can fail to meet the § 89(a) "unanticipated circumstances" requirement, even though it meets the "legitimate commercial reason" requirement, incorporated into § 176(1)(d) by Comment e. If so, this indicates some disparity between the "unanticipated circumstances" requirement and the "legitimate commercial reason" requirement (see text accompanying notes 15 & 16 *supra*). The only other possibility is that the § 89(a) test is not met because one party has already performed when the contract is modified.

27. U.C.C. § 2-103(1)(b).

28. RESTATEMENT, *supra* note 12, § 205, Comment a. Both the U.C.C. and *Restatement* references are supposed to assist in determining the meaning of "good faith." It has been observed that the concept of good faith is basically "nothing more than a requirement of fairness—a definition so broad as to be virtually meaningless." Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 877 (1979). The Hillman article provides a thorough discussion of the rather unilluminating court decisions concerning U.C.C. § 2-209(1) and good faith.

scientists.[29] Even if a survey identified a clearly prevailing view, there would be reason to suspect that many respondents had not accurately reported their own standards of fairness. Moreover, even if the survey were accepted as a reliable reflection of the respondents' real attitudes, the prevailing standard of fairness may not be reasonable. Recall that the UCC refers to "*reasonable* commercial standards of fair dealing in the trade."[30] If pervasive overreaching is condoned by most members of a trade, then the conscientious judge will reject the trade standard as unreasonable.[31]

A vague test should not be used if a better alternative exists. Rules of law should be as definite and precise as possible, so that the legal consequences of contemplated conduct can be accurately predicted, legal incentives for desired behavior can be made effective, and excessive litigation can be avoided. Of course, in the absence of a reasonable alternative, a vital legal doctrine must be stated in vague terms. Nevertheless, before it is concluded that duress is a necessarily vague doctrine in the contract modification context, the possibility of a clear and specific test should be explored.

The task of formulating such a test is aptly described by Calamari and Perillo:

> [C]ourts have defended the pre-existing duty rule as a salutary method of preventing the coerced modification of contracts. Now that the Uniform Commercial Code and other legislation permit a contractual modification without consideration it seems clear that other techniques need to be developed to avoid coerced modifications.
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> . . . It will, of course, require a good deal of creative interpretation of the Code before standards are developed for distinguishing between reasonable and unreasonable demands for

29. Opinion surveys would be necessary because actual contracts and transactions should not be accepted as accurate reflections of the standards adopted by persons in the trade or community. A person's agreement to particular terms does not mean that he regards those terms as fair. He may agree to terms he regards as unfair because he views his alternatives as even worse.

30. U.C.C. § 2-103(1)(b)(emphasis added).

31. *Cf.* U.C.C. § 1-205, Comment 6 (a standard practice does not constitute a "usage of trade" under § 1-205(2) if it is established that the practice is unconscionable or dishonest; commercial acceptance merely makes out a prima facie case that the practice is reasonable).

modification.[32]

The remainder of this article presents an attempt to provide some creative interpretation and develop some distinguishing standards.

II. AN ANALYTICAL FRAMEWORK

Because of the vagueness of fairness, the duress issue should be analyzed without judging whether the amendment terms are fair. An analytical framework that focuses on the objective economic circumstances of each party at the time of contract modification will be useful. A basic assumption underlying this framework is that one party has made a credible threat, either explicit or implicit, to breach the original contract if the other party does not agree to a particular contract amendment.

A. Harmless Amendments

There is no duress if performance of the amended contract does not make the party alleging duress economically worse off than she would be if the contract were performed according to its original terms. For duress to exist, the threat must cause harm.[33] *A*'s threat harms *B* only if it presents *B* with two alternatives, both of which are (from *B*'s point of view) worse than her status quo. For example, *A* obtains *B*'s agreement to x by threatening to do y if *B* does not agree to x. *B* prefers non-x, non-y to either x or y, but prefers x to y, and, therefore, agrees to x in order to avoid y. *B* is harmed no matter what she does. But if *B* agrees to an amendment making her economically better off than or as well off as the original contract would, she has escaped harm and cannot be regarded as a victim of duress, no matter how terrible her other alternative was.[34]

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32. J. CALAMARI & J. PERILLO, *supra* note 20, § 5-15, at 195 (footnotes omitted).

33. *See* II G. PALMER, THE LAW OF RESTITUTION § 9.1 (1978). Duress is a subspecies of coercion. Coercion exists when *B* does what *A* demands, even though it is harmful to *B*, because *A* has threatened *B* with a worse harm if *B* does not comply with the demand. In the law of contracts and the law of restitution, duress is coercion inducing an agreement the law ought not to enforce. For a good discussion of coercion, see Bayles, *A Concept of Coercion*, in COERCION 16 (Nomos XIV, J. Pennock & J. Chapman, eds. 1972).

34. If the amendment makes *B* better off than the original terms, not merely as well off, her assent to the amendment has obviously not been coerced because it was not the result of the threat. See note 33 *supra*. Because *B* would presumably have agreed to the

Amendments of this kind ("Harmless Amendments") can be eliminated from treatment as possible products of duress. Consider, for example, a construction contract whereby the contractor is to build a garage on the east side of the owner's home. The contract is modified, at the owner's insistence, to provide that the garage will be constructed on the west side of the home. If this modification results in no additional cost to the contractor, it is a Harmless Amendment that benefits the owner and does not make the contractor worse off than the original contract would. The contractor is not a victim of duress.[35]

B. Justifying Circumstances

With the elimination of Harmless Amendments, contract modifications that do reduce the contractual rights and expectations of the party alleging duress can be considered. To determine which of these may properly be avoided on the ground of duress, the examination will focus first on the objective economic circumstances, at the time of modification, of the party who threatened to breach. Did any objectively demonstrable intervening circumstances render an exchange on the original contract terms economically less beneficial to that party than he an-

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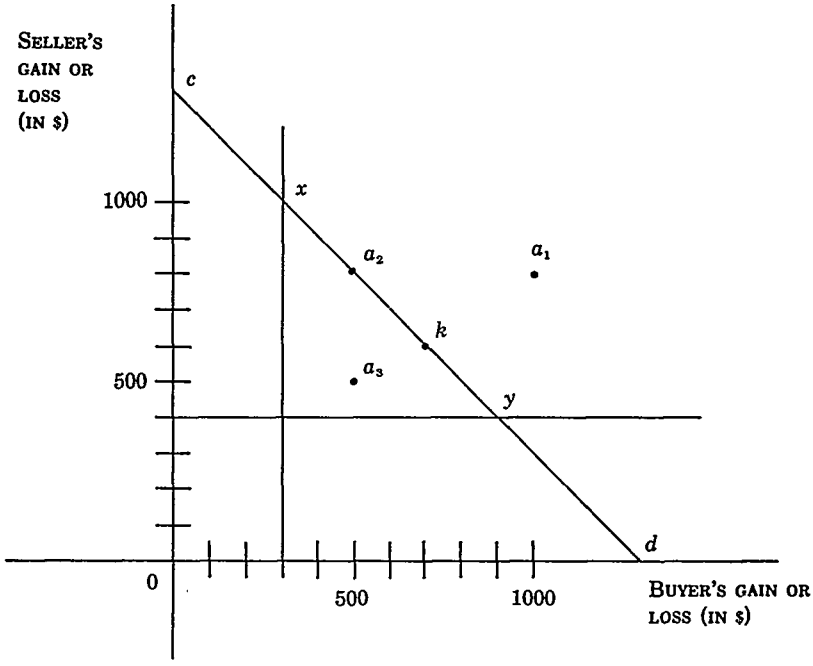
amendment in the absence of *A*'s threat, the threat was not a necessary cause of *B*'s assent. It is assumed that a party has no psychic aversion to contract modification per se and that, if an amendment makes her better off economically, she prefers it "all things considered."

One notion of duress suggests that even a mutually beneficial amendment, one that makes both parties better off than would the original contract terms, might be regarded as the product of duress. According to this notion, there is duress if one party exploits superior bargaining power so as to impose terms that result in an excessively unequal exchange of values. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947). For a discussion of refusal to make a contract on reasonable terms as a form of duress, see Dalzell, *supra* note 20, at 356-61. However, the question of nullifying mutually beneficial agreements on the ground of unequal exchange can be analyzed more conveniently under the doctrine of unconscionability, which is designed to deal with unequal exchanges. The "unequal bargaining power" variety of unconscionability was recognized in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). In the years since the Dawson and Dalzell articles were written, the concept of unconscionability has been enshrined in U.C.C. § 2-302 and Uniform Consumer Credit Code § 5.108 and has been further developed in numerous court decisions. In view of this development, the defense of duress should be reserved for threats that are actually harmful to the victim.

35. In Figure A, point a_1 represents a Harmless Amendment giving Buyer a gain of $1000 from the contractual exchange and giving Seller a gain of $800. Point k represents an original contract that apparently yields Buyer a gain of $700 and Seller a gain of $600.

ticipated when he entered into the original contract? Any such circumstances can be referred to as "Justifying Circumstances."[36] Although they may not justify the particular amend-

FIGURE A



The figure merely depicts net gains or losses in dollars; it does not depict gains or losses in actual utility.

Formation of an original contract at point k is the outcome of a two-person, nonzero-sum, infinite, cooperative game. For definitions of these game-theory terms, see W. RIKER & P. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY 205-07 (1973). The vertical line passing through point x represents the minimum dollar gain Buyer can derive from the exchange and still be willing to contract with Seller. The horizontal line passing through point y represents the minimum dollar gain Seller can derive and still be willing to contract with Buyer. (Assume these minimum requirements are determined by the alternative opportunities of the parties; for example, if Seller does not contract with Buyer, he can sell to someone else at a $400 profit). If both parties bargain efficiently, the original contract should lie somewhere within the "negotiation set" represented by the segment between point x and point y of the (apparently) Pareto-optimal contract curve cd.

An amendment at point a_1 indicates that the cd curve was not Pareto-optimal after all and that both parties can do better by modifying the original contract.

36. The concept of Justifying Circumstances is similar to the concept of "legitimate commercial reason" utilized in Comment 2 to U.C.C. § 2-209, except that it *always* re-

ment terms obtained by the threatening party, they would appear to justify a request for some kind of amendment. Assuming that the other party's circumstances have not changed, the actual social gain (the algebraic sum of the threatening party's net gain or loss and the threatened party's net gain or loss) from the exchange will be less than indicated by the expectations of the parties at the time of original contract formation. In view of this reduction in the social gain, some reallocation of the social gain may be in order.

The following are examples of Justifying Circumstances: (1) Seller demands an amendment increasing the contract price because the cost of some necessary input has risen since the original contract was formed; (2) Seller demands a price increase amendment because a third party has offered to pay more than Buyer's contract price for the very same property or services (assuming that Seller is not a "lost-volume seller" and cannot deliver to both Buyer and third party);[37] (3) Seller discovers that, due to a mistake in his cost computations, he agreed to a contract price below cost, and he now demands a price increase;[38]

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quires that the circumstances be objectively demonstrable. Comment 2 to U.C.C. § 2-209 states that good faith in the case of a merchant *"may in some situations* require an objectively demonstrable reason for seeking a modification." U.C.C. § 2-209, Comment 2 (emphasis added). The definition of Justifying Circumstances proposed in this article is more in keeping with Comment b to *Restatement* § 89, which states that § 89(a) "requires an objectively demonstrable reason for seeking a modification." RESTATEMENT, *supra* note 12, § 89, Comment b.

Note that a Justifying Circumstance need not be unanticipated or unforeseen. Comment b to *Restatement* § 89 suggests that an intervening circumstance might justify a demand for contract modification, even though it was foreseen as a remote possibility. *Id.* If some foreseen circumstances can justify demands for contract modification, no foreseen event should be excluded on grounds that it was foreseen as a strong, rather than remote, possibility. There is no way to ascertain that a person foresaw an event as a strong possibility rather than a remote possibility.

37. Seller's performance of the original contract with Buyer would involve an opportunity cost equal to the additional profit Seller forsakes by performing his contract with Buyer. From the economic point of view, an opportunity cost is like any other intervening cost because it renders Seller's performance of the original contract more burdensome than he had anticipated. It would thus seem to justify an attempt to modify the contract. *See* Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 131 N.E. 887 (1921); RESTATEMENT, *supra* note 12, § 89, Comment b, Illustration 3; Posner, *Gratuitous Promises in Economics and Law,* 6 J. LEGAL STUD. 411, 424 (1977).

38. Throughout this article it is assumed (1) that the original contract is not voidable for mistake, (2) that no unforeseen hardship excuses performance of the original contract on grounds of impossibility, impracticability, or frustration of purpose, and (3) that no fraud or mistake exists that might make the amendment voidable. In short, the origi-

(4) Buyer discovers that he cannot use goods ordered from Seller for some of the purposes he had in mind when he entered into the original contract and now demands an amendment reducing the contract price.

C. *Worse Alternatives*

Focusing now on the objective economic situation, at the time of contract modification, of the party alleging duress, would this party's best available alternative to the amendment have made her even worse off economically than would performance of the amended contract?[39] If so, she had only "Worse Alternatives." The purpose of determining if the party alleging duress had only Worse Alternatives is to ascertain whether her assent

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nal contract is assumed to be enforceable, and the only issue is whether the amendment is voidable for duress.

39. When the party alleging duress is a business, an alternative to the amendment would leave the business economically worse off than the amendment does if it would leave the business with smaller profits or larger losses. When the party alleging duress is a consumer buyer, an alternative to the amendment would leave her worse off than the amendment does if it would leave her with a smaller "consumer's surplus." As defined by Alfred Marshall, the consumer's surplus is "[t]he excess of the price which he would be willing to pay rather than go without the thing, over that which he actually does pay." A. MARSHALL, PRINCIPLES OF ECONOMICS, bk. III, ch. VI, § 1, at 124 (8th ed. 1920). Although ascertaining the consumer's surplus is usually impossible, both the dollar amount the buyer must pay under the amended contract terms and the net amount she would have to pay for equivalent property or services if she were to utilize her best alternative can frequently be ascertained. If this best alternative to the amendment would require the buyer to pay more for equivalent property or services than the amended contract does, the alternative obviously leaves the buyer with a smaller consumer's surplus.

Concentrating on objective economic circumstances means ignoring certain statements made by the parties. Some courts and commentators have suggested that in deciding whether there was coercion, one should note whether the party alleging duress assented to the amendment under protest or assented willingly. *See, e.g.*, United States *ex rel.* Crane Co. v. Progressive Enterprises, Inc., 19 U.C.C. Rep. 1306 (E.D. Va. 1976); 1A A. CORBIN, *supra* note 1, § 184; Hillman, *Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 870-73, 893, 898-99 (1979). Protest or lack of protest is seldom significant, however, and the court's decision should not depend upon the vociferousness of the threatened party's resistance. A person might vehemently protest a reasonable amendment and then agree to it, not because she is coerced but because she finally perceives it to be fair. A person who is really a victim of coercion might acquiesce without protest because she sees that protest would be futile. Similar observations are made in Dalzell, *supra* note 20, at 382; Note, *Contracts-Modification Agreements: Need for New Consideration; Economic Duress*, 50 WASH. L. REV. 960, 975-76 (1975). One astute court observed: "Of course, protest was a mere gesture unless there was duress in fact, and in that event, protest was unnecessary." Manhattan Milling Co. v. Manhattan Gas & Elec. Co., 115 Kan. 712, 721, 225 P. 86, 90 (1924).

to the amendment was coerced. If she would have agreed to the amendment even in the absence of the other party's threat to breach, she was not coerced. The attempt to ascertain whether she would have agreed to the amendment in the absence of the threat involves a presumption that she sought only to maximize her economic welfare, unless it can be inferred from the economic circumstances that she had some noneconomic motive for consenting to the amendment.[40]

Thus, if the party alleging duress had only Worse Alternatives, presumably she agreed to an economically harmful amendment only because she wanted to avert alternatives that were economically even more harmful. Because the economic circumstances suggest no reason to infer that she had some noneconomic motive such as generosity, it can be concluded that she would not have agreed to the amendment in the absence of the threat and, therefore, that her assent to the amendment was coerced.

If the party alleging duress had (1) an alternative that was not economically harmful[41] or (2) an alternative that would have made her economically better off than does the amendment, but would not have avoided economic harm altogether, it can be inferred that she had some noneconomic motive for assenting to the economically harmful amendment. It is uncertain, however, whether that motive was such that she would have agreed to the amendment in the absence of the other party's threat to breach.[42] Thus, it cannot be concluded that assent to the amend-

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40. The presumption that a party seeks only to maximize her economic welfare is based upon the belief that contracting parties usually have only self-interested economic motives. Because a party's real motives cannot be determined with any certainty, presumptions must be made. If it is presumed that the party alleging duress consented to the modification because of some motive other than maximization of her economic welfare, it is difficult for her to establish that she was coerced; she cannot easily prove that such a motive would not have led her to agree to the amendment even in the absence of the threat.

41. A legal or extralegal remedy that prevents the other party's breach from having harmful economic consequences is an example of this type of alternative.

42. We cannot know what the noneconomic motive was or how strong it was; we can only guess. The threatened party may have had a purely psychic aversion to litigation or any rupture of the contractual relationship, and this aversion—perhaps in combination with some psychic attraction to the amendment—may have caused her to prefer the amendment to the breach-and-remedy alternative, "all things considered." She might nevertheless have regarded the amendment as less desirable than her original contract rights, in which case she would not have agreed to the amendment in the absence of the

ment was the result of coercion.[43]

Frequently, the threatened party has only Worse Alternatives because the legal remedy for the threatened breach is not only inadequate to provide her expectancy under the original contract, but is so inadequate that it would leave her economically worse off than she is under the amended contract. There are a number of possible reasons for inadequacy of legal remedy. Buyer may be unable to recover damages for consequential losses because they are not losses Seller had reason to foresee. In some cases, Seller's breach prevents Buyer from taking advantage of some other profitable business opportunity, but the lost profits are not recoverable because they are too uncertain and speculative. Buyer's or Seller's damages may be limited to an inadequate amount by an enforceable liquidated damages clause in the original contract. It may appear that the financial situation of the party threatening breach will render him wholly or partially "judgment-proof." In some cases, the legal remedy for breach will not be available soon enough to save the victim from financial disaster. Frequently, the legal remedy for breach is inadequate because of the substantial uncertainty of winning the lawsuit. Finally, every breach of contract involves transaction costs; the victim must expend time and money in attempting to achieve an out-of-court settlement, and, if litigation becomes necessary, she incurs substantial attorney's fees that are seldom legally compensable. Transaction costs alone are often sufficient

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threat. (The psychic aversion to breach would not be a factor in the absence of a threat to breach.) On the other hand, it is possible that the threatened party had such a strong sense of generosity or sympathy for the other party that she preferred the economically harmful amendment, not only to her best alternative when threatened with breach, but also to her original contract rights.

43. The concept of "Worse Alternative" differs from the concept of "reasonable alternative," the term used in *Restatement* § 175(1) and some other formulations of the doctrine of duress by wrongful threat. "Reasonable alternative" appears to mean an alternative that would have avoided harm altogether. *See* II G. PALMER, *supra* note 33, § 9.5, at 264, § 9.12, at 325 (1978). In inquiring about alternatives, the purpose is to ascertain whether the recipient of the threat was coerced into the contract modification. When the recipient of the threat had an economically better alternative, it cannot be determined whether she would have chosen to modify the contract in the absence of the threat, and it therefore makes no difference whether that alternative was harmful (an "unreasonable alternative") or harmless (a "reasonable alternative"). The better question is whether she had only Worse Alternatives. This question at least isolates modifications that were presumably coerced from modifications that may or may not have been coerced.

to render the breach and remedy alternative economically worse than the proposed contract modification.

In ascertaining whether the party alleging duress had only Worse Alternatives, a court should consider not only her legal remedies for breach but any other available alternatives. For example, it cannot be said that Buyer had only Worse Alternatives if, upon breach by Seller, Buyer could have purchased equivalent property or services from another source at equal or lower cost.

D. The Matrix for Harmful Modifications

In determining whether a harmful modification is voidable for duress, two questions should be asked: (1) Did the party threatening breach have any Justifying Circumstances? (2) Did the party alleging duress have only Worse Alternatives to the modification? The answers to these two questions will indicate one of four possible situations, as shown in the matrix in Figure 1.

FIGURE 1

	PARTY ALLEGING DURESS HAD AN ECONOMICALLY BETTER (OR EQUALLY GOOD) ALTERNATIVE	PARTY ALLEGING DURESS HAD ONLY WORSE ALTERNATIVES
PARTY THREATENING BREACH HAD JUSTIFYING CIRCUMSTANCES	1	4
PARTY THREATENING BREACH HAD NO JUSTIFYING CIRCUMSTANCES	2	3

For each of the four possible situations, it must be determined whether the amendment ought to be enforced.

III. THE SYMPATHETIC AMENDMENT

Consider first the contract modifications falling within BOX 1 in the Figure 1 matrix. At the time of modification, the party threatening breach has Justifying Circumstances, indicating that performance on the original contract terms would be economically less beneficial to him than he anticipated when he entered into the original contract. The threatened party has some alternative to the contract modification that is not a Worse Alterna-

tive; she has an alternative that is economically better than or as good as the amendment.

Suppose that Buyer and Seller form a sale of goods contract with a contract price of $50,000, Seller anticipating costs of $45,000. Seller subsequently discovers that his costs will be $60,000. He requests an amendment increasing the contract price to $60,000 and suggests that he cannot perform for $50,000. Assume that if Buyer rejects the proposed amendment and Seller breaches, Buyer will be able to cover by purchasing equivalent goods elsewhere for $55,000 and will then be able to recover $5000 damages[44] but will incur a $1000 (estimated maximum) litigation expense. Buyer's net cost for the goods in the event of Seller's breach would not exceed $51,000. Although $51,000 exceeds the $50,000 original contract price, it is less than the $60,000 amended price requested by Seller. Nevertheless, Buyer agrees to the price increase amendment.

Such an amendment should be enforced. Seller's Justifying Circumstance, his cost increase of $15,000, suggests that the actual social gain from the exchange is less than indicated by the beliefs of the parties when the original contract was formed. Some price increase may be justified to relieve Seller from bearing the entire burden of the reduction in social gain. The fact that Buyer had an alternative that was economically better than the amendment does not necessarily mean that her assent to the amendment was voluntary in the sense that she would have agreed to the amendment even in the absence of Seller's threat to breach.[45] Buyer, however, must have had some noneconomic motive for preferring the amendment to her economically superior alternative.[46] One very likely motive was sympathy for the unlucky Seller, hence the label, "Sympathetic Amendment." Buyer's noneconomic motive, whatever it was, may well have been such that she would have agreed to the amendment even in the absence of Seller's threat to breach. In doubtful cases, such as Sympathetic Amendment cases, it should be presumed that

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44. Buyer's damages would be the excess of her cost of cover ($55,000) over the contract price ($50,000). U.C.C. § 2-712.

45. See note 42 and accompanying text *supra*.

46. It is assumed that Buyer was not mistaken about the relative economic values of her alternatives and that Seller has not deceived Buyer into believing that Seller has Justifying Circumstances when there are none. See note 38 *supra*.

Buyer's assent was voluntary rather than coerced, a presumption that seems to be required by the general policy of enforcing agreements unless it is probable that the agreement was not voluntary on both sides.[47]

Because Seller's cost increase justified a demand for some price amendment, and Buyer's assent to the $60,000 price amendment was presumably voluntary and not coerced, the amendment should be enforced. If there is no coercion, there is no duress. The Sympathetic Amendment appears to be merely a voluntary adjustment of a contractual relationship that is not as economically beneficial as expected.[48]

IV. THE UNLIKELY AMENDMENT

In situations falling within Box 2 in the Figure 1 matrix, the party threatening breach has no Justifying Circumstances indi-

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47. The presumption that Buyer's assent was voluntary is not a rebuttable presumption, susceptible to being overcome by factual evidence. The threatened party's noneconomic motives and their relative intensity remain forever unknown, and the finder of fact should not attempt to ascertain whether the threatened party would have agreed to the amendment in the absence of the threat. Because the available evidence is unreliable, the probability of coercion cannot possibly be established.

A hypothetical inquiry into what one party would have done if the other party had done something else "is unsatisfactory because usually a matter of speculation." H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 370 (1959). The threatened party's own statements are likely to be self-serving, and it is also likely that she does not even know precisely what her noneconomic motives were. As Freudian psychoanalytic theory suggests, people often act on repressed motives and other motives of which they are not conscious. The threatened party's conduct on similar occasions is not reliable evidence of what she would have decided in the absence of the threat; no two situations are the same, and even if they were, a person's motives vary from day to day and from situation to situation. Nor can reliance be placed on knowledge about the *usual* motives people have for acting in a particular way. A search for the threatened party's noneconomic motives is a search for motives that are *unusual* in contract situations. Finally, it must be acknowledged that the threatened party's decision probably involved a number of motives and a balancing of conflicting desires and aversions. Even if these desires and aversions could be identified, what the threatened party would have decided in the absence of the threat cannot be ascertained because methods for measuring the relative intensity of such desires and aversions are lacking. The problem is illustrated in note 42 *supra*. For a discussion of this and other problems involved in the analysis of motivation, see Alston, *Motives and Motivation*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 399 (P. Edwards ed. 1967).

48. In Figure A, *supra* note 35, the amendment represented by point a_3 is a Sympathetic Amendment if Buyer had an economically better (or equally good) alternative to the amendment. Note that point a_3 is below and to the left of the original contract curve *cd;* this reflects the fact that the economic social gain derived from the exchange is less than indicated by the parties' original expectations.

cating that performance of the original contract would be less beneficial to himself than he originally anticipated. The threatened party agrees to the amendment even though she has an alternative that would make her economically better off than, or as well off as, the amendment; thus, she cannot be said to have only Worse Alternatives.

Imagine a sale of goods contract with a contract price of $100,000. Seller has no cost increase and has not discovered any mistake in his original calculation of costs, but he nevertheless demands an amendment increasing the contract price to $110,000 and threatens to breach if his demand is not met. Assume that if Buyer rejects the proposed amendment and Seller breaches, Buyer will be able to obtain equivalent goods elsewhere at a total cost of $100,200 (a $100,000 price plus $200 in transaction costs that are not worth suing for). Although $100,200 is less than the amendment price of $110,000, Buyer agrees to the amendment.

This is, of course, an unlikely scenario, hence the label, "Unlikely Amendment." If Seller has not informed Buyer of any intervening hardship with which Buyer can sympathize, it is unlikely that Buyer would agree to the amendment when she has an alternative that is economically better for herself. Suppose, however, that Buyer does agree to the amendment—she may have reevaluated the original contract terms and decided that they were unfair to Seller, or she may have a sufficiently strong psychic aversion to any rupture of her contractual relationship with Seller.

The Unlikely Amendment does not present as strong a case for enforcement as the Sympathetic Amendment, since Seller has no Justifying Circumstances; nevertheless, the Unlikely Amendment should be enforced. Because Buyer had an economically superior alternative, it can be inferred that she had some noneconomic motive for agreeing to the amendment. That motive may have been such that she would have agreed to the amendment even in the absence of the threat, in which case it cannot be said that her assent to the amendment was coerced. Like the Sympathetic Amendment, the Unlikely Amendment should be enforced because of the general policy of enforcing agreements unless it is probable that the agreement was not vol-

untary on both sides.[49]

V. THE HOLDUP AMENDMENT

Now consider contract modifications falling within Box 3 in the Figure 1 matrix. At the time of modification, the party threatening breach has no Justifying Circumstances and the threatened party has only Worse Alternatives to the amendment. Imagine a sale of goods contract with a $10,000 contract price. Subsequent to the formation of the contract, Seller has not encountered any intervening circumstances reducing his expected profit, but he nevertheless demands an amendment increasing the price to $11,000 and threatens to breach if his demand is not met. If Buyer rejects the amendment and Seller breaches the original contract, Buyer can cover by obtaining equivalent goods elsewhere at a cost of $12,000, paying a premium to obtain delivery on short notice. Buyer can then recover $2000 damages from Seller, but her legal expenses will be at least $1500. Thus, Buyer's net cost for the goods she needs will be at least $11,500 if Seller breaches. If Buyer agrees to the amendment, her cost will be $11,000. Buyer agrees to the amendment.

The modification smells like a holdup, hence the label, "Holdup Amendment." The courts have readily refused to enforce Holdup Amendments,[50] and this result seems proper. Because Buyer had only Worse Alternatives, there is no reason to infer that noneconomic motives were present. Thus, it can be inferred that her assent to the economically harmful amendment was coerced; she would not have agreed to the amendment in

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49. In Figure A, *supra* note 35, the amendment represented by point a_2 might be an Unlikely Amendment. Because no Justifying Circumstances exist, the economic social gain from the exchange is the same as indicated by the parties' expectations at the time of original contract formation, and the parties are still on their original contract curve *cd*. Whether the move from point k to point a_2 illustrates an Unlikely Amendment or a Holdup Amendment (see text at section V *infra*) depends upon whether Buyer had only Worse Alternatives.

50. *See, e.g.*, Alaska Packers' Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902)(modification unenforceable under pre-existing duty rule); Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S.W. 844 (1891)(modification unenforceable under pre-existing duty rule); Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971)(modification unenforceable because of duress); King Constr. Co. v. W. M. Smith Elec. Co., 350 S.W.2d 940 (Tex. Civ. App. 1961)(modification unenforceable because of duress).

the absence of the threat.[51] Seller had no Justifying Circumstances indicating that the original contract would give him less profit than he anticipated when he entered into the contract. Intuitively, it seems wrong for Seller to use a coercive threat merely to increase his own gain at Buyer's expense. Intuitive and subjective judgments about whether Seller's threat was wrongful should, however, be avoided. Seller may have sincerely believed that the original contract terms were unreasonably favorable to Buyer and that he was justified in taking advantage of economic circumstances to obtain fairer terms. A focus on objective economic circumstances provides justification for a legal rule precluding enforcement of Holdup Amendments.

A. Holdup Bargaining Reduces the Prospects for Mutual Benefit

The major function of contract law is to facilitate future exchanges[52] that are mutually beneficial.[53] If two parties voluntarily agree to perform a future exchange of economic resources, the exchange will presumably be beneficial to both parties; otherwise they would not have agreed to it. In the language of welfare economics, such an exchange is "Pareto-superior"[54] to no exchange at all. Mutually beneficial exchanges are socially desirable because they increase aggregate welfare[55] and also seem to

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51. See text at section IIC *supra*.

52. A "future exchange" is an exchange not completed until some time after formation of an agreement to perform the exchange.

53. A good explanation of this function is contained in Birmingham, *Legal and Moral Duty in Game Theory: Common Law Contract and Chinese Analogies*, 18 BUFFALO L. REV. 99, 103-10 (1969).

54. An allocation of resources is Pareto-superior to an alternative allocation if, and only if, it makes at least one person better off and makes no one worse off. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 513 (1980). *See also* J. HENDERSON & R. QUANDT, MICROECONOMIC THEORY 286 (3d ed. 1980); C. ROWLEY & A. PEACOCK, WELFARE ECONOMICS 7-10 (1975); A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 21-24 (1970); A. SEN, ON ECONOMIC INEQUALITY 6-7 (1973); Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 226 (1980).

A mutually beneficial exchange is Pareto-superior to no exchange at all so long as the exchange produces no harmful effects on third parties.

55. Given the inability to make interpersonal utility comparisons, only when an exchange is Pareto-superior to no exchange at all is it certain that the exchange increases aggregate utility. For a good explanation of this point, see I. MACNEIL, CONTRACTS 2-8 (2d ed. 1978). If one party is made worse off by the exchange, it is not known whether his loss in personal utility is exceeded by the other party's gain, because utility cannot be

be just or, at least, more just than no exchange at all.[56]

Without adequate assurances that promises to perform future exchanges will be kept, very few such exchanges would be undertaken.[57] Contract law provides such assurances in the form of legal remedies (usually expectancy damages) that not only deter each party from breaching, but also assure each party that he will be compensated for any breach committed by the other party. Contract law is in this way designed to facilitate mutually beneficial future exchanges.

In order to perform this function, the legal system must distinguish between bargains that enhance the prospects for mutual benefit and those that do not. This distinction suggests the reason for not enforcing agreements tainted by fraud, duress, or incapacity. Any such defect in the bargaining process renders it all

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cardinally measured for purposes of interpersonal comparison. If both parties are made better off, it is apparent, without measuring either party's gain in utility, that aggregate utility is increased.

56. A mutually beneficial exchange is more just or fair than no exchange at all because it would be preferred by any rational participant who is not afflicted with envy. It does not matter whether the hypothetical rational participant steps into the role of Seller or of Buyer; she will prefer the exchange even if she does not know whose shoes she will step into. Assume that Buyer's and Seller's economic payoffs are as depicted in Figure B below, and that when the exchange is completed, the hypothetical rational person will step out of Buyer's or Seller's shoes and take her gain with her.

FIGURE B

	EXCHANGE	NO EXCHANGE
BUYER	+2	0
SELLER	+4	0

If the hypothetical participant is allowed to choose her role, she will choose to be the Seller and will prefer the exchange to no exchange at all. If she has to allow a second hypothetical participant to choose a role and then herself play the remaining role, she assumes she will end up as Buyer. She will, however, still prefer the exchange to no exchange because she knows that, as Buyer, she will profit from the exchange. The conceptual device of the rational chooser who gets "last choice" is suggested in J. FISHKIN, TYRANNY AND LEGITIMACY 99-104 (1979). If the hypothetical rational participant stands behind a "veil of ignorance" in a transactional version of John Rawls' "original position" and has no idea which role she will end up playing, see J. RAWLS, A THEORY OF JUSTICE 11-22, 118-50 (1971), she will still prefer the exchange because she will profit from it, whether she steps into Seller's shoes or Buyer's. It is assumed that the hypothetical rational participant is self-interested, but it can be seen that she will prefer the exchange to no exchange even if she is altruistic or has mixed goals.

57. When one party's expected gain from the exchange is discounted by the risk that the other party will not perform and by his own aversion to risk, his expected gain may not be a gain at all. See I. MACNEIL, *supra* note 55, at 65-66.

too likely that the agreed-upon exchange would not be mutually beneficial.

When the parties agree to a Holdup Amendment, the bargaining has decreased the likelihood that the resulting exchange will be mutually beneficial. In the hypothetical Holdup considered here, Seller has no Justifying Circumstances indicating that an exchange on the original contract terms would be less profitable than he anticipated when he entered into the original contract. Seller would presumably make a profit without any contract modification, and assuming that the original contract was voluntary on both sides, an exchange on the original contract terms would be mutually beneficial. Buyer, on the other hand, has agreed to an amendment that makes her economically worse off than would the original contract terms (she has agreed to pay $11,000 rather than $10,000) and has done this to avoid an economically worse alternative (she has only Worse Alternatives). The coercive modification thus introduces the risk that the exchange will not be beneficial to Buyer; she may have agreed to amended terms that will yield her a net loss in order to avoid an even greater net loss from Seller's breach.

Because the coercive Holdup Amendment is not necessary to assure Seller of a profit and does introduce the risk that Buyer will suffer a loss, it reduces the likelihood of mutual benefit and should not be enforced. A Holdup Amendment is not justified by any need to adjust the contract terms in view of a change in the expected social gain; it is merely a coerced reallocation of the same social gain.[58]

B. Enforcement is not Necessary to Induce Performance that is Pareto-superior to Breach

It might be suggested that a Holdup Amendment should be

58. In Figure A, *supra* note 35, the amendment represented by point a_3 is a Holdup Amendment if Buyer had only Worse Alternatives; otherwise it is an Unlikely Amendment. The economic social gain (the sum of the two dollar payoffs) is unchanged by the move from the original contract at point k to the amendment at point a_3. Buyer is presumably coerced into the move if she has only Worse Alternatives.

At point a_2, Buyer still has a beneficial exchange. In the real world, however, it is often difficult or impossible to ascertain whether the Holdup Amendment results in a losing exchange for the victim of the threat, and it is convenient and prudent simply to declare all Holdup Amendments unenforceable because they increase the risk that the exchange will not be mutually beneficial.

enforceable if performance of the contractual exchange is better for both parties than a breach and if enforceability of the amendment is necessary to induce the threatening party to perform rather than breach. Surely, legal rules should provide incentives for choosing the Pareto-superior alternative.

In our hypothetical Holdup situation, performance of the exchange at any price from $10,000 to $11,000 is indeed better for both parties than breach. Performance at the amended price of $11,000 or any lower price must be better for Buyer than Seller's breach would be; otherwise Buyer would not have agreed to the amendment in order to avert breach. Performance at the original contract price of $10,000 or any higher price must be better for Seller than his breach would be. Because he has no Justifying Circumstances, such performance yields Seller a profit no smaller than the profit he was willing to take when he made the original contract. His breach of the original contract, however, would subject him to liability for damages of $2000 and to additional transaction costs, leaving him with a net payoff worse than the gain he can make by performing.[59] In this hypothetical situation, as in any Holdup situation, performance is better for both parties than breach.

But even if Holdup Amendments are not enforceable, threatening parties will perform rather than breach. The Seller in the hypothetical will still deliver the goods, even if he knows that the amendment is unenforceable, because performance at the original contract price makes him better off than would his breach.[60] Indeed, a legal rule making Holdup Amendments un-

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59. If he breaches, Seller can probably resell the goods at a profit, but he cannot resell the goods at a price above Buyer's contract price because it is assumed that Seller has no Justifying Circumstances, and it must therefore be assumed that he does not have an opportunity to sell the goods to a third party at a higher price. Any such opportunity would create an opportunity cost and constitute a Justifying Circumstance. See notes 36-38 and accompanying text *supra*. Thus, Seller's profit from the resale cannot exceed his profit from performance of the contract. Because his profit from resale would be offset to some extent by the damages he pays to Buyer and by his other transaction costs arising from breach, Seller's breach would make him economically worse off than would performance of the contract at any price equal to or exceeding the original contract price.

60. Seller's threat to breach converts what began as an infinite game into a finite game. Once the threat has been made, two moves remain; each move requires a choice between two alternatives. First, Buyer moves; she either accepts the amendment or rejects it. Then Seller moves; he either performs or breaches. The situation can thus be depicted in a matrix. For an illustrative use of the matrix form in threat and promise situations, see T. SCHELLING, THE STRATEGY OF CONFLICT 123-37 (paperback ed. 1963).

enforceable would seem to do a better job of inducing perform-

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The matrix in Figure C below depicts a Holdup situation. For each possible outcome, Seller's payoff is shown below and to the left of Buyer's. Each party's payoff value reflects his ordinal ranking of his possible payoffs. Buyer, for example, most prefers a payoff of 4 and least prefers a payoff of 1. It is assumed that each party knows the law and knows his own payoff possibilities but is not aware of the other party's legal knowledge or payoff possibilities.

FIGURE C

		BUYER	
		AGREES TO AMENDMENT	REJECTS AMENDMENT
SELLER	PERFORMS	3 4 IF AMENDMENT ENFORCEABLE	4 3 IF AMENDMENT UNENFORCEABLE	4 3
	BREACHES	1 2 IF AMENDMENT ENFORCEABLE	2 1 IF AMENDMENT UNENFORCEABLE	2 1

Assume first that Holdup Amendments are enforceable. If Seller has made a credible threat to breach in the event that Buyer rejects the amendment, Buyer will agree to the amendment because a payoff of 3 is preferable to a payoff of 2 (the payoff to Buyer when Seller breaches after Buyer rejects the amendment). Seller will then perform (a payoff of 4 is preferable to a payoff of 2).

Now assume that Holdup Amendments are not enforceable. If Seller has made a credible threat to breach in the event that Buyer rejects the amendment, Buyer will agree to the amendment (a payoff of 4 is preferable to a payoff of 2, and even if it is later determined by a court that the amendment is not a Holdup Amendment and is enforceable, a payoff of 3 is preferable to a payoff of 2). Once Buyer has agreed to the amendment, Seller will perform (a payoff of 3 is preferable to a payoff of 1, and if the amendment turns out to be an enforceable amendment and not a Holdup Amendment, a payoff of 4 is preferable to a payoff of 2). Thus Seller will perform regardless of whether Holdup Amendments are legally enforceable or unenforceable.

If Seller will perform anyway, how is Buyer's agreement to the amendment explained? Buyer would insist on the original contract terms if she knew that Seller would perform anyway. But Buyer does not *know* that Seller will perform anyway. She may fear that Seller will breach in order to make future threats more credible or that Seller will act irrationally or that Seller has a secret opportunity to resell the goods to a third party at an increased profit. For whatever reason, Buyer may not be willing to reject the amendment and take the risk that Seller will carry out his threat. In evaluating possible rules of law, certain assumptions about the rational behavior of sellers in general must be made. In a real life situation, however, a buyer does not have this luxury; she is dealing with a particular and somewhat unpredictable seller, and she is making her decision with imperfect knowledge about the seller's situation. For example, this discussion assumes that evidence introduced at trial has established that Seller had no Justifying Circumstances. In making her decision to accept or reject the amendment, Buyer does not have

ance than would a rule making such amendments enforceable.[61] Throughout this article, it has been assumed that the threat to breach is credible. If Seller's threat is not credible, however, Buyer is likely to reject the amendment because it would make her worse off economically than do the original contract terms. If Buyer rejects the amendment, Seller may be tempted to breach in order to make future threats more credible.[62] A clear rule making Holdup Amendments unenforceable reduces the chances of such a breach, because it reduces the chances that Seller will make a holdup threat in the first place; he gains nothing if the amendment obtained by the threat is unenforceable and Buyer knows this.[63] Thus, for the purpose of inducing performance, a legal rule precluding the enforcement of Holdup Amendments seems more effective than a rule making such amendments enforceable.

VI. THE DUAL DISTRESS AMENDMENT

Consider, finally, contract modifications falling within Box 4 in the Figure 1 matrix. At the time of modification, the party threatening breach has some Justifying Circumstances, and the threatened party has only Worse Alternatives. Imagine a sale of goods contract with a contract price of $10,000. When he entered into the contract, Seller, a manufacturer, estimated that his costs would total $8000 and that he would thus derive a $2000 profit from the transaction. Seller now discovers that his costs will be $12,000. He demands an amendment increasing the price to $13,000 and informs Buyer that he cannot perform for $10,000. If Buyer rejects the amendment and Seller breaches, Buyer can obtain equivalent goods for $10,800 and can then recover $800 damages (cost of cover minus contract price) by incurring at least $500 in legal expenses. Buyer will be unable to effect cover in time to prevent a consequential loss of $4000,

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the benefit of this evidence.

61. See Posner, *supra* note 37, at 423 n.29.

62. Seller may feel that even if his breach does not make Buyer change her mind about the amendment, his own enhanced credibility in the future is worth a sacrifice of gain in the present transaction.

63. If a contemplated amendment is a Holdup Amendment, Seller probably recognizes it as such. He knows he has no Justifying Circumstances, and he undoubtedly assumes that Buyer will not agree to a price increase unless Buyer has only Worse Alternatives.

which is not compensable because it relates to a business opportunity of which Seller had no reason to know.[64] If Buyer rejects the amendment and Seller breaches, Seller's best course of action is to refrain from producing the goods and pay $800 to Buyer so as to avoid litigation expense and limit his breach-related transaction costs to $200. After the parties consider their respective alternatives, Buyer agrees to the amendment and Seller performs.

It is difficult to decide whether such an amendment should be enforced; each party was in distress, hence the label, "Dual Distress Amendment." Buyer presumably agreed to pay $13,000 for the goods because she had only Worse Alternatives. If she had rejected the amendment, Seller's breach would have resulted in Buyer incurring total costs of at least $14,500.[65] Inasmuch as Buyer was presumably coerced into the amendment, a court should be reluctant to enforce it. On the other hand, Seller's Justifying Circumstance of a $4000 cost increase would seem to justify a demand for some modification of the contract. Seller was not engaged in a holdup; he was attempting to adjust the contract terms so as to avoid a $2000 loss. The Dual Distress Amendment is perplexing because of the haunting suspicion that the amendment obtained by means of coercion is nevertheless a justifiable modification of original contract terms that were no longer mutually beneficial.

Unfortunately, existing legal authority provides little help. A number of cases involving Dual Distress Amendments have undoubtedly been decided, but it is difficult to identify them. Many cases clearly involve Justifying Circumstances, but the judicial opinions usually fail to disclose whether the threatened party had only Worse Alternatives to the amendment.[66] Nor

64. See U.C.C. § 2-715(2)(a).

65. Total cost to Buyer equals cost of cover ($10,800) minus damages ($800) plus transaction costs (at least $500) plus opportunity cost ($4,000).

66. A case that does appear to involve a Dual Distress Amendment is Goebel v. Linn, 47 Mich. 489, 11 N.W. 284 (1882). The seller ice company had contracted to furnish the buyer brewery with its ice requirements for a specified period. Because of a partial failure of the ice "crop," ice was in short supply, and sales at the original contract price would have resulted in severe financial loss for seller. Buyer had no alternative source of ice. Without ice its beer inventory would have spoiled, and buyer would probably have been put out of business. A contract modification increasing the price from $2.00 per ton to $3.50 per ton was held enforceable and not voidable for duress. The court observed that in view of the unforeseen circumstances, the contract modification

have the commentators dealt with the Dual Distress Amendment as a discrete category of contract modification.[67]

A. Inducing Performance Which is Pareto-superior to Breach: The Inducement Term

It has been suggested that Holdup Amendments generally decrease the chances that the resulting exchange will be mutually beneficial.[68] It cannot be said, however, that Dual Distress Amendments generally increase or decrease the likelihood of a mutually beneficial exchange. A Dual Distress Amendment increases the chances that the party threatening breach will realize a net benefit; it offsets at least partially his expectancy reduction caused by his intervening Justifying Circumstances. But the Dual Distress Amendment also increases the chances that the threatened party will suffer a net loss from the exchange; in order to avoid a Worse Alternative, she may have agreed to amended terms subjecting her to a net loss.

In any Dual Distress situation, performance of the contract on the amended terms makes both parties better off than they would be if the threatening party were to breach the original contract. Presumably, the threatened party agreed to the amendment because she recognized that performance of the amended contract places her in a better position than would breach of the original contract. Assuming that the threatening party really intends to perform the amended contract,[69] it can be

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was fair and may have provided the only means for averting financial disaster for both parties.

Other cases that appear to involve Dual Distress Amendments include Rexite Casting Co. v. Midwest Mower Corp., 267 S.W.2d 327 (Mo. App. 1954)(court applied the pre-existing duty rule and held the modification unenforceable); Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 131 N.E. 887 (1921)(modification held enforceable, pre-existing duty rule circumvented by finding of mutual rescission of original contract).

67. Richard Posner has distinguished three situations in which contract modifications might be sought. Posner, *supra* note 37, at 421-24. Posner's first and second situations involve what this article describes as Holdup Amendments. His third category apparently includes some Sympathetic Amendments and some Dual Distress Amendments (the party seeking the modification has encountered an unexpected event which prevents him from performing without a contract modification). Although Posner does not deal with the Dual Distress Amendment as a discrete category, he apparently believes that modifications fitting within his third category should generally be enforced.

68. See note 58 and accompanying text *supra*.

69. It is conceivable that the threatening party has no intention of performing and is merely obtaining the modification in order to reduce the damages he will have to pay

presumed that such performance also places him in a better position than would breach; otherwise he would have breached instead of agreeing to the amendment.

Inasmuch as performance of the amended contract is Pareto-superior to breach of the original contract, the legal system ought to encourage performance. Whether Dual Distress Amendments must be legally enforceable in order to induce contractual performance should, therefore, be considered. Holdup Amendments need not be enforceable in order to induce performance. In many Dual Distress situations, however, the party confronted with Justifying Circumstances will breach the original contract unless he knows that a contract modification will be enforceable. In any situation in which the threatening party would be better off by breaching than by performing the original contract, he will be tempted to breach if there is a significant risk that a contract modification will be held unenforceable and that he will thus be limited to his rights under the original contract.[70]

In the hypothetical example, if Seller had known that a contract modification would be unenforceable, he probably would have breached the original contract rather than modify it and perform. If he were to modify the contract and perform but receive only the original contract price of $10,000, he would suffer a $2000 loss as a result of the amendment being unenforceable. If he were to breach the original contract, he would suffer only a $1000 loss (an $800 payment to Buyer plus $200 transaction costs). If Seller knew, however, that a contract modification would be enforceable, he would obtain the price amendment and perform the amended contract, confident of his legal right to a $13,000 price and a $1000 profit.[71]

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when he breaches. But if it can be shown that he planned to breach in any event, the modification would probably be unenforceable because of fraud. The threatening party's express or implied promise to perform the amended contract, when he intends not to perform, is a misrepresentation of fact. *See* J. CALAMARI & J. PERILLO, *supra* note 20, § 9-19 and authorities cited therein.

70. In a Holdup situation, the threatening party has no Justifying Circumstances, and breach cannot make him better off than would performance of the original contract. See note 59 and accompanying text *supra*. In a Dual Distress situation, the threatening party has Justifying Circumstances, and his breach would make him better off than would performance of the original contract if his Justifying Circumstances have reduced his contract expectancy below the level of his net payoff from breach.

71. Making Dual Distress Amendments enforceable does not always guarantee that

The Dual Distress Amendment need not, however, be enforceable to its full extent in order to induce the threatening party to modify the original contract rather than breach it. The amendment need only be enforceable to the extent that it makes the threatening party better off than his breach of the original contract would. In the hypothetical example, Seller will enter into a modification and agree to perform for the amended price of $13,000, so long as he knows that the amendment will be enforced at least to the extent of a price exceeding $11,000. If Seller is assured of receiving more than $11,000, his performance will yield him something better than the $1000 loss he incurs if he breaches the original contract. Since $11,000 is the marginal price term necessary to induce Seller to modify the original contract rather than breach, it will be referred to as the "Inducement Term." The Inducement Term is the adjusted amendment term that, if enforced, would make the threatening party as well off as would his breach of the original contract. In order to deter the threatening party from breaching the original contract, the law need only make the Dual Distress Amendment enforceable to an extent exceeding the Inducement Term.[72]

B. The Limited Efficacy of Economic Analysis

A court should not assume that it must either enforce the Dual Distress Amendment according to its terms or hold the amendment completely unenforceable. Partial enforcement of the Dual Distress Amendment may be preferable to an all-or-

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the amended contract will be performed. In some situations, the party who threatened to breach the original contract will be tempted to breach the amended contract because he has discovered that breach of the amended contract will make him better off than performance of the amended contract would. This possibility arises if the amendment sufficiently reduces his potential liability for breach. Although making Dual Distress Amendments enforceable does not always assure performance of the amended contract, it at least induces contract modifications that are mutually beneficial if performed and, in many cases, also provides sufficient inducement for performance of the amended contract.

72. In Dual Distress situations in which performance of the original contract would make the threatening party better off than his breach would, there is no Inducement Term. The amendment need not be enforceable to any extent in order to deter the threatening party from breach. As in the Holdup situation, he will perform whether or not the amendment is legally enforceable. Such a situation arises when the threatening party's Justifying Circumstances have not reduced his contract expectancy to the level of his net payoff from breach.

nothing approach.[73] Economic analysis does not indicate the extent to which the amendment should be enforced.

The Pareto-superiority principle suggests that the amendment should be enforced at least to an extent exceeding the Inducement Term but does not indicate whether the amendment should be enforced to any further extent. In our hypothetical example, the Pareto-superiority principle suggests that the amendment should be enforced at a price exceeding $11,000 (the Inducement Term) but not exceeding $13,000 (the amendment term). At any price in this range, the modification is Pareto-superior to breach of the original contract, because it places both parties in a better position. No one price within that range, however, is Pareto-superior to any other price within the same range.[74]

Nor is a determinate solution reached by applying Richard Posner's wealth maximization test. In Posner's view, economic efficiency means the maximization of aggregate wealth,[75] with aggregate wealth defined as "the value in dollars or dollar equivalents . . . of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up."[76] Under Posner's

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73. According to John Dawson, "[t]he broad limitation that emerges from the modern cases is that relief for duress will be given only for the purpose of restoring the excess over what is reasonably and justly due, and to the extent that such excess is shown to exist." Dawson, *supra* note 34, at 283. In keeping with this purpose, it may be appropriate to enforce a Dual Distress Amendment to the extent that no unjust enrichment results. *Cf.* U.C.C. § 2-302(1)(court may nullify an unconscionable contract or clause "or it may so limit the application of any unconscionable clause as to avoid any unconscionable result"). *But see* Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980)(no court-imposed adjustment of price term amendment is available under U.C.C. § 2-209).

74. For example, performance at an enforced price of $12,500 makes Buyer better off than performance at an enforced price of $13,000, but it makes Seller worse off; thus, a $12,500 price is not Pareto-superior to a $13,000 price.

75. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, at 10 (2d ed. 1977). The wealth maximization test must be distinguished from the Pareto-superiority test. An exchange maximizes aggregate wealth (compared to no exchange at all) when Seller gains wealth and Buyer loses wealth, and Seller gains more than Buyer loses. Such an exchange, however, is not Pareto-superior to no exchange at all, because it places Buyer in a worse position.

76. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979). Although Posner uses the quoted definition of "wealth" in presenting wealth maximization as a normative concept, he would presumably be willing to use the same definition as the equivalent of "value" in stating that "efficiency" (used as a technical

South Carolina Law Review, Vol. 33, Iss. 4 [1982], Art. 3
wealth maximization approach, it does not matter how aggregate wealth is distributed between two parties, so long as it is maximized in the aggregate. The wealth maximizer would make our hypothetical Dual Distress Amendment enforceable at some price exceeding $11,000 but not exceeding $13,000. This result facilitates an exchange that gives each party more wealth than he would have in the absence of the exchange. The wealth maximizer is, however, indifferent to the price Buyer is required to pay, so long as it exceeds $11,000 and does not exceed $13,000. Whether Buyer pays $11,500 or $12,500 or $13,000, aggregate wealth is the same.

No test for economic efficiency indicates the extent to which the Dual Distress Amendment should be enforced.[77] Nevertheless, a court should not simply assume that the amendment is fair and that it should be enforced according to its terms. If the hypothetical amendment were enforced to the full extent of $13,000, Buyer would be forced to bear three-fourths of the burden of Seller's $4000 unanticipated cost increase. This result seems unjust because Seller's cost increase is the consequence of his failure to estimate his own costs accurately. Thus, there is good reason to suspect that the amendment term involves unjust enrichment. Economic analysis will neither confirm nor nullify this suspicion. Although economic analysis indicates that certain allocations are efficient, it cannot determine which of these efficient allocations are equitable.

C. *Effecting an Equal Allocation of the Intervening Burden: The Equitable Term*

So long as a Dual Distress Amendment is enforced to an extent exceeding the Inducement Term, it should be enforced only to the extent that it is equitable. An equitable amendment

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and positive, rather than normative, term) means exploiting economic resources in such a way that value is maximized. See R. POSNER, *supra* note 75, § 1.2, at 10.

77. In addition to Pareto-superiority and wealth maximization, there are other notions of economic efficiency; for example, allocative efficiency, Pareto-optimality, and Kaldor-Hicks efficiency. These notions of economic efficiency are discussed in Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221 (1980). See also Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980). None of these tests for economic efficiency indicates the extent to which the Dual Distress Amendment should be enforced beyond the Inducement Term.

term is one that allocates the threatening party's intervening burden equally between the parties; it will be referred to as the "Equitable Term." In the hypothetical example, the Equitable Term would be a price term of $12,000. The threatening party's intervening burden (Seller's Justifying Circumstance) was a cost increase of $4000. Increasing the enforceable contract price by $2000 (from $10,000 to $12,000) results in each party bearing one-half of Seller's cost increase. Thus, a court should enforce the amendment, not to its full extent of $13,000, but only to the extent of $12,000.[78]

An equal allocation of the threatening party's intervening burden is justified by the notion that the law should accord equal treatment to equally legitimate interests. John Coons has argued that "[a]bsent a relevant factor peculiar to one disputant, justice is governed by a presumption of equal desert, and an even apportionment is required."[79] A presumption of equal desert seems as arbitrary as any contrary presumption (for example, a presumption that plaintiffs are twice as deserving as defendants). Nevertheless, as Coons observes, the presumption is reflected in much of our law, including the equal protection clause of the fourteenth amendment to the United States Constitution.[80]

In the Dual Distress case, no arbitrary presumption in favor of equal treatment is needed. Equal allocation of the intervening burden is indicated by the roughly equal weight of the equities in favor of each party. Both parties appear to be innocent of moral turpitude. The party threatening breach has Justifying Circumstances and is thus justified in seeking some modification of the original contract. It is not unreasonable for him to bargain for the most favorable amendment he can obtain. There is certainly no reason to suggest that the threatened party is guilty of moral turpitude. Furthermore, a policy favoring nonenforcement of the amendment roughly counterbalances a policy favoring enforcement. The libertarian policy of protecting persons from coercion[81] suggests that a Dual Distress Amendment should not be

78. In this example, the $12,000 Equitable Term exceeds the $11,000 Inducement Term.

79. Coons, *Compromise as Precise Justice*, 68 CALIF. L. REV. 250, 252 (1980).

80. *Id.* at 256-57.

81. The policy of preserving individual freedom and preventing coercion is pervasive

enforced at all because the threatened party was presumably coerced into the amendment. On the other hand, the party who obtained the amendment by means of a threat has a reasonable expectation that the other party will perform the contract as amended. The policy of protecting reasonable expectations[82] thus suggests that the amendment should be fully enforceable.

If both parties are innocent and the conflicting policies balance each other, the judicial decison should provide an equal allocation of the intervening burden.[83] Such a decision recognizes the equally meritorious conduct of the parties and promotes each of the competing policies to some extent. It does not rest upon an arbitrary presumption of equal desert, but rather upon a showing that there really is equal desert. It thus conforms to the Aristotelian notion that justice requires a distribution of shares in proportion to what people deserve.[84]

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in contract law. According to Kessler and Gilmore, case law reveals two primary aspects of freedom of contract: "(1) there can be no contracts by compulsion, and (2) the parties are free as to the content of their contracts." F. KESSLER & G. GILMORE, CONTRACTS 36 (2d ed. 1970). In particular, the voidability of contracts on the ground of duress stems largely from a desire to relieve a person from agreements that are not produced by her "free will." *See, e.g.*, RESTATEMENT OF CONTRACTS § 492 (1932) ("Duress . . . means . . . any wrongful threat . . . that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will . . . . "); Austin Instrument, Inc. v. Loral Corp., 29 N.Y.2d 124, 130, 272 N.E.2d 533, 535, 324 N.Y.S.2d 22, 25 (1971) ("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."). Although such definitions of duress have been abandoned because they are vague and unworkable, they do evidence a basic policy underlying the legal doctrine of duress.

82. According to Corbin, the main underlying purpose of the law of contracts is to effect the "realization of reasonable expectations that have been induced by the making of a promise." 1 A. CORBIN, *supra* note 1, § 1, at 2.

In many Dual Distress cases, the threatening party has also engaged in detrimental reliance. If his breach of the original contract would have made him better off than would performance of the original contract, his performance of the amended contract is rendered in reliance upon the amendment. Without the amendment, he would not have performed. He has, however, relied on the other party to perform the amended contract only to an extent exceeding the Inducement Term; he has not relied on the other party to fully perform the amended contract. Thus the policy of protecting detrimental reliance supports enforcement of the amendment only to the point at which it exceeds the Inducement Term.

83. See Coons, *supra* note 79, at 259-60.

84. The ratio between *A*'s distributive share and *B*'s distributive share should be the same as the ratio between *A*'s desert and *B*'s desert. ARISTOTLE, NICHOMACHEAN ETHICS bk. V, § 3, at 118-19 (M. Ostwald trans. 1962).

Other normative theories lend additional support to the proposal to enforce the

Note that it is the intervening burden—not the social gain

Dual Distress Amendment only to the extent of the Equitable Term, the term that allocates the intervening burden equally between the parties. These theories also appear to support the proviso that Dual Distress Amendments must be enforceable beyond the extent of the Inducement Term. Although some of these theories were not designed for individual transactions, they all express notions of justice that are suitably applied to the Dual Distress Amendment.

James Fishkin suggests that in evaluating alternative social policies, we ask which policy would be selected by a hypothetical rational person who knows that he will be left with the position (under the selected policy) that remains after everyone else has selected a position. J. FISHKIN, *supra* note 56, at 99-101. Fishkin's device is an adaptation of John Rawls' imaginary situation in which one person divides a cake and gets the last piece remaining after the other persons involved have selected their pieces. *Id.* In the hypothetical Dual Distress situation, the policy question is how Seller's $4000 cost increase will be allocated between the two parties. A rational person who knows that he will bear whichever share the other person has rejected will choose to divide the burden equally. If he chooses a $3000-$1000 distribution, he must expect the other person to elect to bear only $1000 of the cost increase. Fishkin's hypothetical cake-cutter would also prefer a contractual performance that makes both parties better off than does breach and thus would be willing to choose an unequal division of the intervening burden when that is necessary to induce performance. See note 56 *supra.*

Equal allocation of the intervening burden can also be supported by an application of Douglas Rae's "principle of simple justice." Under Rae's principle, a more equal allocation should be chosen rather than a less equal alternative, unless the less equal alternative makes some social strata better off and makes none worse off. In other words, justice requires the most equal allocation available, unless there is an alternative that is Pareto-superior. *See* Rae, *A Principle of Simple Justice,* in PHILOSOPHY, POLITICS AND SOCIETY 134, 138-49 (5th Series, P. Laslett & J. Fishkin eds. 1979). If Rae's principle is applied to the hypothetical Dual Distress situation, the intervening burden (Seller's $4000 cost increase) should be divided equally between the two parties unless an alternative allocation would make one or both parties better off without making either party worse off. The only unequal allocation that is Pareto-superior to an equal allocation is one that is necessary to induce Seller to perform rather than breach; it is Pareto-superior in the sense that it is required by a legal rule that must be made known to the parties in advance so that they will perform an exchange that is Pareto-superior to a breach of the original contract. Thus Rae's principle leads to the solution proposed in this article for Dual Distress Amendments: so long as the amendment is enforced beyond the extent of the Inducement Term, it should only be enforced to the extent of the Equitable Term.

This solution is also the indicated outcome if John Rawls' maximin criterion is applied to the two-person amendment conflict. The maximin criterion requires a choice of the allocation that maximizes the worst payoff. J. RAWLS, *supra* note 56, at 152-53 (1971). If a fixed sum is being distributed and an equal allocation is an available alternative, the maximin criterion obviously requires equal allocation since the worst payoff in any unequal allocation is worse than the "worst" payoff in an equal allocation. Thus, the maximin criterion indicates that the intervening burden in the Dual Distress situation should be allocated equally between the two parties (the Equitable Term). The maximin criterion points, however, to an unequal allocation if that is necessary to induce a contractual performance that makes both parties better off than they would be under a rule requiring equal allocation but failing to induce such performance.

Normative concepts have crept into welfare economics. For a discussion of the notion that an allocation of a fixed bundle of goods is fair if it is both Pareto-efficient and

or loss from the contractual exchange—that is to be allocated equally. In the Dual Distress situation, the real issue is the allocation of the intervening burden that is imposed by one party's Justifying Circumstances and which results in a coercive modification of the contract. The other burdens and benefits of the exchange should be allocated by the original contract terms, which are validated by untainted bilateral consent. Note also that in allocating the intervening burden equally, the court does not simply split the amount in dispute.[85] Although this would equally promote the competing policies of relieving the threatened party from a coercive agreement and protecting the other party's reasonable expectations, a court should not use the amendment as its starting point. The amendment should be viewed as an abortive attempt to do what the court must now do equitably.

D. Summary of the Proposed Solution

The following solution to the Dual Distress dilemma is thus suggested: a Dual Distress Amendment should be enforced at least to the extent that it makes the threatening party better off than he would be had he breached the original contract; but so long as this is accomplished, the amendment should be enforced only to the extent of an equal allocation of the intervening burden created by the threatening party's Justifying Circumstances. In other words, a Dual Distress Amendment should be enforced to an extent exceeding the Inducement Term, but so long as this is done, the amendment should be enforced only to the extent of

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equitable, *see* H. VARIAN, MICROECONOMIC ANALYSIS 225-26 (1978). An allocation is equitable if no one prefers anyone else's payoff to his own. *Id.* An allocation is Pareto-efficient if there is no alternative that would make everyone better off. *Id.* at 57, 145. *See also* Varian, *Distributive Justice, Welfare Economics, and the Theory of Fairness*, 4 PHILOSOPHY & PUB. AFF. 223, 240-47 (1975). In the Dual Distress context, if a fixed-sum burden is being distributed, Varian's concept of equitable allocation seems to require an equal allocation; only then will neither party regard the other party's payoff as preferable to his own. An allocation must, however, be *both* Pareto-efficient *and* equitable in order to qualify as a fair allocation. In the solution proposed in this article, an unequal allocation is permitted if necessary to induce a performance that makes both parties better off than would breach. This would not be a "fair allocation" in Varian's terms because it is "Pareto-efficient" but not "equitable."

85. In our hypothetical example, the amount in dispute is the difference between the $13,000 amended price and the $10,000 original contract price.

the Equitable Term.[86]

The Inducement Term provides a floor, and the amendment term agreed to by the parties provides a ceiling. So long as it exceeds the floor and does not exceed the ceiling, the amendment term enforced by the court produces an outcome that is Pareto-superior to breach of the original contract. In order to produce the most equitable Pareto-optimal outcome, the court enforces the amendment to the extent of the Equitable Term. A just allocation of the threatening party's intervening burden is thus achieved by employing the Pareto-superiority criterion and the equal allocation principle in that order.

The Dual Distress Amendment is distinguished from the Sympathetic Amendment and the Unlikely Amendment in that it is presumably coercive in nature. It is distinguished from its coercive cousin, the Holdup Amendment, because it reflects an attempt to allocate an intervening burden, a reduction in the social gain derived from the contractual exchange. The Dual Distress Amendment is an allocation, albeit a procedurally defective one, of a fixed sum that has been added to the social cost and suggests a need for contract modification.[87] The Holdup Amendment, on the other hand, is a coercive reallocation of the same social gain allocated by the original contract terms. It is the outcome not of a fixed-sum game, but of a zero-sum game in which one party takes away what the other party previously had.

E. Problems in Ascertaining the Equitable Term and the Inducement Term

Our hypothetical Dual Distress Amendment involved a price increase obtained by a seller confronted with an intervening cost increase. Given the hypothetical facts, it was easy to ascertain the Equitable Term and the Inducement Term. Do se-

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86. If the Inducement Term is more favorable to the threatening party than the Equitable Term, the court should nevertheless enforce the amendment to an extent exceeding the Inducement Term.

87. In Figure A, *supra* note 35, point a_3 represents a Dual Distress modification if Buyer had only Worse Alternatives. Otherwise it reflects a Sympathetic Amendment. At point a_3, the social gain is not as great as it would be at point k or at any other point on the original contract curve *cd*. Unfortunately, Seller's Justifying Circumstances have rendered impossible any exchange on what originally appeared to be the contract curve. The move from point k (the original contract) to point a_3 reflects the allocation of a $300 fixed-sum reduction in social gain.

rious problems arise when other types of Dual Distress Amendments are involved?

1. Quantifying the Intervening Burden.—In order to ascertain the Equitable Term, the court must quantify the intervening burden being allocated by the amendment. This task is difficult if a consumer-buyer is confronted with a partial frustration of purpose and obtains a Dual Distress Amendment reducing the contract price. The intervening burden is the reduction in the subjective value, to the consumer, of the seller's performance and is equal to the excess of (i) the maximum amount the consumer would have been willing to pay when he entered into the original contract, over (ii) the maximum amount he is willing to pay in view of his intervening frustration of purpose. Unfortunately, the maximum amount the consumer would be willing to pay at any point in time cannot be ascertained.

In such a situation, the finder of fact must estimate what a reasonable person with the consumer's interests, tastes, and financial situation would be willing to pay.[88] Two estimates are necessary, one corresponding to the consumer's situation at the time of original contract formation and one taking into account the intervening frustration of purpose. Although this method produces grossly inaccurate estimates of the intervening burden, the problem will not arise often because consumer buyers are seldom able to obtain Dual Distress Amendments.[89]

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88. *Cf.* Harris, Ogus & Phillips, *Contract Remedies and the Consumer Surplus*, 95 L.Q. REV. 581 (1979)(suggesting that when other remedies for breach are inappropriate, an aggrieved consumer buyer should be awarded damages compensating him for his lost consumer's surplus—the amount by which contract price is exceeded by the maximum amount a reasonable person in buyer's position would have been willing to pay).

89. Quantifying the intervening burden may appear difficult in other situations. The intervening burden may be an intervening risk of some loss that may or may not occur but is nonetheless a risk that qualifies as a Justifying Circumstance. Such a risk need not be quantified. The risk will have been allocated by the contract amendment (a new indemnification, warranty, or other risk of loss provision), and when one party seeks to enforce that amendment, the court can arrive at the Equitable Term by simply making an equal allocation of the loss that has actually occurred.

Quantifying the intervening burden does become difficult as one moves along Ian Macneil's spectrum, away from discrete transaction contracts and toward ongoing relationship contracts involving the sharing of benefits and burdens that are hopelessly nonquantifiable. For explications of Macneil's model of transactional and relational contracts, see I. MACNEIL, *supra* note 55, at 12-16; Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978); Macneil, *The Many Futures of Contracts*, 47 S. CAL. LAW REV. 691 (1974); Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA.

2. Nondivisible Amendments.—The Equitable Term allocates the intervening burden equally between the parties. If the contract modification involves a term that, unlike the price term, is not divisible, how does the court make an equal allocation?

Suppose that Seller contracts to sell Buyer a machine for $50,000 and deliver the machine to point *A*. Later, Seller discovers that delivery to point *A* will cost him $3000 more than he had anticipated. He informs Buyer that he will not be able to perform unless Buyer agrees to modify the place of delivery from point *A* to point *B*. Delivery to point *B* will result in Seller's total costs being $1000 less than he originally anticipated. Taking delivery at point *B* will impose an additional $2000 transportation expense on Buyer. Nevertheless, Buyer agrees to the amendment because she has only Worse Alternatives.

In ascertaining the Equitable Term, it must first be recognized that the intervening burden being allocated by the amendment is not Seller's potential $3000 cost increase. This cost increase has been avoided by a modification of Seller's contractual performance which results in only a $1000 increase in the social cost of the exchange. (Seller's costs are reduced by $1000, and Buyer's costs are increased by $2000.) The Equitable Term allocates this $1000 cost increase equally between the two parties.

Assuming that point *A* and point *B* are the only practicable delivery points, the amendment term is not divisible; Seller must deliver at either point *A* (the original contract term) or point *B* (the amendment term). The obvious solution is to enforce the amendment but grant Buyer a $1500 reduction in the price so that each party's net gain will be reduced $500. Whenever the Dual Distress Amendment involves a nondivisible term, the price term can be adjusted so that the net result is the economic equivalent of enforcing the amendment to the extent of the Equitable Term.

3. Estimating the Consequences of a Breach that Did Not Occur.—In establishing the Inducement Term, the court must ascertain the economic position the threatening party would

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L. REV. 589 (1974). In the context of highly relational contracts, the analytical framework presented in this article may break down, and the proposed resolution of the duress issue may become inapplicable.

have occupied had he breached the original contract. The Inducement Term is the amendment term that would put the threatening party in an equivalent position. Estimates must be made of the damages the threatening party would have paid and the legal fees and other transaction costs he would have incurred as a result of his breach.

Fortunately, the court needs only a reasonable estimate of the minimum amounts and does not need to ascertain what the precise damages and transaction costs would have been. The law must assure the threatening party that the court will make him better off than he could possibly have been had he breached the original contract. If it is established that he would have been liable for at least $20,000 in damages, that he would have incurred at least another $1000 in transaction costs, and that he could have derived no wholly or partially offsetting benefit from breach, the Inducement Term is an amendment term that gives him a $21,000 net loss.

The court must also estimate the consequences of breach in order to determine whether the threatened party had only Worse Alternatives to the amendment; unless the threatened party had only Worse Alternatives, there is no Dual Distress Amendment.[90] To ascertain whether the threatened party's rejection of the proposed amendment would have made her economically worse off than the amendment, an estimate must be made of the damages she would have recovered and the transaction costs she would have incurred had she rejected the amendment and suffered a breach by the other party. Here, too, precise figures are unnecessary. If there was a substantial risk that, despite reasonable efforts to mitigate losses, the breach would have left the threatened party worse off than the amendment, the court should find that she had only Worse Alternatives.

VII. CONCLUSION

The issue of duress in contract modification requires analysis more rigorous than that performed by courts in the past. The tests provided by contemporary contract law are inadequate, be-

90. Under the traditional doctrine of duress by wrongful threat, the economic consequences of a breach would have to be calculated in order to ascertain whether the threatened party had a "reasonable alternative" to the amendment. See notes 21 & 43 and accompanying text *supra*.

cause each of them makes the judicial decision hinge upon a hopelessly subjective and unpredictable determination of whether the amendment terms are fair.

Courts should focus on the objective economic circumstances existing at the time of contract modification. Two questions should be answered.[91] The first question is whether the party threatening breach had any Justifying Circumstances. A Justifying Circumstance is some objectively demonstrable intervening circumstance indicating that an exchange on the original contract terms would be economically less beneficial to the threatening party than he anticipated when he entered into the original contract. The second question is whether the threatened party had only Worse Alternatives to the amendment. A Worse Alternative is one that would have made the threatened party economically worse off than would performance of the amended contract.

When these two questions are answered, the contract modification can be placed in one of four categories, as shown in Figure 2.

FIGURE 2

	PARTY ALLEGING DURESS HAD AN ECONOMICALLY BETTER (OR EQUALLY GOOD) ALTERNATIVE	PARTY ALLEGING DURESS HAD ONLY WORSE ALTERNATIVES
PARTY THREATENING BREACH HAD JUSTIFYING CIRCUMSTANCES	SYMPATHETIC AMENDMENT	DUAL DISTRESS AMENDMENT
PARTY THREATENING BREACH HAD NO JUSTIFYING CIRCUMSTANCES	UNLIKELY AMENDMENT	HOLDUP AMENDMENT

When it is alleged that a contract modification was obtained by means of duress, courts should employ the following rules:

(1) A Sympathetic Amendment should be enforced according to its terms because it is presumably noncoercive.

(2) An Unlikely Amendment should be enforced according to its terms because it is presumably noncoercive.

91. For an analysis focusing on the same two questions but reaching different conclusions, see Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 532-52 (1981).

(3) A Holdup Amendment should be declared unenforceable because it is presumably coercive, and enforceability does not facilitate mutually preferable outcomes.

(4) A Dual Distress Amendment should be enforced at least to an extent that makes the threatening party better off than he would be had he breached the original contract. So long as this is accomplished, the amendment should be enforced only to the extent that it provides an equal allocation of the intervening burden that it distributes. Although the Dual Distress Amendment is presumably coercive, partial enforcement is required in order to facilitate mutually preferable outcomes and to recognize equally legitimate interests.

(5) A Harmless Amendment (not shown in Figure 2, which depicts only "harmful" amendments) is not coercive and should be enforced according to its terms. A Harmless Amendment is an amendment that does not make the party alleging duress economically worse off than she would be under the original contract terms.

These proposed rules for duress are designed to produce outcomes that are both predictable and just. The legal system should provide something more than a perfunctory assurance that contract modifications will be enforced if they are "fair." When a contract is formed, the parties become fellow prisoners in the relationship they have created. Although they cannot escape the obligations of their relationship, they should be assured that they can modify those obligations when they both desire. But the contractual relationship involves dependence, and dependence invites coercion and exploitation. Confronted with a coercive modification of the contract, a court must do what the parties were unable to do. It must prevent exploitation and give each party the fullest possible opportunity to realize his designs and dreams.