NEW YORK UNIVERSITY
LAW REVIEW

VOLUME 81 MAY 2006 NUMBER 2

ARTICLES

THE DEMAND FOR IMMUTABLE CONTRACTS: ANOTHER LOOK AT THE LAW AND ECONOMICS OF CONTRACT MODIFICATIONS

KEVIN E. DAVIS*

One of the most challenging questions in contract law is whether parties should be free to create contracts that limit their own freedom of contract and thereby, in effect, contract over the scope of freedom of contract itself. So far the debate has revolved around the enforceability of "anti-modification clauses," which state that subsequent modifications to the contract in which they are contained will be unenforceable. The courts appear reluctant to enforce anti-modification clauses. Some prominent law and economics scholars have argued that in certain circumstances parties would benefit from being able to make their contracts immutable and that courts therefore should enforce anti-modification clauses.

This Article advances several claims that contradict the underlying premises of this argument. It begins by setting out a variety of reasons why the demand for immu-

 Professor of Law, New York University School of Law. E-mail: ked2@nyu.edu. A substantial portion of this Article was prepared in the course of a sabbatical leave granted by the University of Toronto, during which I held visiting fellowships at Cambridge University in Clare Hall, the Centre for Corporate and Commercial Law, and the Centre for Business Research, and was a Visiting Lecturer at the Faculty of Law, University of the West Indies. I am grateful to all of these institutions for their support and to Jennifer Arlen, Ian Ayres, Omri Ben-Shahar, Bill Bratton, GuyLaine Charles, Stephen Choi, Mark Geistfeld, Edward Iacobucci, Christine Jolls, Benedict Kingsbury, Tracy Robinson, Alan Schwartz, Steven Shavell, Robert Sitkoff, Lee-Ford Tritt, Stephen Waddams, the editors of the *New York University Law Review* and participants in the 2003 Annual Meeting of the American Law and Economics Association and workshops at New York University and Georgetown University for helpful comments on earlier drafts, to William Allen, Victor Goldberg, Dan Halem, Marcel Kahan, Ehud Kamar, and Linda Silberman for helpful conversations, and to Michael Kruse, U-Hyeon Kwon, Peter Psiachos, and Tali Reisenberger for excellent research assistance. All errors remain my own.

table contracts, or at least those created by adopting anti-modification clauses, might be low. The central claim is that although anti-modification clauses may be unenforceable, contracting parties can duplicate their economic effects by using a technique labeled the "representative trustee technique." The essence of this technique is that the parties agree to turn over the benefits of any modification to a trust with a large number of beneficiaries. The conceptual building blocks of the representative trustee technique are all familiar, yet there is no indication of its use in practice. If valid, these observations are inconsistent with the idea that there is a significant demand for enforceable anti-modification clauses. It is, however, possible that, contrary to the primary argument in this Article, contracting parties are unaware of the possibility of adopting the representative trustee technique. In that case, the analysis here is still relevant because it suggests that once the technique is publicized it will satisfy at least some of the demand for enforceable anti-modification clauses. In any case, there seems to be no compelling reason to heed calls to enforce anti-modification clauses.

INTRODUCTION

The common law of contracts has always paid lip service to, but never fully embraced, the concept of freedom of contract. By contrast, the general thrust of many contemporary economic analyses of contract law is towards promoting a brand of contract law that provides almost complete freedom of contract to sophisticated commercial actors.[1] Scholars working in this tradition generally take the view that contract law should consist almost exclusively of "default" rules rather than "mandatory" or "immutable" rules,[2] terms of art that refer to the distinction between rules that can and cannot be ousted by agreement of the parties.[3] The rules that provide the basic structure of the contracting game by discouraging fraud and duress are usually presumed to be immune from scrutiny by proponents of the freedom

[1] *Cf.* Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 842 (2003) ("The premises of economics push in the direction of freedom of contract, and this current can be resisted only with difficulty.").

[2] This position is exemplified by the work of Alan Schwartz and Robert Scott. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 619 (2003) (arguing that contract law's mandatory rules should focus on regulating contracts tainted by unconscionability, fraud, or duress, and contracts that create externalities).

[3] *See generally* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (discussing significance of distinction between default and mandatory rules).

of contract paradigm.[4] But even those rules no longer appear to be entirely safe.[5]

The laissez-faire approach to contract law has recently been taken to the ultimate extreme with an attack upon the rules governing the scope of freedom of contract itself. Prominent law and economics scholars have argued that contracting parties should be free to determine whether or not the courts give effect to subsequent attempts to modify their agreements.[6] In other words, it has been argued that the rules concerning the enforceability of contract modifications should be default rather than mandatory rules.[7]

The most straightforward way to implement this recommendation would be to provide for the enforcement of anti-modification clauses, meaning contractual provisions that purport to prohibit enforcement of modifications. Interestingly, there does not appear to be a single reported case in which an English or American court has been asked to enforce an anti-modification clause contained in a bilateral agreement.[8] However, there are a number of cases in which courts have been called upon to enforce clauses that purport to regulate the *form* of contract modifications by prohibiting oral modifications.[9] In those

4 *See* Schwartz & Scott, *supra* note 2, at 609 (noting that welfare-maximization goal of contracting does not justify many existing mandatory rules, but does justify courts refusing to enforce contracts influenced by fraud or duress).

5 For example, in a previous work, I have suggested that certain parties should be allowed to contract over the extent of liability for fraud. Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-Contractual Misrepresentations*, 33 VAL. U. L. REV. 485 (1999) (arguing that organizational actors should be able to disclaim liability for fraudulent pre-contractual misrepresentations). The literature canvassed in Part I, *infra*, can be interpreted as supporting the claim that parties should be able to contract over the scope of the doctrine of economic duress.

6 *See* Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203, 205 (1997) ("Contrary to traditional wisdom, the parties to a contract may be better off if the law enables them to tie their hands, or ties their hands for them, in a way that prevents them from taking advantage of certain ex post profitable modification opportunities."); Schwartz & Scott, *supra* note 2, at 611–14 ("[T]he refusal to enforce a modification ban violates a basic justification for the existence of contract law itself."); Alan Schwartz & Joel Watson, *The Law and Economics of Costly Contracting*, 20 J.L. ECON. & ORG. 2, 24 (2004) ("[N]o-modification rules are inefficient; rather parties should be permitted to specify the renegotiation parameter that is appropriate to the contract form they choose.").

7 *See* Schwartz & Scott, *supra* note 2, at 611–14 (arguing that rules should not be mandatory).

8 This claim is based on searches on Lexis and Westlaw for cases citing or cited by Restatement (Second) of Contracts § 311 and a Westlaw search for state or federal cases using the term "anti-modif!".

9 *See, e.g.*, Zumwinkel v. Leggett, 345 S.W.2d 89, 93–94 (Mo. 1961) (holding that there was insufficient evidence to find that written contract between parties was modified by subsequent oral statements); Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 381 (N.Y. 1919) (refusing to find that covenant stating no oral waiver or amendments nullified employer's subsequent oral consent to employee investment); Davis v. Payne & Day, Inc.,

cases, Anglo-American courts have established a general principle that any contractual provision that purports to limit the enforceability of a subsequent modification is unenforceable.[10] This feature of Anglo-American law has been characterized as an inefficient mandatory rule.[11]

However, it is misleading to focus exclusively upon the question of whether or not anti-modification clauses are enforceable because there may be other devices that can be used to forestall contract modifications ("anti-modification devices"). Although legal academics often ignore this fact, even moderately sophisticated commercial actors routinely and strategically tap the benefits of an array of legal principles that lie outside the domain of "contract law" as it is conventionally understood in order to avoid inconvenient legal norms.[12] For

348 P.2d 337, 338–39 (Utah 1960) (holding that seller was entitled to relief where agent of buyer requested extra materials not stated in contract); World Online Telecom U.K. Ltd. v. I-Way Ltd., [2002] EWCA (Civ) 413, [1]-[17] (Eng.). (upholding lower court decision not to determine in summary judgment phase whether contract clause prohibited oral modification).

[10] Restatement (Second) of Contracts § 311 cmt. a (1979) ("The parties to a contract cannot by agreement preclude themselves from varying their duties to each other by subsequent agreement."). This does not mean, however, that all contract modifications are enforceable. As discussed below, courts frequently use doctrines such as consideration, good faith, and duress to justify non-enforcement of certain contract modifications. The point here is simply that decisions on the enforceability of modifications are typically made without reference to the intentions of the parties. *See* Jolls, *supra* note 6, at 207–08; Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225, 1283 n.127 (1998) (expressing doubt over enforceability, under current law, of agreements not to modify contract); David V. Snyder, *The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver, and Estoppel*, 1999 Wis. L. Rev. 607, 638–49 (observing that, excluding sales contracts, courts have often refused to enforce "no oral modification" and "no oral waiver" clauses, instead using reliance as determinative factor when deciding validity of modifications). In the United States, the Uniform Commercial Code (U.C.C.) departs somewhat from the common law position, but only to the extent of permitting the enforcement of "no oral modification" clauses. *See* U.C.C. § 2-209 (2) (2000).

[11] *See* Schwartz & Scott, *supra* note 2, at 611–14 (providing illustrations of rule's inefficiency).

[12] In some contexts, parties can use choice of law, choice of forum, or arbitration clauses to opt out of local contract law entirely. However, these techniques are unlikely to be helpful in the present context. First, I am not aware of any jurisdiction that enforces anti-modification clauses, and so a choice of law or choice of forum clause in favor of another jurisdiction is unlikely to be of assistance. Second, an agreement containing an anti-modification clause combined with an arbitration clause (and unequivocal instructions for the arbitrator to ignore ordinary common law principles concerning enforceability of arbitration clauses) could still be modified by a subsequent agreement between the parties that is governed by ordinary common law principles. Consequently, the arbitration clause itself could be modified to deprive the arbitrator of jurisdiction. This would, at the very least, complicate efforts to enforce an arbitration agreement or any ensuing arbitral award since the statutory basis for enforcing arbitration agreements and arbitral awards in ordinary courts seems to be conditioned upon the existence of an arbitration agreement that

instance, multi-party contracts can be used to create a normative framework for subsequent bilateral contracting that differs significantly from the default legal framework.[13] Several professional sports leagues have exploited this fact by drafting collective agreements that restrict the ability of individual athletes and teams to renegotiate bilateral player contracts governed by the collective agreement.[14]

Contracting parties can also exploit the tremendous degree of flexibility offered by the modern law of business organizations (corporations, trusts, partnerships, etc.). This allows them to filter their contractual rights and duties through legal entities whose internal governing norms override the effects of external norms imposed by contract law.[15] A significant portion of the Article is devoted to defending the proposition that, contrary to popular belief, Anglo-American law permits contracting parties to use a type of anti-modification device that exploits principles of trust law to effectively override the prohibition upon enforcement of anti-modification clauses. For convenience, I will refer to the device as the "representative trustee technique."

The essence of the representative trustee technique is that it raises the cost of modifying a contract by providing that, in the event of modification, one of the principal parties to the contract will become subject to costly obligations to a large number of other parties.[16] Using a single third party is widely recognized to be a flawed approach, because the third party has an incentive to release the principal parties from their obligations in exchange for a share of the

has not been revoked. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2000) ("[Agreements to arbitrate are] valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. II, V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, 38–40 (stating that arbitration agreements and arbitral awards shall not be recognized or enforced if arbitration agreement is "null and void," "inoperative," or "not valid"). *But see* Eric Maskin & Jean Tirole, *Unforeseen Contingencies and Incomplete Contracts*, 66 REV. ECON. STUD. 83, 99 & n.13 (1999) (suggesting that arbitration agreements can be used to make contracts immutable).

13 *See generally* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) (showing how rules created by trade association to govern contractual disputes diverge from rules contained in Article 2 of U.C.C.).

14 *See infra* Part II.C.4.

15 *See* John H. Langbein, *The Trust As an Instrument of Commerce*, 107 YALE L.J. 165, 179–85 (1997) (discussing flexibility offered by trust law and reasons commercial actors prefer trust law to contract law).

16 Other anti-modification devices that use one or more third parties in this fashion have been discussed previously in the academic literature. *See, e.g.*, Oliver Hart & John Moore, *Foundations of Incomplete Contracts*, 66 REV. ECON. STUD. 115, 128–31 (1999); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 24–25 (1960).

potential benefits from modification.[17] The possibility of using multiple third parties and thereby increasing the costs of negotiating such a release has also been discussed,[18] but the transaction costs of implementing such a scheme will often be prohibitive.[19] Finally, in an interesting paper Charles Knoeber has suggested that a particular type of agreement involving multiple third parties, namely a most favored nation ("MFN") agreement, can be and is used as an anti-modification device.[20] However, as will be discussed at greater length below, MFN clauses do not necessarily preclude contract modifications.[21] Furthermore, they impose more substantial restrictions upon a firm's future dealings than does a simple anti-modification device. For both these reasons MFN clauses do not seem like particularly attractive anti-modification devices. The representative trustee technique appears likely to be substantially more effective and less costly than any of these other anti-modification devices.

The existence of an (apparently) enforceable yet unused method of discouraging contract modifications casts doubt upon claims that there is significant pent-up demand for enforceable anti-modification clauses. Alternatively, it suggests that any such demand can be satisfied without altering the legal treatment of anti-modification clauses. Either way, the principal normative implication of this analysis is that there is little need to remove the current limitations on parties' freedom to contract over the scope of freedom of contract itself.[22]

This Article is organized as follows. Part I describes the reasons why actors may be interested in adopting enforceable anti-modification clauses. Part II discusses a range of factors that might limit the demand for enforceable anti-modification clauses. Part III briefly summarizes the ambiguous state of the available evidence concerning the demand for enforceable anti-modification clauses and discusses the way in which an alternative anti-modification device might be used to estimate that demand. Part IV describes the representative trustee technique and its potential ability to serve as an anti-

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[17] *See* Hart & Moore, *supra* note 16, at 129–30 (discussing possibility of collusion between third party and principal); *see also* SCHELLING, *supra* note 16, at 25 n.2 (illustrating how anti-modification device relying upon single third party might be effective if third party has incentive to maintain reputation for never renegotiating).

[18] *See, e.g.*, SCHELLING, *supra* note 16, at 25; Hart & Moore, *supra* note 16, at 130–31 (discussing and dismissing possibility of using multiple third parties to avoid collusion).

[19] *See* Jolls, *supra* note 6, at 232–33.

[20] *See* Charles R. Knoeber, *An Alternative Mechanism to Assure Contractual Reliability*, 12 J. LEGAL STUD. 333, 340–41 (1984).

[21] *See infra* Part II.C.5.

[22] *See* Patrick W. Schmitz, *Should Contractual Clauses That Forbid Renegotiation Always Be Enforced?*, 21 J.L. ECON. & ORG. 315 (2005) (arguing that it may be socially advantageous to maintain current limitations on immutable contracts).

modification device. It begins by outlining the technique, then discusses potential legal objections to its enforcement, and then finally outlines its advantages over other potential anti-modification devices that have been discussed in the literature. In light of this discussion, Part V argues that it is worth exploring the question why there is no evidence of contracting parties making use of the representative trustee technique as an anti-modification device. One step in this direction is to consider the possibility that contracting parties are simply ignorant of the representative trustee technique's potential. This Part, however, argues that widely used financial contracts incorporate the key elements of the representative trustee technique, thus casting doubt on claims that either ignorance or lack of ingenuity can explain the technique's apparent disuse. This Part concludes by arguing that the most plausible explanation for the representative trustee technique's lack of popularity is the fact that only a negligible number of contracting parties would actually derive any significant benefits from using an anti-modification device to render their contracts immutable. Part VI explores the normative implications of this conjecture, focusing specifically upon whether and to what extent it undermines the arguments that have been made in favor of enforcing anti-modification clauses. Part VII concludes.

I
The Potential Demand for Immutable Contracts

There are a number of settings in which it will be mutually beneficial for contracting parties to preclude contract modifications. The common feature of these scenarios is that in order to induce efficient behavior at an early stage in their relationship ("ex ante") the parties must sign a contract that commits them to behaving inefficiently at a later stage ("ex post").[23] Under these conditions, the ability to sign an immutable contract can enhance the joint benefits that parties expect to receive from a contractual relationship. When this insight is combined with economists' conventional assumption that the parties to a contract are in the best position to determine where their own inter-

[23] The crucial distinction between the ex ante and ex post welfare implications of contract modifications seems to have been first analyzed in Varouj A. Aivazian et al., *The Law of Contract Modification: The Uncertain Quest for a Bench Mark of Enforceability*, 22 Osgoode Hall L.J. 173, 190–91 (1984). Not all of the ex ante welfare effects discussed in this Part have attracted equal attention. For example, in a recent article, Oren Bar-Gill and Omri Ben-Shahar argue that for the sake of maximizing ex post welfare the law governing contract modifications should focus upon mitigating only one of the ex ante effects discussed. *See* Oren Bar-Gill & Omri Ben-Shahar, *The Law of Duress and the Economics of Credible Threats*, 33 J. Legal Stud. 391, 405–06 (2004) (arguing that modifications should generally be enforced unless induced by bluffing (discussed in Part I.A, *infra*)).

ests lie, it seems logical to conclude that lawmakers concerned with maximizing social welfare—at least from an ex ante perspective—ought to give contracting parties the freedom to determine whether or not their contracts should be immutable.[24]

These potential benefits of immutable contracts can be—and have been—demonstrated using formal models.[25] However, the key insights that underlie those models can also be presented using informal illustrations. Thus, the sections that follow informally describe four distinct economically significant scenarios in which theoretical analysis suggests that parties ought to find it mutually beneficial to conclude an immutable contract. In each case the basic economic insights are illustrated using a hypothetical transaction involving a software developer who promises to create a customized website for a large retailer in time for the October launch of the retailer's new product line. As we shall see, there are a number of reasons why it might be useful for the developer and the retailer to cast their agreement in the form of an immutable contract.

A. *Preventing Efficient Trade Ex Post in Order to Induce Disclosure Ex Ante*

Perhaps the most intuitively plausible scenario in which contracting parties might find it useful to be able to conclude an immutable contract is where they wish to bind themselves not to agree to contract modifications designed to forestall inefficient breaches of contract. From an ex post perspective such modifications are efficient, but from an ex ante perspective they may be undesirable because they create incentives for parties to misrepresent their willingness to perform their contractual obligations.

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[24] This important argument was introduced by Jolls, *supra* note 6, at 214–15. The basic insight that immutable contracts might be advantageous to contracting parties does not necessarily lead to the conclusion that the parties must be the ones to specify whether their contract is to be immutable. An alternative approach would be for the courts to determine which contracts are to be immutable by conducting their own assessment of whether conditions warrant immutability. This is the path taken in Aivazian et al., *supra* note 23, at 180–83, as well as subsequent works in the legal literature. *See, e.g.*, Jason Scott Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. CAL. INTERDISC. L.J. 335, 339 (1993) (arguing that enforcement of contract modification should be subject to mandatory good faith test); Bar-Gill & Ben-Shahar, *supra* note 23, at 417 (arguing that courts should conduct inquiry into credibility of threat to breach, and allow modification when threat is credible). The possibility that this sort of judicial intervention will eliminate the need for contracting parties to take matters into their own hands is discussed in Part II.C.2, *infra*.

[25] *See* Hart & Moore, *supra* note 16, at 118–21; Maskin & Tirole, *supra* note 12, at 103–06. Lawyers interested in exploring the economics literature should be aware that economists typically refer to "renegotiation" rather than "modification" of contracts.

For example, suppose that the developer and the retailer in our hypothetical scenario sign their agreement in March (t_1). The deal involves completion of the website in September at a price of p_1. However, in August the developer threatens to stop work unless the retailer agrees to pay a higher price ($p_2 > p_1$). The retailer will, of course, have the option of rejecting the seller's demand and either suing for damages for breach of contract or seeking substitute performance, or both. However, these options will not necessarily be more appealing than agreeing to the proposed modification. In particular, obtaining substitute performance in the form of replacement software from another developer or suing the original developer for breach of contract may be too time-consuming. Under these circumstances, if the retailer finds the developer's threat to withhold performance credible, she will be inclined to accept the proposed modification and pay p_2.

If the developer actually intends to withhold performance, then modification is, ex post, a Pareto-efficient outcome. However, such modifications may appear somewhat less benign from an ex ante perspective. One concern is that the prospect of obtaining a favorable contract modification by simply threatening to withhold performance may encourage the developer in this scenario to threaten to withhold performance even when he or she has no intention of carrying out the threat. Creating incentives to bluff in this way is undesirable because such bluffing leads to costly renegotiations that simply redistribute, rather than create, value.[26] Moreover, the fear that a developer might be bluffing may lead retailers to ignore legitimate threats to withhold performance in situations where both parties would be better off if the contract were performed. One way of deterring this sort of bluffing is for courts to permit the parties to determine ex ante whether the original contract ought to be immutable.[27] Developers who are bound by immutable contracts cannot obtain favorable modifications by threatening to withhold performance and consequently they should have no incentive to make threats that they are unwilling to carry out.

The ability to modify contracts in response to threats to withhold performance also gives rise to a second, related concern. In our scenario, prior to the formation of the contract, the developer will have unduly weak incentives to disclose whether it is likely to be worth its

[26] *See* Johnston, *supra* note 24, at 345.

[27] As discussed in Part II.C.2, *infra*, another way of discouraging this sort of behavior is through judicial intervention.

while to complete performance at the original contract price.[28] In fact, if modification is feasible, the developer may have an incentive to make "lowball" offers that lure in customers with prices set below the cost of performance. This strategy will be attractive in situations where it is difficult for customers to obtain substitute performance after the contract has been signed and when remedies for breach are ineffectual. Under these circumstances, developers who attract customers with low-priced contracts can obtain favorable modifications by threatening to withhold performance unless the contract is modified. This practice tends to increase the cost to customers of identifying developers whose costs of performance are truly low and encourages costly, but purely redistributive, renegotiations.

One way that the legal system can discourage this type of lowballing is by allowing the parties to create an immutable contract. A developer who has signed an immutable contract will have no incentive to make a lowball offer.[29] Again, the basic idea is that an immutable contract may lead to inefficient outcomes ex post—in this scenario, performance by a developer who offers to perform at a price that does not cover its ultimate costs and who may not be the lowest cost provider of the software in question—but may create more significant incentives to behave efficiently ex ante. Here, the desired ex ante behavior consists of providing accurate information about the cost of performance.

This analysis suggests that immutable contracts are potentially attractive in any scenario where two conditions are satisfied: first, when it is difficult to observe a trading partner's true costs of completing performance (either before or after the contract is signed), thus opening up the possibility of bluffing or lowballing; and second, when legal remedies are sufficiently unreliable that the trading partner will at some point have a superficially credible threat to withhold performance.[30] A wide range of scenarios is likely to satisfy

28 *See* Johnston, *supra* note 24, at 346 (indicating that strategic behavior may be problematic during contract formation stage because parties may not disclose information regarding likelihood of subsequent need for modification).

29 Making a contract immutable may not discourage a seller from setting a price that exceeds its expected cost of performance as of the date the contract is formed, but that the seller knows has a positive probability of being lower than the cost of performance at a future point during the term of the contract. For example, even if it signs an immutable contract, a seller who is not vulnerable to the ordinary remedies for breach of contract may have no incentive to set a price that is sufficiently high to ensure performance of the original contract if it receives a large order from an important customer. Moreover, the seller may have no incentive to disclose to the first client the likelihood of receiving a second order of this kind.

30 Bar-Gill and Ben-Shahar argue that under these circumstances parties will typically be better off if, rather than unconditionally barring enforcement of modifications, judges

these conditions, including the classic scenarios involving contract modifications sought by sailors,[31] as well as more modern scenarios involving builders,[32] entertainers, and professional athletes.[33] In addition, outside the strictly contractual context, the argument that immutable contracts can induce disclosure of actors' intentions has been used to justify initiatives that prevent parties from divorcing solely on the basis of consent.[34]

B. *Preventing Efficient Reallocation of Risk Ex Post in Order to Induce Investment Ex Ante*

Immutable contracts can also be used to prevent parties from renegotiating contracts that allocate risk to relatively risk-averse parties where the purpose of the original allocation of risk is to give the risk-bearing party an incentive to take actions that either cannot be observed by the trading partner ("unobservable" actions) or verified by a third party charged with enforcing the contract ("unverifiable"

condition the enforceability of modifications upon verification that the party making the threat will actually find it prohibitively costly to perform the original contract. Bar-Gill & Ben-Shahar, *supra* note 23, at 405–09. Their claim does not seem likely to hold, however, if the costs of going to court are very high. Therefore, the possibility of this form of judicial intervention should not completely eliminate the demand for enforceable anti-modification devices. Nevertheless, the basic point that there may be judicial substitutes for anti-modification clauses is consistent with the argument set out in Part II.C.2, *infra*.

[31] *See, e.g.*, Alaska Packers' Ass'n v. Domenico, 117 F. 99, 102 (9th Cir. 1902) (holding that contractual renegotiation of employment contract while ship was at sea was invalid due to lack of consideration); Stilk v. Myrick, (1809) 170 Eng. Rep. 1168, 1168–69 (N.P.) (same).

[32] *See, e.g.*, Watkins & Son v. Carrig, 21 A.2d 591, 591–92, 594 (N.H. 1941) (holding that contractor was entitled to collect fee exceeding initial contract price after defendant ceded to new price without protest); Williams v. Roffey Bros. & Nicholls Ltd., (1991) 1 Q.B. 1, 16, 19, 23 (Eng.) (upholding judgment granting subcontractor's claim to collect additional sum promised by defendant after parties determined initial bid was insufficient, and holding that benefit to general contractor sufficed as consideration).

[33] For a general discussion of this issue in the context of contracts with athletes, see Alex M. Johnson, Jr., *The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts*, 22 CONN. L. REV. 61 (1989). Johnson argues that modifications of professional athletes' contracts should not be enforced. In the athletic context, one of the ex ante concerns would be about creating incentives for athletes to threaten to withhold performance in order to extract salary increases. The ex post cost of prohibiting renegotiation is that some athletes may follow through on their threats to withhold performance. Another ex ante concern would be that club owners will threaten to harass athletes to induce them to agree to salary reductions or other concessions. This last concern has been offered as a justification for the Major League Baseball Players' Association's policy of refusing to permit baseball players to agree to contract modifications that do not actually or potentially provide benefits to the player. *See* Joe Sheehan, *Prospectus Today: The A-Rod Mess*, BASEBALL PROSPECTUS, Dec. 18, 2003, http://www.baseballanalysis.com/article.php?articleid=2490 (discussing Association's policy as it relates to potential trade of baseball player Alex Rodriguez).

[34] *See* Scott & Scott, *supra* note 10, at 1283.

actions).[35] This could arise in the context of a software agreement to the extent that the parties want the developer to exert an efficient level of effort—meaning a level of effort such that the change in cost associated with choosing any other level would exceed the resulting change in benefits—in improving the quality of its product. If the developer's level of effort is unobservable or unverifiable, then it will be impossible for the parties to write an enforceable contract that directly binds the developer to exert the efficient level of effort. Consequently, the parties might turn to an incentive contract that makes the developer's compensation contingent, at least in part, upon the quality of its product. For example, they might offer the developer a bonus determined by reference to the number of visitors to critical parts of the website during its first six months of operation.

The difficulty with this contract arises if the developer is, compared to the retailer, relatively averse to risk, and there is a window between the time at which the developer finishes exerting effort that will influence the quality of its software and the time when the quality becomes observable to the parties. In that window the parties have an incentive to modify their original agreement in a way that transfers risk from the developer to the retailer by, for example, replacing the developer's originally agreed variable payment with one that is, in whole or in part, fixed. This kind of reallocation of risk will be efficient ex post because, by hypothesis, the developer finds it relatively costly to bear the risk of a low-quality site; and the fact that the developer has no further opportunity to respond to incentives means that there is no incentive-based justification for allocating that risk to him or her. Naturally, though, if the developer anticipates that the contract will be modified in this fashion, the initial promise of a bonus contingent upon the quality of the website will provide no incentive to exert effort. Again, the difficulty is that the contract that is required to induce efficient behavior ex ante involves a commitment to inefficient behavior ex post. In this case, the inefficient ex post behavior is the failure to engage in an efficient trade in risk.

Professor Jolls suggests that this problem is a very general one that is liable to arise in virtually any principal-agent relationship in which the agent is relatively risk-averse and there is a delay between the agent's exertion of effort and the realization of value.[36] She

[35] This class of contracts plays a prominent role in Jolls's analysis, *supra* note 6, at 211–19. For a discussion of the distinctions between observable and verifiable information in the contractual setting, see Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 279–80 (1992).

[36] *See* Jolls, *supra* note 6, at 211.

argues that agreements such as sharecropping and employment agreements, and in particular managerial compensation agreements, probably fit this description.[37]

C. *Preventing Efficient Trade Ex Post in Order to Induce Investment Ex Ante*

In the economics literature, the most commonly cited scenario in which an immutable contract would be advantageous is one in which parties attempt to induce efficient investment in an early period by signing a contract that potentially involves inefficient trading behavior in a later period.[38] Again we can illustrate this point using our hypothetical software transaction. Suppose that the parties are still concerned with encouraging the developer to invest in improving the quality of the website. Now, however, we focus upon aspects of quality such as the look and feel of the website that can be observed by the parties, but cannot be reduced to a set of contractual specifications because they cannot be verified to an adjudicator.

Despite the fact that they cannot write a contract that explicitly requires the developer to make an efficient level of investment in improving quality along unverifiable dimensions, it has been shown that if the parties are able to write an immutable contract, they can devise a mechanism that induces efficient investment on the part of the developer. The most straightforward contract of this sort is one under which the parties agree that the terms upon which the website is traded will be determined by having the developer make a take-it-or-leave-it offer to the retailer. So long as the parties are rational and unconcerned about establishing any particular sort of reputation (either with one another or with other parties) and these facts are common knowledge, they will expect the retailer to accept any offer that requires it to pay any price that is lower than the value that it places on the product. This means that a developer who makes an efficient investment in enhancing the quality of the website can be assured of recouping its investment by making an offer that specifies a sufficiently high price.[39]

[37] *Id.*

[38] *See* Patrick W. Schmitz, *The Hold-Up Problem and Incomplete Contracts: A Survey of Recent Topics in Contract Theory*, 53 BULL. ECON. RES. 1, 3–9 (2001) (surveying literature); Schwartz & Scott, *supra* note 2, at 611–14 (explaining hypothetical contract negotiation).

[39] The take-it-or-leave-it offer structure causes virtually the entire ex post surplus from the transaction to accrue to the developer. However, the overall division of the surplus can be manipulated by having the developer make an up-front payment to the retailer.

This mechanism is most likely to work, however, if the contract specifying the take-it-or-leave-it bargaining procedure is immutable; otherwise, the retailer could renege on its promise to abide by the take-it-or-leave-it offer procedure. If it could renege, the retailer would have an incentive to reject the developer's offer and then, instead of simply walking away, negotiate a price that approaches the minimum price at which the developer is willing to transfer the website.[40] If the website is sufficiently customized and the retailer's patience exceeds that of the developer, then the resulting price may not be sufficiently high to allow the developer to recover the cost of an efficient investment. Anticipating such an outcome, the developer will not make the efficient investment, and so the prospect of contract modification will have undermined the parties' ability to induce efficient investment behavior. The root of the problem is that the "leave it" contemplated by the procedure specified in the original contract may require the parties to ignore potential gains from trade and accept an outcome that is, ex post, inefficient. Parties always have an incentive to modify contracts that provide for inefficient behavior of this sort, and contracts that depend upon a commitment to such behavior are unlikely to be useful under a regime that permits contract modification. Consequently, it has been suggested that contracting parties faced with the problem of inducing unverifiable investment would benefit from being able to make contracts specifying take-it-or-leave-it bargaining procedures of this sort—as well as other more sophisticated bargaining procedures—immutable. A large body of economics literature is premised upon the assumption that contracting parties are frequently interested in inducing unverifiable investment.[41]

[40] Threatening to walk away in these circumstances is unlikely to be credible because the developer will probably assume that the retailer attaches a positive value to the website and so will be better off paying some positive price for the website than walking away. This fact will limit the extent to which the retailer can bargain for a lower price. *Cf.* Thomas P. Lyon & Eric Rasmusen, *Buyer-Option Contracts Restored: Renegotiation, Inefficient Threats, and the Hold-Up Problem*, 20 J.L. ECON. & ORG. 148, 160–65 (2004) (analyzing buyer option contracts using game theory to determine consequences of renegotiations and take-it-or-leave-it offers).

[41] *See, e.g.*, Alan Schwartz, *Incomplete Contracts*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 277, 279 (Peter Newman ed., 1998) ("In many cases, information is easier for a party to observe than to establish in a litigation."); Schwartz, *supra* note 35, at 279–80, 314 (arguing that relational contracts often deal with issues that involve unverifiable information).

D. *Requiring Inefficient Anticompetitive Behavior Ex Post in Order to Deter Entry or Encourage Exit*

For some time now, lawyers and economists concerned with the regulation of anticompetitive behavior have recognized that firms' ability to make credible threats to engage in anticompetitive behavior is limited by the fact that many types of anticompetitive behavior tend to be costly for investors in both the firm engaging in the anticompetitive behavior and the firms that it targets.[42] Firms may be able to overcome this obstacle by signing immutable contracts that effectively bind them to engage in anticompetitive behavior.

There are at least two ways in which immutable contracts can be used in this fashion. First, anti-modification devices can be combined with long-term contracts and penalty clauses to deter entry.[43] For example, suppose that our software developer signs long-term contracts with its customers which require them to pay supra-compensatory damages to the developer in the event that they switch to a new, lower-cost supplier. The developer's customers may be inclined to accept these contracts because they can receive compensation for any damages paid to the incumbent in the form of low prices for software supplied by the new entrant. In a sense, the damages payable for breach of the developer's existing contracts will serve as a tax upon entry. However, this scheme will be less effective if the developer and its customers are able to modify their original contract.[44] If the contract can be modified, then the developer and its customers should be

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[42] *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 144–60 (1978) (critiquing various theories of predation); John S. McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289, 292 (1980) (claiming that predatory pricing is rare and more costly for predator than for prey); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 282–97 (1981) (discussing predation strategies and reasons for their lack of success); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 926–28 (1979) (noting that predators will lose money in long run because competitors may enter market when predator is trying to recoup lost profits).

[43] The discussion that follows is based upon Philippe Aghion & Patrick Bolton, *Contracts as a Barrier to Entry*, 77 AM. ECON. REV. 388, 389–92 (1987). *See* Joseph F. Brodley & Ching-to Albert Ma, *Contract Penalties, Monopolizing Strategies, and Antitrust Policy*, 45 STAN. L. REV. 1161, 1165–72 (1993) (summarizing Aghion and Bolton's analysis and discussing legal implications).

[44] *See* Scott E. Masten & Edward A. Snyder, *The Design and Duration of Contracts: Strategic and Efficiency Considerations*, 52 LAW & CONTEMP. PROBS. 63, 71 (1989) (observing that parties' ability to modify their contract weakens credibility of take-it-or-leave-it offers in long-term contracts); *see also* Kathryn E. Spier & Michael D. Whinston, *On the Efficiency of Privately Stipulated Damages for Breach of Contract: Entry Barriers, Reliance and Renegotiation*, 26 RAND J. ECON. 180, 183–89 (1995) (extending Aghion and Bolton model to allow for renegotiation and showing that if renegotiation is possible then, in absence of reliance expenditures, penalty clauses cannot be used to deter entry).

willing to waive compliance with the penalty clause if necessary to ensure entry. In other words, where contract modification is possible, the parties should be willing to negotiate with the potential entrant over the level of its entry tax (although the developer would insist upon recovering at least the amount of its expected lost profits, the traditional measure of expectation damages). This implies that anti-modification devices can be used to reinforce the anticompetitive effects of penalty clauses by making it impossible for penalty clauses to be waived in the face of potential entry.

Anti-modification devices might also serve a second but related anticompetitive purpose: They might be used to enhance the credibility of threats to engage in predatory pricing. Predatory pricing—selling a product at a price below its cost of production—is generally regarded as undesirable. In the short term, it encourages consumers to purchase products whose social cost of production exceeds the social benefits associated with their consumption. In the longer term, predatory pricing discourages competition and thus permits products to be sold at prices that significantly exceed their costs of production, thereby preventing some potential buyers who are willing to pay more than the cost of production (but less than the seller's price) from consuming the products in question.[45]

This last point suggests that firms have an incentive to make credible commitments to engage in predatory pricing in order to discourage entry or to encourage exit. However, the credibility of such commitments tends to be limited by the fact that prolonged or intensive periods of predatory pricing can cause losses that are too great to be recouped by setting the price above cost once competition has been eliminated. Firms may attempt to make threats to engage in unprofitable predatory pricing credible by signing contracts that delegate responsibility for pricing decisions to managers who, either because of natural inclinations or incentive pay schemes, are more interested in eliminating competition than in maximizing firm profits.[46] However,

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[45] *See* Phillip E. Areeda & Herbert Hovenkamp, Fundamentals of Antitrust Law § 7.03(a) (2003) (defining predatory pricing and explaining consequences); Herbert Hovenkamp, Antitrust Law § 2007 (2d ed. 1999) (same); *see also* Richard A. Posner & Frank H. Easterbrook, Antitrust: Cases, Economic Notes, and Other Materials 680–89 (2d ed. 1981) (discussing debate regarding ability of firms to recoup losses incurred during predatory period); Edward M. Iacobucci, Predatory Pricing and the Recoupment Test 5 (undated) (unpublished manuscript, on file with the *New York University Law Review*) (discussing justifications for predatory pricing recoupment test).

[46] John R. Lott, Are Predatory Commitments Credible? 18–21 (1999). The concept of this sort of strategic delegation is typically credited to Thomas Schelling, who also suggested the importance of being unable to modify the terms of the delegation. *See* Schelling, *supra* note 16, at 29, 37, 142. For a more recent general discussion, see Michael L. Katz, *Game-Playing Agents: Unobservable Contracts as Precommitments*, 22

these types of contracts do little to enhance the credibility of threats to engage in unprofitable predatory pricing if they can be renegotiated and modified. Whenever its managers are confronted with an opportunity to engage in unprofitable predatory pricing the firm has an incentive to modify the contract so as to create incentives to maximize profits.[47] Adding anti-modification devices to contracts of this sort would, however, allow such devices to serve as credible commitments to engage in unprofitable predatory pricing.

A wide range of firms operating in industries with low barriers to entry may be interested in using immutable contracts, with either customers or managers, for anticompetitive purposes. This is yet another reason why one might expect the demand for immutable contracts to be high.

II
Why the Demand for Enforceable Anti-Modification Clauses May Be Limited

The preceding discussion suggests that there is a wide range of scenarios in which parties would benefit from being able to make their contracts immutable. Moreover, some of those scenarios involve high-value transactions, such as long-term supply contracts and managerial employment agreements, implying that the benefits from adopting immutable contracts in those settings would be substantial. In short, these arguments suggest that there ought to be a significant demand for immutable contracts, and that the potential consumers of those contracts will include parties who are willing to incur nontrivial expenses in order to adopt them.

Several of these arguments have been marshaled by legal scholars in support of the claim that the law ought to enforce anti-modification clauses, relying more or less implicitly on the notion that the law ought to be adapted to satisfy this unfulfilled demand.[48] However, the

RAND J. Econ. 307, 323–24 (1991). For discussions of the possibility of using strategic delegation to undertake anticompetitive behavior, see Lott, *supra*, at 18–20; Gillian K. Hadfield, *Credible Spatial Preemption Through Franchising*, 22 RAND J. Econ. 531, 539, 541 (1991) (arguing that market entry can be deterred by delegating pricing decisions to franchisees and making those delegation agreements immutable).

[47] Lott, *supra* note 46, at 20 (discussing shareholder preference for avoiding costly predatory measures).

[48] *See, e.g.*, Jolls, *supra* note 6, at 224–26 (favoring enforcement of anti-modification clauses in "owner-worker" contracts to prevent reallocation of risk to party less able to bear it); Schwartz & Scott, *supra* note 2, at 611–14, 618–19 (describing scenario in which parties would benefit from anti-modification clause); Schwartz & Watson, *supra* note 6, at 24 (arguing that welfare maximization does not justify ban on anti-modification clauses).

fact that there may be significant benefits associated with immutable contracts does not inexorably lead to the conclusion that there is a significant demand for either immutable contracts in general, or immutable contracts created through adoption of anti-modification clauses in particular. First, there may be costs associated with adopting immutable contracts that typically offset any of the benefits set out above. Second, inherent limits on the effectiveness of anti-modification clauses or other anti-modification devices might limit the extent to which it is possible to capture the potential benefits of immutable contracts. Third, parties who are interested in adopting immutable contracts might be able to achieve their objectives by using substitutes for anti-modification clauses. All of these factors will limit the demand for enforceable anti-modification clauses and, in most cases, other anti-modification devices.

A. *Costs of Immutability*

1. *Inflexibility*

One reason that actors might be reluctant to rule out the possibility of modifying their agreements is that they fear that, in light of the cognitive and economic constraints that limit parties' ability to draft complex contracts, they will be unable to draft an agreement that is sufficiently immutable to generate significant ex ante benefits but sufficiently mutable to allow them to capture potentially significant ex post gains from trade.[49] In other words, sometimes it may be not only prohibitively costly to adopt a contract that is completely immutable (i.e., in all circumstances) but also impossible to draft a partially immutable contract that successfully defines and distinguishes circumstances in which modifications should and should not be permitted. For example, in the case of our software contract, the parties may wish to retain the flexibility to modify the agreement to give the developer a fixed payment in the case where an exogenous factor, such as an unusually severe economic downturn, reduces the amount of traffic to the website, but may find it difficult to specify in advance exactly what constitutes an "unusually severe" downturn. Similarly, parties may find it useful to retain the flexibility to modify managerial employment agreements that provide for performance-

[49] For similar arguments, see Viral V. Acharaya et al., *On the Optimality of Resetting Executive Stock Options*, 57 J. FIN. ECON. 65, 67 (2000); Karen Eggleston et al., *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW. U. L. REV. 91, 123–25 (2000); Jolls, *supra* note 6, at 211; Ilya Segal, *Complexity and Renegotiation: A Foundation for Incomplete Contracts*, 66 REV. ECON. STUD. 57, 72–74 (1999).

based compensation in cases where firm profits vary as a result of unforeseen events beyond the manager's control.

2. *Requests for Immutability as Adverse Signals*

Another possibility is that parties will be reluctant to offer to sign immutable contracts because doing so will signal to prospective trading partners that they place a relatively low value on the ability to modify the contract.[50] In some circumstances, sending such a signal might serve to undermine the bargaining power of the party in question. For instance, a customer who asks a developer to sign an immutable contract may be signaling that it has relatively few alternative service providers, a factor that will tend to increase the developer's bargaining power. Similarly, a developer who appears eager to make its agreements immutable may be signaling that it places little value on the ability to modify the contract to substitute a fixed payment for a variable payment. This implies that the developer is not particularly risk-averse. However, the less risk-averse the developer, the lower the compensation it requires for bearing the risk inherent in a variable payment contract. All other things being equal, the lower the minimum amount of compensation the developer appears to require, the less the client is likely to offer. Again, willingness to accept an immutable contract may serve as a signal that undermines bargaining power.

B. *Limitations of Anti-Modification Clauses*

Anti-modification devices typically require that the occurrence of a contract modification be proven to some third party who can then impose a penalty of some sort upon one or both of the principals. For instance, even if enforceable, an anti-modification clause will only be effective if the parties are able and willing to prove to a court that it has been breached.

Some types of contract modification might be difficult for the principals to a contract to verify to third parties.[51] For example, a modification that involves a retailer paying more than the original

[50] Johnston makes essentially the same point in arguing why contracting parties, if given the option, would not necessarily invite the courts to police contract modifications under the rubric of the doctrine of good faith in performance. Johnston, *supra* note 24, at 365–73. Johnston uses this argument to defend the fact that under American law the duty of good faith is mandatory. *Id.* Jolls explicitly concedes that immutable contracts might be undesirable "if signaling issues were shown to be important across a range of contractual settings." Jolls, *supra* note 6, at 225.

[51] Similar concerns are raised in Hart & Moore, *supra* note 16, at 128–29, in which the authors discuss the difficulty of proving to a judge that two contracts are sufficiently similar.

price for a software developer's services might be cleverly disguised as an independent transaction, perhaps involving an intermediary, rather than a modification of the original contract. To the extent that it is possible to make contract modifications unverifiable, an anti-modification clause—or, for that matter, any other type of anti-modification device that relies on third parties—can be easily circumvented, and so demand for it will be minimal. As we shall see in a moment, however, there is some debate over the extent to which information is ever completely unverifiable in contractual settings.[52]

Another concern is that fear of nonlegal sanctions, such as a refusal to engage in future dealings, might discourage a party from seeking to enforce an anti-modification clause. For instance, in our example the retailer might refrain from enforcing an anti-modification clause if it fears that the software developer will retaliate by refusing to provide crucial support services.

C. *Substitutes for Anti-Modification Clauses*

It is also reasonable to challenge the assumption that using anti-modification clauses and the threat of inefficient ex post outcomes is the only way of inducing contracting partners to behave efficiently ex ante. In fact, there may be substitutes for anti-modification clauses.

1. *Nonlegal Sanctions*

In practice, norms of fairness and reciprocity, as well as reputational concerns, frequently induce efficient behavior.[53] For example, professional pride, regard for norms of fair dealing, and the need to preserve a reputation for providing high quality products and good service in order to attract future business—from either the present buyer or other potential buyers—may be sufficient to induce software developers to make unverifiable investments designed to improve the quality of their products.

2. *Judicial Intervention*

Even though litigation is costly and courts have difficulty verifying many sorts of information, it may often be the case that contracting parties feel comfortable relying upon the prospect of judicial intervention to encourage efficient behavior, either directly or indi-

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52 *See infra* Part II.C.3.

53 *See* Jolls, *supra* note 6, at 231 (discussing possibility that nonlegal sanctions may serve as substitutes for legal methods of achieving bilateral commitment).

rectly.[54] For example, the law of misrepresentation (including the doctrine of promissory fraud) and breach of warranty can facilitate credible disclosure of information bearing on the risk of non-performance, and competitive forces may create incentives for promisors to make such disclosure.[55]

Contracting parties may also eschew anti-modification devices because they believe that the courts will indirectly encourage desirable pre-modification behavior by refusing to enforce contract modifications likely to reward undesirable behavior.[56] In other words, contracting parties may expect the courts to do a sufficiently good job of determining whether to make their contracts immutable that there is little benefit in the parties' attempting to do the job themselves.[57] This expectation would be consistent with the facts that the potential dangers of enforcing contract modifications are now well known and many Anglo-American courts have, using a variety of doctrinal techniques, declined to enforce contract modifications. For instance, enforcement of contract modifications has often been denied under the rubric of the doctrine of consideration on the theory that a promise to render performance that a person has a preexisting legal duty to render cannot provide the consideration required to support a promise to modify a contract.[58] In the United States, Section 89 of the current Restatement of Contracts attempts to close some of the loopholes in the common law,[59] suggesting that in determining whether

[54] Johnston argues that even if courts err in assessing the validity of claims about the cost of performance, judicial intervention will still, so long as courts are reasonably competent, serve to discourage misrepresentations. Johnston, *supra* note 24, at 366–67. *See* Bar-Gill & Ben-Shahar, *supra* note 23, at 406–12 (discussing how parties may anticipate judicial error and adjust prices accordingly).

[55] *See, e.g.*, Occidental Worldwide Inv. Corp. v. Skibs A/S Avanti, (1976) 1 Lloyd's Rep. 293, 319–25, 336–37 (Q.B.D.) (Eng.) (setting aside modification to charter contract due to party's misrepresentations). It may still be difficult, however, to make credible disclosure regarding the probability of performance when that probability is less than one. Because the probabilities of many events are purely subjective, it is likely to be difficult to prove that a person has falsely stated their assessment of probability rather than correctly stated an opinion that turned out to be incorrect.

[56] *See* Jolls, *supra* note 6, at 228–30.

[57] For a formal demonstration of how even imperfect judicial intervention can discourage misrepresentation of willingness to withhold performance, see Johnston, *supra* note 24, at 350–74. *See also* Bar-Gill & Ben-Shahar, *supra* note 23, at 406–09 (discussing extension of their formal model to take into account imperfect verification).

[58] Stilk v. Myrick, (1809) 170 Eng. Rep. 1168, 1168 (N.P.) (finding modification unenforceable due to lack of consideration); Alaska Packers' Ass'n v. Domenico, 117 F. 99, 102 (9th Cir. 1902) (same).

[59] In its traditional form the preexisting duty rule did not cover two important types of modifications: those in which the promisee provided consideration of nominal value and those in which the original contract was rescinded by mutual agreement of the parties—a type of agreement that has always been recognized to be enforceable—and replaced with a

modifications are to be enforceable, courts should consider whether the modification is "fair and equitable in view of circumstances not anticipated by the parties when the contract was made" (along with whether "justice requires enforcement in view of material change of position in reliance on the promise").[60] Meanwhile, in cases involving sales of goods, courts will refuse to enforce modifications that they find inconsistent with the U.C.C.'s good faith requirement.[61] Finally, in both England and the United States, the doctrine of economic duress is regularly cited as a basis for refusing to enforce contract modifications.[62]

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modified agreement. For examples of the second type of case, see Schwartzreich v. Bauman-Basch, Inc., 131 N.E. 887, 889–90 (N.Y. 1921) (holding that no additional consideration necessary when modifying contract if parties mutually agree to rescind original contract); Raggow v. Scougall & Co., (1915) 31 Times L. Rep. 564, 565 (K.B.) (Eng.) (same). The Restatement (Second) of Contracts explicitly attempts to close the first loophole by insisting that in order to qualify as consideration, performance has to differ from what was required by a preexisting duty "in a way which reflects more than a pretense of bargain." However, the illustrations that accompany the section suggest that the drafters have left courts and litigants a great deal of room to invent consideration. *See* RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979); Snyder, *supra* note 10, at 615–17 (discussing application of Restatement rule to recent cases). The Restatement's attitude towards the second loophole is somewhat more ambiguous. Although it does not appear to conflict with any of the Restatement's main provisions, the theory is "rejected" in comment b to § 89.

60 RESTATEMENT (SECOND) OF CONTRACTS § 89 (1979). For cases following this provision, see, for example, McCallum Highlands v. Wash. Capital Dus Inc., 66 F.3d 89, 94–95 (5th Cir. 1995) (applying Restatement § 89(a) as exception to preexisting duty rule); United States v. Sears, Roebuck & Co., 778 F.2d 810, 813, 816 (D.C. Cir. 1985) (applying fair and equitable standard to modification without consideration); Billman v. V.I. Equities Corp., 743 F.2d 1021, 1024 (3d Cir. 1984) (endorsing Restatement § 89 with regard to waiver, detrimental reliance, and equity); Coyer v. Watt, 720 F.2d 626, 629 (10th Cir. 1983) (same); *see also* Lange v. United States, 120 F.2d 886, 890 (4th Cir. 1941) (reaching conclusion similar to that later endorsed in § 89 of Restatement); Fluor Enters., Inc. v. United States, 64 Fed. Cl. 461, 487 n.26 (2005) (citing Restatement § 89 for proposition that modifications do not always give rise to new contracts); Univ. of the V.I. v. Petersen-Springer, 232 F. Supp. 2d 462, 470 (V.I. App. Div. 2002) (applying Restatement § 89 as exception to preexisting duty rule); Quigley v. Wilson, 474 N.W.2d 277, 281 (Iowa 1991) (adopting Restatement rule); Smaldino v. Larsick, 630 N.E.2d 408, 413 (Ohio Ct. App. 1993) (applying reliance exception of Restatement); Roussalis v. Wyo. Med. Ctr. Inc., 4 P.3d 209, 240–41 (Wyo. 2000) (same).

61 The U.C.C. has abolished the common law requirement that a contract modification be supported by consideration. U.C.C. § 2-209(1). *But cf.* U.C.C. § 2-209 cmt. 2 ("[T]he extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith [set out in U.C.C. § 1-304].").

62 Williams v. Roffey Bros. & Nicholls Ltd., (1991) 1 Q.B. 1, 13–15 (Eng.) (discussing British rule); Universe Tankships Inc. v. Int'l Transp. Workers Fed'n, (1983) 1 A.C. 366, 383–85 (H.L.) (Eng.) (appeal taken from A.C.) (identifying rationale for defense of economic duress); RESTATEMENT (SECOND) OF CONTRACTS §§ 175–76 (1979).

3. *Express Contractual Provisions Conditioned on Partially Verifiable Information*

As we have seen, some of the demand for immutable contracts supposedly arises in situations where parties' actions are unverifiable and where important decisions, such as the amount to invest in improving the quality of goods or services, cannot be influenced by the prospect of judicial enforcement of express terms of the parties' contract. However, it may not be reasonable to presume that it is commonplace for actions to be completely unverifiable. Rather, in many contexts it seems plausible that actions will be partially verifiable, meaning that it will not be prohibitively costly for the courts (or other private adjudicators) to draw inferences about the parties' behavior that are more likely than not to be accurate.[63] Once information about parties' actions is partially verifiable, it becomes feasible to use explicit contractual provisions to influence behavior.[64] This is because if compliance with a given provision is even partially verifiable then, by hypothesis, failure to comply with the provision increases, at least to some extent, the risk of legal liability.[65]

4. *Multi-Party Agreements*

Perhaps the most straightforward method of deliberately discouraging contract modification is to increase the number of parties to the agreement in a way that increases the number of parties whose consent must be obtained before the contract can be modified. This technique serves to discourage modifications both by increasing the out-of-pocket transaction costs of negotiating modifications and by giving the other parties to the agreement incentives to hold out for a large share of the benefits to be gained from modification.[66]

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63 The degree of verifiability in any given context is likely to be influenced by a range of factors, including the state of management information technology, the degree of specialization on the part of the adjudicators, and the rules of evidence.

64 *See* Robert E. Scott & George G. Triantis, *Harnessing Litigation by Contract Design*, 115 YALE L.J. 814, 825–26 (observing that courts must analyze verifiable behavior as proxy for unverifiable behavior).

65 For a formal demonstration, see Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUD. 159, 162–63 (1994). Eric Posner has developed a model in which breach increases the risk of legal liability, even though breach is completely unverifiable, by positing that contracting parties have an incentive to sue for breach in order to create or maintain a reputation for toughness. This result depends upon an assumption that breach is at least partially verifiable to third parties among whom the contracting parties wish to create a reputation. Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 765 (2000).

66 These effects are discussed at greater length in Part V, *infra*, in connection with the representative trustee technique.

There are a number of examples of multi-party agreements that contain terms that are difficult to renegotiate. The most striking examples are contracts between professional athletes and the teams for which they play. These are often made pursuant and subject to the provisions of collective agreements between associations representing the athletes and teams, respectively, in the relevant sports league. In some prominent cases, the collective agreements explicitly restrict the ability of individual athletes and teams to renegotiate their agreements. For instance, among other things, the National Basketball Association's 1999 collective agreement limits the maximum amount by which a player's salary can be increased through renegotiation,[67] limits the frequency of renegotiation,[68] bars renegotiation in the period from March 1 through June 30 of each year,[69] prevents the salary specified in a player contract from being renegotiated downwards,[70] and prevents contracts from being renegotiated to cover a shorter term.[71] The latest National Hockey League collective agreement appears to go even further by prohibiting any sort of renegotiation of player contracts.[72] An interesting contrast is the National Football League's collective agreement, which places relatively few restrictions on renegotiation of a player's contract.[73]

A second situation in which multi-party contracts that are (at the very least) difficult to renegotiate are common is in the context of sovereign debt. Many debt agreements contain so-called unanimous action clauses (UACs) which provide that certain terms of the agreement can only be modified with the unanimous consent of the bondholders. Most debt agreements containing these terms are not completely immutable, because they can be amended without unanimous consent in the course of bankruptcy proceedings. However, there is no comparable statutory basis for amending debt issued by sovereign nations, and such debt is frequently issued subject to similar

[67] Nat'l Basketball Players Ass'n, Collective Bargaining Agreement, art. II, § 7(b), art. VII, § 7(c)(3)–(4), http://www.nbpa.com/downloads/CBA.pdf (last visited March 23, 2006) [hereinafter NBPA CBA].

[68] *Id.* art. VII, § 7(c)(1)–(2).

[69] *See id.* art. VII, § 7(c)(5).

[70] *See id.* art. VII, § 7(d)(1).

[71] *See id.* art. VII, § 7(d)(5).

[72] Press Release, National Hockey League, Board of Governors Ratifies Collective Bargaining Agreement (July 22, 2005), http://assets.sportvision.com/wild/assets/files/37202.pdf.

[73] *See* Nat'l Football League Players Ass'n, Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association, art. XXIV, § 9 (as amended Feb. 25, 1998), *available at* http://www.nflpa.org/Agents/main.asp?subPage=CBA+Complete (limiting frequency of renegotiation and barring renegotiation after last regular season game of each season).

amendment provisions as is U.S. corporate debt. Consequently, sovereign debt agreements containing UACs that cover all of their key terms may be effectively immutable.

For contracts that would not otherwise be structured as multi-party agreements, there are likely to be significant costs associated with adding extra parties to an agreement simply to forestall modifications. First, there are the transaction costs of searching for suitable additional parties. Second, there are the costs of negotiating the contract with the additional parties.[74] Third, there is the fact that increasing the number of parties to the contract is likely to increase the costs of enforcing it in the event of default. All of these costs seem likely to increase in proportion to the number of additional parties. The additional search costs are likely to be most significant where the obligations to be performed by the added parties require specialized expertise or resources. The additional enforcement costs, and possibly the negotiation costs, seem likely to be most significant where the parties' obligations are relatively complex.[75] For these reasons, multi-party agreements probably should not be regarded as good substitutes for anti-modification clauses.

5. *Most Favored Nation Clauses*

In their simplest form, MFN clauses involve one party making a binding commitment to another party not to deal with any third party on more favorable terms.[76] For example, a software developer might promise several of its clients that they will pay a price no higher than the price paid by any other client. In an early paper on this topic, Knoeber suggests that actors can use MFN clauses to discourage contract modification—in other words, as substitutes for explicit anti-modification clauses.[77]

To a certain extent this is true: Extending the benefit of an MFN clause to one or more other parties clearly reduces the likelihood of the promisor subsequently assuming certain types of contractual obli-

[74] *See* Jolls, *supra* note 6, at 233.

[75] By way of illustration, the obligations of a creditor under a multi-party debt agreement—namely, to advance credit—are relatively simple and do not require specialized resources or expertise. Moreover, the incremental transaction costs of searching for and negotiating with additional creditors may be insignificant because the benefits to creditors of diversification give debtors and creditors an independent reason for entering into multi-creditor agreements.

[76] Black's Law Dictionary 1035 (8th ed. 2004) (defining Most Favored Nation clause as "agreement between two nations providing that each will treat the other as well as it treats any other nation that is given preferential treatment" and extending concept to similar clauses in other contracts).

[77] Knoeber, *supra* note 20, at 340–42.

gations. MFN clauses do this in two ways. First, they increase the cost to the promisor of agreeing with any trading partner to abide by unusually favorable terms, because MFN clauses represent commitments to trade on the same terms with a number of other parties.[78] Second, MFN clauses create a free-rider problem among a promisor's existing and prospective trading partners: Once a set of MFN obligations is in place, any trading partner covered by the MFN clause who invests resources in negotiating with the promisor for improved terms will automatically confer a benefit upon every other trading partner. This means that in the absence of some sort of coordination mechanism each beneficiary has an incentive to wait for someone else to invest in negotiation.[79] So, for instance, a developer who has signed contracts containing MFN clauses with a number of its clients will find it relatively costly to accede to any individual client's request for a price reduction, because the benefits of the modification will have to be extended to all of the clients entitled to MFN treatment. Moreover, the presence of an MFN clause will give each client an incentive to refrain from taking the trouble to attempt to negotiate a price reduction, because the clause allows each client to benefit from other clients' negotiating efforts.

It is important to recognize, however, that an MFN clause does not have the same effect upon the promisor's subsequent contracting behavior as a pure anti-modification device, such as an enforceable anti-modification clause. This is because an MFN clause does both less and more than a pure anti-modification device. It does less because it does not discourage the promisor from agreeing to modifications that it is willing to extend to all of the beneficiaries of the MFN clause. Therefore, in terms of flexibility an MFN clause is superior to a simple anti-modification clause and equivalent to an anti-modification clause that makes a contract only partially immutable.

Perhaps even more significantly for present purposes, an MFN clause does more than a pure anti-modification device because, to the extent that it discourages the promisor from assuming certain types of obligations, it discourages him from assuming those obligations by forming new contracts as well as modifying old ones. An MFN clause also does more than a pure anti-modification device in the sense that

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78 *Id.*

79 This point represents an application of the general argument developed in Zvika Neeman, *The Freedom to Contract and the Free-Rider Problem*, 15 J.L. ECON. & ORG. 685 (1999), which demonstrated how a person contracting with multiple actors can induce them to refrain from acting in their collective interest. Of course, the fact that the MFN clause makes the promisor relatively unlikely to accede to a modification also reduces its trading partners' incentives to invest in seeking modifications.

it tends to force parties to contract with a large number of trading partners on more or less identical terms.

For these reasons, an MFN clause is very different from an anti-modification clause. The additional consequences, including greater flexibility, of adopting an MFN clause as opposed to an anti-modification clause mean that any demand for enforceable anti-modification clauses probably cannot be satisfied by MFN clauses. By the same token, however, the fact that many parties currently use MFN clauses does not necessarily mean that they will be interested in using enforceable anti-modification clauses.[80] In other words, MFN clauses do not seem like particularly good substitutes for enforceable anti-modification clauses.

III
EVIDENCE

The magnitude of the demand for enforceable anti-modification clauses is difficult to estimate given the potential costs and benefits of immutability, the inherent limitations of anti-modification clauses, and

80 To fully appreciate this point, it is helpful to consider some of the reasons why people use MFN clauses. According to the literature, promisors can have either malign or benign reasons for using MFN clauses to influence their subsequent contracting behavior. Another line of argument suggests that beneficiaries may seek MFN protection to avoid being placed at a competitive disadvantage or even to eliminate competitors. *See generally* Joseph Kattan & Scott A. Stempel, *Antitrust Enforcement and Most Favored Nation Clauses*, ANTITRUST, Summer 1996, at 20. The malign reason is that the promisor may wish to facilitate the exercise of market power by discouraging itself from negotiating around prices that it has set, either on its own or in concert with others, at levels that depart from those that would arise under competitive conditions. A more benign reason for using an MFN clause is to support a scheme that contemplates a subset of the beneficiaries (such as the most recent parties to deal with the promisor) or their representatives (such as the representatives of a buyers or sellers cooperative) negotiating terms applicable to all of them to avoid the wasteful duplication of effort likely to arise in the absence of coordination. For present purposes, the key point to recognize is that promisors interested in using MFN clauses for either of these reasons will not necessarily be interested in immutable contracts. Neither a firm wishing to facilitate the exercise of its market power, nor one interested in coordinating negotiations among a number of trading partners, will necessarily wish to lose the flexibility to renegotiate contracts in response to changed market conditions. An MFN clause provides that flexibility whereas a (completely) immutable contract does not. Similarly, both types of firms will typically want to influence their ability to negotiate with prospective as well as existing trading partners, but making their existing contracts immutable will have no relevant effect upon their negotiations with prospective trading partners. *See generally* Joseph J. Simons, *Fixing Price with Your Victim: Efficiency and Collusion with Competitor-Based Formula Pricing Clauses*, 17 HOFSTRA L. REV. 599, 607–10, 621–25 (summarizing these and other arguments); Keith J. Crocker & Thomas P. Lyon, *What Do "Facilitating Practices" Facilitate? An Empirical Investigation of Most-Favored-Nation Clauses in Natural Gas Contracts*, 37 J.L. & ECON. 297 (1994) (surveying literature on MFN clauses and conducting empirical analysis suggesting that in natural gas industry benign explanations for use of MFNs are more plausible).

the availability of potential substitutes for enforceable anti-modification clauses. The most natural way to measure that demand, and thereby test the competing theoretical claims, would be to examine whether and in what circumstances contracting parties actually adopt anti-modification clauses.[81] However, this test is not conclusive.

As mentioned at the outset, a review of the case law reveals no evidence that any party has ever attempted to enforce a pure anti-modification clause in the context of a bilateral contract.[82] The only settings in which parties to bilateral contracts seem interested in explicitly restricting their ability to modify their contracts are those in which they attempt to specify the form that modifications must take or the types of agents authorized to conclude them.[83] This behavior may be motivated by evidentiary concerns and concerns about agency costs rather than by an attempt to manipulate incentives. Therefore, the use of these sorts of provisions provides little or no support for the theoretical claims outlined in Part I.A.

The other prominent examples of contracts that explicitly limit the enforceability of contract modifications are professional athletes' contracts, as mandated by league-wide collective agreements. It is plausible that the parties to these contracts might want to adopt anti-modification clauses to address concerns about the undesirable incentive effects of permitting renegotiation. For instance, one might speculate that owners would fear that, given the likely inadequacy of remedies for a player's breach of contract, permitting renegotiation would give players an incentive to bluff by (falsely) claiming that they were unwilling to play at their agreed salaries.[84] Similarly, players

81 Jolls implies that the demand for such clauses might be significant by presenting evidence describing the prevalence of scenarios in which her theoretical models suggest anti-modification clauses might be useful, the frequency of modifications in those scenarios, and, to a limited extent, the ex ante effects of anticipated modifications. *See* Jolls, *supra* note 6, at 215–19, 223–24. However, this approach to assessing the demand for immutable contracts and anti-modification clauses is only valid if the underlying theoretical models are also valid. The validity of at least one of those models is called into question by the arguments set out in Part II.C.3, *supra* (discussing validity of assumption that information is often completely unverifiable).

82 *See supra* note 8.

83 Witness the nontrivial amount of litigation concerning the enforceability of "no oral modification" and "no oral waiver" clauses under U.S. law referred to in Snyder, *supra* note 10, at 638–49. *See* Jolls, *supra* note 6, at 232 (citing Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55 (1991)) (referring to settlements between firms and shareholder litigants requiring shareholder approval of modifications to executive compensation agreements).

84 In principle, a player could also agree to play for a low salary and then, after a team has made investments or passed upon opportunities in reliance on their availability, threaten not to play, or not to play to his full ability, unless given a higher salary.

might fear that enforcing modifications might tempt owners to induce players to agree to unfavorable modifications by inconveniencing the players, making their lives miserable in various subtle but unverifiable ways.

Alternative explanations for the existence of at least some of these restrictions on modification also seem plausible, however. For example, the NBA's collective agreement does not bar all sorts of modifications outright, as one would expect if it was primarily designed to combat the perverse incentive effects of permitting modifications. Instead, many of the provisions of the NBA agreement seem designed to preclude renegotiations that would conflict with the complex system of salary caps that the league has adopted to enhance competitive balance and redistribute wealth among different categories of players.[85] In particular, the restrictions on the extent to which a player's salary may be increased through renegotiation seem designed to avoid circumvention of the provisions of the NBA's collective agreement that, subject to some important exceptions, regulate the magnitude of the raises that any given player can receive from year to year and impose caps on the maximum salaries that can be paid to players in the league as a whole, players on a particular team, and individual players.[86] Restrictions on modifications that reduce either players' salaries or the duration of player contracts may be designed to prevent teams from abusing the numerous exceptions to the salary cap by having players accept unfavorable modifications to create room under the salary cap in exchange for tacit assurances that in some subsequent year they will receive benefits under a contract that takes advantage of one of the exceptions.[87] However, the restrictions on renegotiation of NBA player contracts near the end of the regular season are difficult to explain without reference to concerns about incentive effects.

The other noteworthy examples of potential anti-modification devices are the unanimous action clauses incorporated in multi-creditor debt agreements. Again, however, there is also only limited evidence that these provisions are designed to make debt contracts

85 *See generally* J. Richard Hill & Peter A. Groothuis, *The New NBA Collective Bargaining Agreement, the Median Voter Model, and a Robin Hood Rent Redistribution*, 2 J. SPORTS ECON. 131 (2001) (arguing that NBA collective bargaining agreement is designed to redistribute wealth among players).

86 These provisions are contained in Articles II and VII of the NBPA CBA. *See* NBPA CBA, *supra* note 67, art. II, § 7, art. VII, §§ 2–6. *See generally* Larry Coon, NBA Salary Cap FAQ, http://members.cox.net/lmcoon/salarycap.htm (last visited Mar. 6, 2006).

87 *See* Coon, *supra* note 86 (question 50) ("[P]layers can't take a 'pay cut' in order to create salary cap room for the team."). This question presumably refers to Art. VII, § 7(d)(1) of the NBPA CBA, *supra* note 67.

immutable.[88] In the United States, the presence of a UAC in a bond indenture cannot be taken as an indication that the parties were seeking to make their contract immutable, because the requirement of unanimous consent to certain types of trust indenture modifications is implied by law pursuant to the Trust Indenture Act of 1939.[89] In any event, most debt agreements containing UACs can be amended pursuant to bankruptcy legislation. However, there is no comparable statutory basis for amending debt issued by sovereign nations, and sovereign debt is frequently issued subject to similar amendment provisions as U.S. corporate debt. Some commentators have suggested that these UACs are included in sovereign debt agreements to discourage borrowers from—to revert to the terminology used above—bluffing about their ability to repay loans.[90] Other commentators, however, have suggested that unanimous action clauses were originally included in sovereign debt agreements only by happenstance, and that they continue to be used as a result of a combination of inertia and the fact that they only seem to make amendment difficult, not impossible.[91] Consequently, there is no clear-cut evidence that parties to sovereign debt agreements, or for that matter any other type of debt agreement, have deliberately sought to adopt immutable contracts.

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88 It is well known that parties to debt agreements can and do limit their ability to modify the terms by issuing debt to a relatively large number of unrelated parties and adopting rules that certain types of modifications to the terms upon which the debt is issued require the unanimous consent of the debtholders. *See* Dianna Preece & Donald J. Mullineaux, *Monitoring, Loan Renegotiability, and Firm Value: The Role of Lending Syndicates*, 20 J. Banking & Fin. 577, 578–79 (1996) ("[L]oans involving 'large' syndicates possess less contractual flexibility than loans by single lenders because of potential hold-out problems."); Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 Yale L.J. 232, 278 (1987) (discussing how requirement of unanimous consent impedes renegotiation of trust indentures).

89 15 U.S.C. §§ 77aaa-bbbb (2000)).

90 *See, e.g.*, Michael P. Dooley, *International Financial Architecture and Strategic Default: Can International Financial Crises Be Less Painful?*, 53 Carnegie-Rochester Conf. Series on Pub. Pol'y 361, 363 (2000) (discussing framework of international lending and how lenders draft contracts to avoid strategic defaults); Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 Emory L.J. 929, 939 (2004) ("UACs may serve as a means to bond the country against engaging in moral hazard."); *see also* Patrick Bolton & David S. Scharfstein, *Optimal Debt Structure and the Number of Creditors*, 104 J. Pol. Econ. 1, 3 (1996) (suggesting that some borrowers have incentive to borrow from multiple creditors to discourage strategic defaults (which are roughly equivalent to bluffing, discussed in Part II.A, *supra*) by making renegotiation in aftermath of default inefficient).

91 For a critical survey of the various explanations for the existence of unanimous action clauses, see William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 Vand. L. Rev. 1, 50–61 (2004). For evidence that inertia plays an important role, see generally Choi & Gulati, *supra* note 90.

Under the circumstances, the available evidence concerning the use of anti-modification clauses suggests that there is little demand for anti-modification clauses. This evidence is not, however, conclusive, especially since some of the reasons for including restrictions on renegotiation in some professional athletes' contracts are ambiguous. Moreover, some might argue that the reason why we do not observe widespread use of anti-modification clauses may be the fact that these clauses are generally believed to be unenforceable.[92] This argument is less than compelling, because it does not explain the abundance of cases involving unenforceable "no oral modification" clauses. Nevertheless, it is impossible to discount the possibility that the current state of the law has discouraged a significant number of interested parties from even attempting to adopt anti-modification clauses.

This all suggests that it would be useful to have an alternative way to measure the demand for enforceable anti-modification clauses. One way to do this is to measure the demand for some other type of anti-modification device that is, unlike the substitutes discussed above, a very close substitute for an enforceable anti-modification clause. The next Part describes such an anti-modification device.

IV
The Representative Trustee Technique

A. Description

U.S. law allows parties to increase the cost of contract modifications by limiting low-level agents' authority to modify contracts, specifying that enforceable modifications must be in writing, or indicating that attempts at renegotiation count as evidence of a course of dealing.[93] But it seems to be accepted that the increases in modification costs associated with these tactics are likely to be of marginal significance in many contractual settings—hence the presumption that the failure to enforce anti-modification clauses prevents contracting parties from making their contracts immutable. However, the representative trustee technique described below should be a substantially more effective method of increasing modification costs than any of the techniques that have been discussed in the literature and a viable substitute for an enforceable anti-modification clause.

The representative trustee technique can be regarded as a refinement of another technique that is superficially attractive but can easily

[92] Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 381 (N.Y. 1919) (citations omitted) ("Those who make a contract may unmake it.").

[93] *See* Schwartz & Watson, *supra* note 6, at 24 (discussing rule codified in U.C.C. § 2-209).

be revealed to be ineffective. At first glance, a relatively straightforward way of making a contract immutable is to provide that, in the event of modification, a prohibitively large payment must be made to a third party. For example, a contract between A_1 and A_2 might provide that in the event of modification a sum of money equal to X must be paid to B. So long as X exceeds the surplus to be derived from modification, S, modification will be prohibitively costly. For the sake of convenience we will refer to this technique as the "third party" technique.[94]

The third party technique is well known to academic lawyers and economists, but is considered to suffer from a fatal flaw: A_1 and A_2 have an incentive to offer any amount less than S to persuade B to waive its right to receive X in the event of modification.[95] B has an incentive to accept this proposal because A_1 and A_2 can credibly claim that if the initial agreement remains in force they will not attempt a modification, and so B will receive nothing. This problem can be mitigated by adding a large number of additional parties but, as Jolls has argued, the costs of dealing with those parties ("transaction costs") are likely to make this tactic prohibitively costly.[96] In addition, free-rider problems might limit the additional parties' ability to enforce their rights. This is because each party will typically have an incentive to wait until another party has sued, so that it can take advantage of information generated in the course of earlier litigation, as well as—if the first party's suit is successful—the doctrine of collateral estoppel.

Aside from its questionable economic benefits, the third party technique might also appear, at least at first glance, to be legally suspect. First, some might argue that courts would recognize that the sole purpose of this contract was to evade the doctrine that renders anti-modification clauses unenforceable and on this basis might treat the transaction as an unenforceable sham. Second, the payment to the third party might be characterized as a penalty imposed for breach of an implied anti-modification clause. The common law is famously hostile to penalty clauses, and any clause characterized as a penalty is clearly unenforceable. A final concern about the third party scheme is

94 The earliest discussion of this method of using contracts with third parties to make other commitments irrevocable seems to appear in SCHELLING, *supra* note 16, at 24–25.

95 *See id.*; Hart & Moore, *supra* note 16, at 130; Jolls, *supra* note 6, at 232; Schwartz & Watson, *supra* note 6, at 24–25.

96 *See* Jolls, *supra* note 6, at 232–33. The multi-party variant of the third party technique is mentioned by SCHELLING, *supra* note 16, at 24–25. *See generally* Maskin & Tirole, *supra* note 12, at 99 nn. 14–15 (discussing other authors' theories). Schelling has suggested that an alternative possibility is that the third party who expects to specialize in this sort of activity may refuse to renegotiate in order to maintain a reputation for reliability. *See* SCHELLING, *supra* note 16, at 25 n.2.

that the third party does not appear to provide any consideration in return for the benefit of the promise. In many common law jurisdictions, the general rule is that a promise cannot be enforced by a party who has not provided consideration.

The representative trustee technique described below offers a way of avoiding the economic concerns surrounding the third party technique and is no more vulnerable from a legal perspective. We will return to the legal concerns—which I believe are misplaced—shortly. From the economic perspective, the central insights are that if *B* in the above example acts as a trustee for a large class of agents $C = \{c_1 \ldots c_n\}$, as opposed to being an individual agent, and all of the members of C must consent to the contract modification for it to be effective, then either transaction costs or the possibility of holdouts may make it prohibitively costly to induce the members of *C* to grant their consent. However, since *B* can be designated trustee for *C* without dealing directly with any of *C*'s members, the costs of adopting this scheme should not be particularly high. Moreover, the fact that the trustee can be expected to represent the interests of the beneficiaries means that no collective action is required to enforce the beneficiaries' rights.

To elaborate, suppose that at time t_1 two parties, A_1 and A_2 (the "principals"), wish to conclude a contract. Assume that for any or all of the reasons identified in Part II.A they find it mutually beneficial to ensure that their contract cannot be modified after it has been formed. The difficulty that the parties are likely to face is that at t_2 they may find it mutually beneficial to agree to a contract modification. To represent this scenario let Q_1 represent the value of the ex post benefits of contract modification to party A_1, where there is a positive probability that $Q = Q_1 + Q_2 > 0$ at t_2. It is also possible that at t_3 one party or the other will regret having renegotiated the contract and will prefer to replace the modified contract with the terms of the original contract.

I suggest that by taking the following steps the principals can effectively ensure that their contract will not be modified. To begin, they must settle the terms of their contract assuming that no modifications will be possible. Next, they seek out a third party, *B*, who agrees to serve as trustee for a large but finite number of entities. For example, *B* might be trustee for all of the members of the local Better Business Bureau. Ideally *B* will be a wealthy institution that frequently acts as a trustee. The principals then add a clause to their contract which provides that in the event that the contract is modified principal A_1 will pay $P_1 = Q_1$ to an intermediary, *I*, who will assign its rights under this contract to *B* in its capacity as trustee. In practice, the parties would probably try to secure performance of this obligation by granting B an interest in A_1's property.[97] It would also be necessary to give B the right to be indemnified for all of the costs it incurs in the course of enforcing its rights. In addition, in order to give the parties incentives to cooperate with the trustee, it will be useful to require B to share a portion of the benefits of its rights to P_1 with the other party (A_2), by making A_2 the beneficiary for that portion of the gains. The crucial feature of the scheme is that the terms of the trust specify that the trust is irrevocable and that B cannot waive the trust's right to be paid P_1. It will also be useful to specify that among the primary purposes of the trust are that the beneficiaries of the trust cannot alienate their interests—in other words, that it is a spendthrift trust[98]—and that it cannot be terminated or modified.

The practical effect of structuring the trust in this way is that the principal cannot be released from its obligation to pay P_1 unless the trust is modified or terminated and its beneficiaries (to whom the benefit of the contract must be transferred upon termination of the trust) grant a release. In many U.S. jurisdictions a trust structured in this way will be, as a practical matter, virtually impossible to modify or terminate.

Under U.S. law a trust can typically be modified or terminated with the consent of the settlor and all of the trust's beneficiaries (not including any parties who cannot be identified or lack legal capacity).[99] It would not be difficult to ensure that the settlor of the trust, B, is a legal entity that is dissolved following settlement of the trust so as to ensure that it cannot grant its consent to the modifica-

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97 For example, cases in which A_1's benefit from the modification consists of the receipt of additional property can be dealt with by having A_1 agree to assign such property to B. Both U.S. and English law recognize an assignment of an interest in property that does not exist at the time of the assignment as a valid agreement to assign that takes effect once the interest in question is received by the assignor, although in the United States this rule only applies to interests in rights to a payment expected to arise out of an employment or other continuing business relationship that is already in existence at the time of the assignment. For the English position, see generally Tailby v. Official Receiver, (1888) 13 A.C. 523, 553 (H.L.) (appeal taken from Eng.) (U.K.) (upholding assignment of future book debts not existing at time of assignment). For the American position, see Restatement (Second) of Contracts § 321 (1979). This approach will not, however, work in cases where A_1's benefit is received in the form of services (including any sort of release from legal obligations). In those situations, B will have to look to other forms of collateral. One option would be to take an interest in A_1's contractual rights vis-à-vis A_2, the other party. It is also worth noting that regardless of the form of security obtained, B will find it useful to comply with certain registration requirements to maximize the chances that its claim to A_1's property takes priority over the claims of third parties.

98 *See* 2A Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts § 151 (4th ed. 1987) (defining spendthrift trusts as "[t]rusts in which the interest of a beneficiary cannot be assigned by him or reached by his creditors").

99 *See* Uniform Trust Code § 411(a) (2003); Restatement (Second) of Trusts § 338(2) (1959).

tion. As we shall see, if the class of beneficiaries is sufficiently large, this unanimity requirement will, practically speaking, make it impossible to modify or terminate the trust.[100]

Under U.S. law a trust can also typically be terminated or modified without the consent of the settlor but with the consent of some or all of the beneficiaries so long as this course of action would not be inconsistent with a material purpose of the trust.[101] However, the type of modification that would permit a representative trustee to waive its right to be paid P_1 would clearly be inconsistent with a material purpose of the trust. Consequently, this exception to the unanimity requirement should not interfere with the operation of the representative trustee technique.

U.S. jurisdictions also commonly permit modifications without the consent of all of the beneficiaries if necessary to further the purposes of the trust in light of unanticipated circumstances.[102] This exception to the unanimity requirement also should not interfere with the operation of the representative trustee technique because it would not support judicial modification of provisions that exist precisely because the parties anticipated that they might become inconvenient at a later date. In fact, this exception—which could presumably be reinforced or extended by incorporating explicit language analogous to a *force majeure* clause into the trust instrument—should provide comfort to parties who might otherwise be reluctant to commit themselves to immutable contracts because of concerns about unanticipated circumstances.

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[100] On the reasons why the unanimity requirement will impede modification, see *infra* Part V.C. If the consent of the settlor can somehow be obtained, then modifications that do not prejudice the non-consenting beneficiaries will be permitted. *See* RESTATEMENT (SECOND) OF TRUSTS § 338(2) (1959); UNIFORM TRUST CODE § 411(e) (2003). This rule seems to preclude modifications that would impair either the trust's right to be paid P_1 or the trustee's incentives to enforce that right. However, it might allow a trust that creates a representative trustee to be modified to remove restrictions on alienability of the interests of consenting beneficiaries, even if contrary to a material purpose of the trust, on the theory that the other beneficiaries are not prejudiced by such an amendment. On whether such a modification would undermine the scheme, see *infra* note 117.

[101] *See* UNIFORM TRUST CODE § 411(b), (e) (2003); RESTATEMENT (SECOND) OF TRUSTS §§ 337, 340(2) (1959).

[102] *See* UNIFORM TRUST CODE § 412 (2003); RESTATEMENT (SECOND) OF TRUSTS § 336 (1959). *See, e.g.*, Horne v. Timber Hill Holdings, 594 S.E.2d 207 (N.C. Ct. App. 2004) (reversing trial court's dissolution of trust as neither based on consent of all parties nor necessary or expedient); *In re* Day's Estate, 317 A.2d 648 (Pa. 1974) (allowing termination of trust in whole or in part without consent of all parties if settlor's original purpose has become impractical and termination would more nearly approximate intent of settlor); *see also* SCOTT & FRATCHER, *supra* note 98, §§ 165–67 (modification in terms of trust when compliance is impossible, § 165, illegal, § 166, or because of changed circumstances, § 167).

Although some jurisdictions may permit modifications in other circumstances,[103] it would be straightforward to establish a trust creating a representative trustee in a jurisdiction that does not.[104] To illustrate the operation of the representative trustee technique we can return to our hypothetical software agreement.

First, let us consider the case in which the retailer is concerned about the developer making a lowball offer and then honestly claiming that it cannot afford to complete performance at the original price, or bluffing about its ability to complete performance. Suppose that the developer originally signs a contract agreeing to deliver the software for a price of $100,000. Imagine that the developer subsequently approaches the retailer and requests that the contract be modified to increase the price to $150,000, citing increased costs of performance. In the absence of a representative trustee the retailer might be willing to accede to the request. If, however, the contract includes a representative trustee, the developer will have no incentive to request the modification. This is because the representative trustee will be entitled to sue the developer to recover the entire $50,000 benefit ($150,000 - $100,000) it has derived from the modification. The trustee will be prompted to sue by the retailer—presumably at some

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[103] The Third Restatement of Trusts recommends that courts permit modifications that are inconsistent with a material purpose of the trust without the consent of all beneficiaries and in the absence of the settlor's consent (if the settlor is dead) so long as the interests of non-consenting beneficiaries are not prejudiced, and if the court determines that the reason(s) for termination or modification outweigh the material purpose. RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. c (2001). As noted above, *supra* note 100, it seems that only a limited set of modifications can be made without prejudicing the interests of non-consenting beneficiaries.

[104] Perhaps the most plausible example of such a jurisdiction is Delaware, whose legislation on statutory business trusts provides that:

> A governing instrument may contain any provision relating to the management of the business and affairs of the statutory trust, and the rights, duties and obligations of the trustees, beneficial owners and other persons, which is not contrary to any provision or requirement of this subchapter and, without limitation: . . . (9) May provide for the manner in which it may be amended, including by requiring the approval of a person who is not a party to the governing instrument or the satisfaction of conditions, and to the extent the governing instrument provides for the manner in which it may be amended such governing instrument may be amended only in that manner or as otherwise permitted by law (provided that the approval of any person may be waived by such person and that any such conditions may be waived by all persons for whose benefit such conditions were intended).

See DEL. CODE ANN. tit. 12, § 3806 (Supp. 2004). Section 3825(b) goes on to state: "It is the policy of this subchapter to give maximum effect to the principle of freedom of contract and to the enforceability of governing instruments." *Id.* § 3825(b). I am grateful to Rob Sitkoff for bringing these provisions to my attention. More generally, the approach to modifications described in the text is consistent with the Uniform Trust Code. *See* UNIFORM TRUST CODE §§ 411, 412 (2003).

point after it is no longer vulnerable to a threat on the part of the developer to withhold performance—who will be entitled to a reward paid from the proceeds of any suit. The retailer cannot bargain away its entitlement to the reward as part of the contract modification because it takes the form of an inalienable beneficial interest. The presence of the reward will also give the retailer an incentive to assist the trustee by sharing information about the nature and magnitude of the benefit accruing to the developer.

The representative trustee technique can also work if the parties modify their agreement to substitute a fixed payment for a variable one. Suppose that the original contract specified that the developer would receive $10 for each customer who purchases at least one item from the website. Imagine that after the website is completed, but before it is unveiled to the public, the developer requests that the contract be modified to substitute a fixed fee of $100,000 for the variable payment. Adopting the representative trustee technique will also serve to deter this type of modification. If the modification ultimately benefits the developer, because the variable payment would have been less than $100,000, then the retailer will obtain a reward by inducing the representative trustee to sue for the benefit to the developer. Similarly, if the modification ultimately works to the benefit of the retailer, because the variable payment would have exceeded $100,000, then the developer will be rewarded for inducing a suit by the representative trustee. In other words, the representative trustee can deprive either the developer or the retailer of the benefits—but not the costs—of modifying their contract to substitute a fixed fee for a variable fee.

Lastly, let us consider the case in which the parties have signed a sophisticated contract that requires inefficient trading behavior ex post in order to induce efficient ex ante investment in the quality of the software. In other words, we can examine the case in which the parties enter into a contract providing that the customized software package can only be transferred to the customer at the first price named by the developer. If it is transferred to the customer at any other price, either directly or indirectly, then the party who benefits from the variation (presumably the customer) must make a payment equal to the amount of that benefit to a representative trustee, who will in turn share a portion with the other party. Suppose that the developer names a price of $100,000. The retailer, however, contrary to the provisions of the original agreement, refuses to accept this price and bargains the developer down to $25,000 (taking advantage of the fact that the developer has no other customer interested in the unique features of the software). If the representative trustee is in place, however, the trustee will then be entitled to sue the retailer for $75,000, a portion of which will be turned over to the developer as a reward for tipping off the trustee. This scheme should discourage the retailer from rejecting the developer's price unless it exceeds the retailer's own valuation of the software—if the retailer rejects a reasonable offer from the developer and then tries to negotiate a lower price the developer may accept the lower price, but will have an incentive to then turn around and inform the representative trustee.

So far we have only considered modifications that benefit one of the parties to a contract. Suppose, however, that more than one party's obligations are modified. For example, imagine that in the first scenario described above—where the developer demands that the price be increased from $100,000 to $150,000—the retailer agrees to pay the developer an additional $50,000 and the developer simultaneously agrees to provide a somewhat more extensive website. If applied as described above, the representative trustee technique would allow the trustee to recover $50,000 from the developer and the value of the additional work from the retailer. Some parties, however, might prefer to adopt a variant of the technique that allows the representative trustee to recover only the *net* benefits that a modification confers upon any particular party. This alternative approach would provide the parties with greater flexibility to adapt their agreement to changed circumstances.

Finally, it is worth emphasizing that adoption of the representative trustee technique would not bar either party to a contract from breaching it. For example, in the first scenario described above, the developer is free to breach the contract by refusing to complete performance and exposing itself to liability for breach of contract. The representative trustee technique would have no application here. It would only apply if the retailer made a binding agreement not to sue the developer for breach. That would be tantamount to a modification of the contract and the representative trustee could sue the developer to recover the benefit of the modification. The representative trustee could not, however, sue if the retailer simply declined to sue the developer for some period of time (unless this was tantamount to a legally binding waiver of the right to sue); the representative trustee technique is only designed to thwart efforts to make legally enforceable contract modifications.

B. Possible Legal Objections

1. The Sham Objection

The representative trustee technique operates by depriving parties of the benefits of enforcing a modification but does not involve any attempt to create a legal bar to enforcement. Therefore, strictly speaking, the representative trustee technique operates quite differently from an anti-modification clause, and giving legal effect to the representative trustee technique is not inconsistent with enforcement of an otherwise valid contract modification. Nonetheless, some might argue that giving effect to the representative trustee technique would be tantamount to enforcing an anti-modification clause and for that reason may be objectionable to a court considering the matter. Of course, the effectiveness of the scheme depends upon a court being willing, at some point, to enforce an obligation to turn over the benefits of a modification. Consequently, reflexive judicial antipathy to this type of scheme would be fatal to its effectiveness.

The objection to the idea of enforcing anti-modification clauses was most famously set out in the leading case of *Beatty v. Guggenheim Exploration Co.*,[105] where Judge Cardozo, writing for a majority of the New York Court of Appeals, stated:

> Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. Every such agreement is ended by the new one which contradicts it. What is excluded by one act, is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again.[106]

It is important to recognize, however, that Cardozo objected only to the idea of allowing the parties to a contract to destroy their power to jointly modify the contract. There is no reason to suppose that he objected to the idea of allowing those parties to subject their power to modify their contract to a third party. It is well established that the parties to a contract can surrender their power to jointly modify a contract by adding a third party to a contract.[107] In addition, and more pertinently for present purposes, it is well-established that the

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105 122 N.E. 378 (N.Y. 1919).

106 *Id.* at 387–88 (quotation marks and citations omitted).

107 *See, e.g.*, Riverside Rancho Corp. v. Cowan, 198 P.2d 526, 532 (Cal. Dist. Ct. App. 1948) (holding that escrow granted to corporation required consent of corporation to modify contract); Thomas v. Garrett, 456 S.E.2d 573, 574 (Ga. 1995) (discussing multiparty contract); Rimer v. Hubbert, 439 S.W.2d 5, 7 (Mo. Ct. App. 1969) (holding that individual assent of husband and wife is required to alter contract to which they were both parties).

parties to a contract can alienate this power by adding "third parties" who have not provided consideration. Both the American and the English legal systems readily enforce contractual provisions specifying that rights conferred upon third party beneficiaries whose rights have vested cannot be revoked or modified without the third parties' consent.[108] Section 311 of the U.S. Restatement of Contracts (Second) is quite explicit on this point.[109]

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[108] *See, e.g.*, Orthodontic Affiliates, P.C. v. OrthAlliance, Inc., 210 F. Supp. 2d 1054, 1061 (N.D. Ind. 2002) (holding that contract cannot be modified to detriment of third-party beneficiary once that party has justifiably relied upon contract); Trs. of Four Joint Bds. v. Penn Plastics, Inc., 864 F. Supp. 342, 347 (S.D.N.Y. 1994) (holding that promisor and promisee are not free to modify promise to intended third-party beneficiary of contract after that beneficiary's rights have vested); Bain v. Pioneer Plaza Shopping Ctr., 894 P.2d 47, 51 (Colo. Ct. App. 1995) (recognizing principle that parties to contract cannot modify contract without consent of third-party beneficiary who has justifiably changed position in reliance upon promise); Swavely v. Freeway Ford Truck Sales, Inc., 700 N.E.2d 181, 186 (Ill. App. Ct. 1998) (denying promisor right to alter promise once rights of third-party beneficiary vest); Jack v. Jack, 745 N.E.2d 1101, 1109 (Ohio Ct. App. 2000) (denying attempt to modify separation agreement where child was third-party beneficiary and was of proper age). The law in the U.K. is set out in Contracts (Rights of Third Parties) Act, 1999, c. 31, § 2(3)(b).

[109] The Second Restatement of Contracts provides:

> § 311 Variation of a Duty to a Beneficiary
>
> (1) Discharge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement between promisor and promisee is ineffective if a term of the promise creating the duty so provides.
>
> . . .
>
> Comment:
>
> (a) The power to create an irrevocable duty. The parties to a contract cannot by agreement preclude themselves from varying their duties to each other by subsequent agreement. Nor can they force a right on an unwilling beneficiary, or prevent the beneficiary from joining with them in an agreement varying the duty to him. Compare Restatement, Second, Trusts § 338. *But they can by agreement create a duty to a beneficiary which cannot be varied without the beneficiary's consent.* Compare § 104; Restatement, Second, Trusts §§ 330, 331.
>
> (b) Express and implied terms. Agreements precluding variation of a duty to a beneficiary before the beneficiary knows of the promise are unusual and would often be unwise. See Comment f. But the power of the parties to make such an agreement is not restricted by special formal requirements. The agreement need not be explicit: omission of a standard clause reserving a power of modification may manifest an intention to preclude modification; reservation of a limited power may negate a broader power; usage of trade or course of dealing may supply a term precluding modification. See § 5, defining "term."

RESTATEMENT (SECOND) OF CONTRACTS § 311 (1979) (emphasis added). The ensuing commentary and the cases cited in support make it clear that the rationale behind this principle is not simply concern about third-party beneficiaries who might have relied upon the relevant promise. The doctrine also appears to be grounded in the familiar idea that a contractual obligation becomes binding upon mutual assent; once mutual assent has occurred, mutual assent is also required to modify the obligation. For examples of cases applying the Restatement, see Stratosphere Litig. L.L.C. v. Grand Casinos, 298 F.3d 1137, The representative trustee technique—like, for that matter, the third party technique—simply involves surrendering the power to modify a contract to a third party. Unlike an anti-modification clause, the representative trustee technique does not violate Cardozo's prohibition upon outright abandonment of the power to re-contract. Therefore, the fact that anti-modification clauses appear to be unenforceable does not necessarily imply that the representative trustee technique should be treated similarly.

It is also worth noting that Cardozo's prohibition is probably not founded upon any clear principle of public policy against restrictions upon modification. In many jurisdictions, statutory provisions have been enacted that render at least certain types of "no oral modification" clauses enforceable. The most notable example of such a provision is section 2-209 of the Uniform Commercial Code (U.C.C.), which has been adopted in every American state.[110]

2. *The Consideration Objection*

The objection here is that the representative trustee may lack the legal right to enforce A_1's promise to pay P_1 in the event of a modification to the original contract because the trustee has not provided consideration. This argument relies upon the well-known common law doctrine that consideration is a prerequisite to the formation of an enforceable contract.[111]

In England, and to a lesser extent in the United States, it is not particularly difficult to render an agreement enforceable by having a party provide consideration of nominal value or by putting the agreement under seal. However, there is a much more straightforward way to rebut the argument that the representative trustee technique fails because of the doctrine of consideration. Although consideration may be a prerequisite to the formation of an enforceable contract, it is not a prerequisite to the creation of a right in an actor to enforce a promise. As noted in passing in the previous section, the law of third party beneficiaries in both England and the United States permits the parties to an otherwise enforceable contract to make a promise in favor of and enforceable by a third party who has not provided con-

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1146 (9th Cir. 2002); Brunswick Leasing Corp. v. Wisconsin Ctr., Ltd., 136 F.3d 521, 527 (7th Cir. 1998); Audio Odyssey, Ltd. v. United States, 243 F. Supp. 2d 951, 969 (S.D. Iowa 2003), *aff'd*, 373 F.3d 870 (8th Cir. 2004).

110 U.C.C. § 2-209 (2002).

111 *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979); E. ALLAN FARNSWORTH, CONTRACTS 45–50 (3d ed. 1999).

sideration.[112] Consequently, so long as the contract between the principals includes the provision of consideration and satisfies all of the other standard requirements for formation of an enforceable contract, the provisions concerning the payment to a representative trustee should be enforceable notwithstanding the absence of consideration flowing from the trustee.

3. *The Penalty Objection*

As indicated above, even though it is not explicitly conditioned upon breach of any contractual obligation, the obligation to pay P_l to a representative trustee under the circumstances described above might be characterized as an obligation that is triggered by A_l's breach of an implied promise to refrain from renegotiating its contract.[113] The common law refuses to enforce provisions that require a party in breach of a contract to make a payment on account of that breach which exceeds the loss suffered by the non-breaching party.[114] Consequently, some might argue that the representative trustee technique founders upon the shoals of the penalty doctrine. However, even if we accept the less than obvious idea that the payment to the representative trustee can be characterized as being made on account of breach of an implied promise not to modify the contract, it should not be difficult to avoid characterization of the payment as a penalty.

Contract modifications invariably involve one party gratuitously providing the other with some sort of additional promise or performance, such as a promise to provide additional consideration for the original contract or a promise to waive some or all rights to insist upon performance of the original contract. For example, in a contract for the sale of widgets, a modification in favor of the seller will involve the buyer promising either to pay more for, or to accept less than, the promised quantity or quality of widgets. The representative trustee technique would require the party receiving this kind of gratuitous

[112] Restatement (Second) of Contracts § 304 (1979); Contracts (Rights of Third Parties) Act, 1999, Chapter 31, § 1 (U.K.). For U.S. case law authority, see Vesta Fire Ins. Corp. v. Milam & Co. Constr., 901 So. 2d 84, 103–04 (Ala. 2004); Ervin v. Nokia, Inc., 812 N.E.2d 534, 540 (Ill. App. Ct. 2004); McCoy v. Illinois Int'l Port Dist., 778 N.E.2d 705, 712 (Ill. App. Ct. 2002); *In re* County Collector, 774 N.E.2d 832, 845 (Ill. App. Ct. 2002); L.A.C. v. Ward Parkway Shopping Ctr. Co., 75 S.W.3d 247, 260 (Mo. 2002); Kester v. Kester, 108 S.W.3d 213, 226 (Mo. Ct. App. 2003); Trout v. Gen. Sec. Serv. Corp., 8 S.W.3d 126, 132 (Mo. Ct. App. 1999); Mut. Hous. of Tompkins County, Inc. v. Hawes, 780 N.Y.S.2d 276, 283 (Ithaca City Ct. 2004). For the U.K., see Laemthong Int'l Lines Co. v. Artis, [2005] EWCA (Civ) 519, [21]-[22] (Eng.); Nisshin Shipping Co. v. Cleaves & Co., [2003] EWHC 2602 (Q.B.), [47] (Eng.).

[113] *Cf.* Robert Cooter & Ariel Porat, *Anti-Insurance*, 31 J. Legal Stud. 203, 204 (2002) (proposing scheme that involves payment of damages for breach of contract to third party).

[114] *See* Restatement (Second) of Contracts § 356 (1979).

promise or performance (the seller, in this case) to give up the benefits. As noted, this requirement might be characterized as a specification of the damages payable for breach of a promise not to renegotiate the original contract. Under current law, however, this will only amount to the imposition of a penalty if the magnitude of the damages imposed upon the "breaching" party (the party benefiting from the modification) exceeds the loss suffered by the "non-breaching" party (the party harmed by the modification) as a result of the breach. In this context, the loss suffered by the non-breaching party equals the cost of gratuitously paying more for or accepting less than the promised performance. The magnitude of that cost in turn depends upon the amount that the non-breaching party could have obtained by providing the payment or concession on a commercial basis. The value of that promise or performance to the breaching party (as measured by the amount they would have been willing to pay) seems like as good a way as any of determining this figure. In fact, in many situations it will be a perfect measure. For instance, the additional payment received by a software developer over and above the original contract price seems like a perfect measure of the cost to the client of the developer's failure to refrain from modifying the original contract. In other words, reverting to the terminology introduced above, when a contract between A_1 and A_2 is modified to the benefit of A_1, A_2's loss (the additional payment) will be roughly equal to Q_1, A_1's benefit. Consequently, a transaction that requires A_1 to pay $P_1 = Q_1$ to A_2 in the event of a contract modification should not run afoul of the rule prohibiting enforcement of penalty clauses. Of course, paying P_1 to a representative trustee is different from paying it to A_2. However, it is straightforward to provide that if the payment of P_1 is to be characterized as a payment of damages, then the representative trustee's entitlement to those damages is to be based upon an assignment from A_2.

C. *Economic Virtues of the Representative Trustee Technique*

In economic terms, the representative trustee technique differs from and improves upon the third party technique because it causes a greater increase in modification costs while requiring the parties to incur lower initial transaction costs. It also improves upon a multi-party variant of the third party technique (referred to below as the "third party beneficiary" technique) by minimizing the risk of circumvention by the principals and maximizing the likelihood of modifications being not only detected but also sanctioned. The following sections address each of these points in greater detail.

1. *Increasing Modification Costs*

The most obvious way to deter contract modification is by raising the transaction costs associated with modification to the point where those costs exceed the benefits of modification (Q). If we assume that each modification involves transaction costs, then the total costs of modification can be increased simply by increasing the number of parties who must consent to a contract modification. The representative trustee technique embodies this insight by permitting the parties to a contract to specify that a large number of beneficiaries must provide their consent before the principals can be allowed to retain the benefits of any contract modification. Therefore, if there are n beneficiaries and the average transaction costs associated with obtaining the consent of each beneficiary are equal to t, total transaction costs associated with effecting a modification will be $T = nt$. Consequently, the magnitude of T can be manipulated by altering the number of beneficiaries. If $T > P_1+P_2= Q$ then A_1 and A_2 will have no interest in attempting to modify their contract.[115]

Even if transaction costs do not discourage modification, i.e., even if $Q > T$, if the principals to a contract have adopted the representative trustee technique, strategic behavior may also impede their ability to secure beneficiaries' unanimous consent to a modification. Specifically, attempts to obtain the consent of beneficiaries will fail if each beneficiary attempts to "hold out" for a relatively large proportion of Q.[116]

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[115] Alternatively, if, as suggested by Schwartz and Watson, the parties find it useful to increase modification costs to less than prohibitive levels, the first step towards accomplishing this goal would be to set n so that T equals some lower value. *See* Schwartz & Watson, *supra* note 6, at 24 n.33.

[116] To see how this might happen, suppose that one or both of the principals offer(s) each beneficiary an amount b, in return for their consent to a modification, where b is less than the beneficiary's pro rata share of the total payment to be received by the trust (i.e., $b < P/n$). The beneficiaries may well believe that if the principals do not obtain unanimous consent they will eventually return with an offer of b', which offers each holdout b plus a share of the portion of Q that the principals would have retained after paying b to each consenting beneficiary. The reasonableness of this expectation will depend upon the beneficiaries' beliefs about how impatient and risk-averse the principal(s) might be, which will in turn depend upon beliefs concerning the principal's (or principals') beliefs concerning the beneficiaries' beliefs, and so on. Consequently, in an environment with a large number of heterogeneous beneficiaries, it seems reasonable to assume that at least some beneficiaries will believe that they can expect to receive an offer of $b' > b$ if they reject an offer of b. Assuming that these beliefs are in place, consider the options facing beneficiary x, drawn from the set $\{1, \ldots x, \ldots n\}$:

If x consents along with all of the other beneficiaries, x receives b.

If beneficiaries $\{1 \ldots x\}$ consent and $\{x+1, \ldots n\}$ hold out, x receives b'.

Under these circumstances x will do better by holding out than by consenting. In other words, the dominant strategy for each beneficiary holding the specified beliefs is to hold

The incentive to hold out would effectively disappear if the unanimity requirement were abandoned. For example, imagine that only a supermajority of beneficiaries were required to consent to a trustee's waiver of the right to receive P_1 (in exchange for a payment of $Y < P_1$ to the trust). In this case, no single beneficiary could benefit from holding out because his consent would not be essential to obtaining a waiver. The beneficiaries might still have an incentive to free-ride on other beneficiaries' decisions to expend resources on granting consent. In other words, they would not bother to incur the costs of granting consent because they would hope that enough of the other beneficiaries would grant their consent that they could receive the benefits of modification without incurring any costs. However, principals could overcome this problem by paying beneficiaries to grant their consent. In other words, in the absence of a unanimity requirement, transaction costs would be the only barrier to obtaining beneficiaries' consent. Thus, parties interested in setting modification costs at less than prohibitive levels may find it advantageous to abandon the unanimity requirement, but requiring unanimity seems like the most effective way of creating a complete deterrent.

Before leaving the question of modification costs, it is necessary to consider whether the representative trustee scheme can be undone by principals who contract directly with beneficiaries. Principals who would be liable to benefit from a modification might approach individual beneficiaries and propose to attempt the modification and turn over the benefits to the trust as promised, if the individual beneficiaries promise to share their distributions from the trust with the principal(s). From a beneficiary's perspective this sort of invitation to collude might be superficially attractive as the principal would be saying "you can either split something with me, or keep all of nothing." The most straightforward way to guard against this scenario is, as proposed above, to make the beneficiaries' interests inalienable.[117]

out. Thus, in equilibrium no such beneficiary will grant his consent (unless offered the entire remaining surplus).

For discussion of these sorts of holdout and free-rider problems, see generally Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991).

117 It is not clear that the scheme would fail even if the beneficiaries' interests (not including the interests of the principals) were freely alienable. Another obstacle to this form of principal-beneficiary collusion is that rational beneficiaries have little incentive to participate. Rather, their incentive seems to be to attempt to free ride on the participation of other beneficiaries. That is to say, a beneficiary who receives such a proposition may believe that the principals will attempt the modification even if the beneficiary does not agree to share its receipts from the trust. If this comes to pass, beneficiaries who refrain from colluding will be able to keep their entire payout from the trust. This implies that if beneficiaries behave strategically they may refrain from colluding. In addition, other safe-

2. *Minimizing Initial Transaction Costs*

It would not be advantageous for contracting parties to take steps to bar contract modification if the costs of those measures exceeded the benefits. Thus, the lower the transaction costs associated with adopting an anti-modification device, the more attractive it will be. As explained in the preceding section, the representative trustee technique relies on the notion that contract modifications can be made prohibitively costly by granting a large number of parties the right to veto such modifications. The creation of a trust is among the least costly ways of distributing such rights. An obvious alternative would be to distribute the rights by entering into a contract with each of the recipients. However, each such contract would be costly, and so the costs of this technique would increase in proportion to the number of veto-holders, offsetting any benefits that flow from increasing modification costs.[118] By contrast, trust law permits a trust to be created in favor of a set of beneficiaries without obtaining their consent. This makes it possible to increase the number of veto-holders without causing a proportionate increase in initial transaction costs.

It is important to recognize, however, that the creation of a trust is not the least costly way of distributing veto rights. An even less costly alternative is to distribute the rights by way of a contractual provision. As noted above, both U.S. and English law permit the courts to enforce contractual provisions specifying that rights conferred upon third party beneficiaries cannot be revoked or modified without the third parties' consents.[119] In other words, in both of the leading common law jurisdictions it is possible to use a simple contractual provision to distribute irrevocable veto rights to a large number of persons without going to the trouble of creating a trust in their favor, much less contracting with them directly. We can refer to this method of preventing contract modification as the "third party beneficiary" technique. At least initially, the third party beneficiary technique is likely to involve somewhat lower transaction costs than the

guards could be provided. First, if the transaction costs of colluding with beneficiaries in this way were sufficiently high, meaning that they exceed the amount likely to be distributed to any given beneficiary, then principals will have no incentive to make such proposals. Consequently, if the transaction can be structured to minimize the amount that each beneficiary expects to receive from the trust, then the likelihood of this form of collusion will also be minimized. This could be accomplished by requiring the trustee to invest the trust property unprofitably for a number of years before distributing it to the beneficiaries. Alternatively, the trustee could be given unfettered discretion over the amount distributed to each beneficiary. Yet another possibility is that the beneficiaries could be made anonymous to make it difficult for the principal to contact them.

[118] *See* Jolls, *supra* note 6, at 232–33.

[119] *See supra* note 107 and accompanying text.

representative trustee technique. However, for reasons discussed in the next section, the higher upfront costs associated with the representative trustee technique may be justified by an enhanced likelihood that attempts to circumvent veto rights will actually be sanctioned.

3. *Ensuring that Modifications Will Be Detected and Sanctioned*

At first glance, one obstacle to the use of any third party anti-modification device seems to be the danger that the third parties will not be able to observe or verify a modification.[120] This danger seems particularly significant in cases where the principals have no direct dealings with the third parties ex ante. In those situations, the third parties are unlikely to be aware of their rights, so there is no reason to expect them independently to discover attempts to circumvent those rights. Moreover, even if the third parties are aware of their rights, they may not be willing to invest in the type of monitoring that will be required to discover unreported modifications; individual beneficiaries will typically have an incentive to free ride on the monitoring activities of other beneficiaries.

Ultimately, though, concerns about unobservable or unverifiable modifications seem misplaced, because it is probably not prohibitively difficult to ensure that one of the principals has an incentive to provide the information required to convince a court that an unauthorized modification has taken place. Invariably, one principal or the other will be made worse off as a result of a contract modification (i.e., the one who ultimately had to either promise more or accept less than provided in the original contract) and so will have an incentive to seek reinstatement of the original contract terms.[121] Consequently, offering some sort of relatively small reward should be sufficient to give the injured principal an incentive to disclose the occurrence of a modification to the relevant third party. The most straightforward way to do this is to provide, as suggested above, that the trustee must share the proceeds received from the principal who benefited from the modification with the principal who would otherwise be injured. In order to ensure that the entitlement to this reward, and thus the incentive to disclose information to the representative trustee, is not bargained away as part of a contract modification, the reward is structured as an inalienable beneficial interest in a spendthrift trust.

[120] Of course, if the occurrence of a particular type of contract modification is difficult for the principals themselves to verify, then the representative trustee technique will fail to deter the modification. However, as noted above, in this scenario an enforceable anti-modification clause would also fail.

[121] *See* Schwartz & Watson, *supra* note 6, at 5 n.4.

There is, however, another basis for concern about the efficacy of third party anti-modification devices. The idea of preventing contract modifications by granting veto rights to one or more third parties will only be effective if those veto rights are supported by a perception that attempts to modify a contract without the consent of the rightholders will not only be detected, but also sanctioned. Compared to the third party beneficiary technique, the representative trustee technique seems to offer the greatest likelihood of such sanctions being imposed. The reason for the difference between the two techniques is simple: Both techniques involve the artificial creation of collective action problems to impede contract modification, but in the case of the third party beneficiary technique, the same collective action problems also threaten to undermine efforts to sanction attempted modifications. As it turns out, it may be possible to overcome those problems by allowing the right to sanction modifications to be exercised collectively, but not without simultaneously permitting the right to consent to modifications to be exercised collectively as well. In the case of the representative trustee technique, however, the presence of a trustee empowered to sanction—but not consent to—a modification resolves collective action problems that might impede sanctioning while maintaining the barriers to obtaining beneficiaries' consent.

The basic concern here is that if the third party beneficiary technique is adopted, the beneficiaries may not initiate proceedings designed to enforce their right to deprive the principals of any resulting benefits, even if informed of an unauthorized modification. Procedurally speaking, third party beneficiaries could enforce their rights either individually or collectively. If they choose to sue individually, then contract law will only permit each beneficiary to recover damages reflecting his own losses, as opposed to the losses incurred by other beneficiaries. In the present context, this implies that if the third party beneficiary technique is adopted, in the event of modification each third party beneficiary will only be able to recover damages equivalent to P_I/n and will have to incur his own litigation costs to do so. As a consequence, if litigation costs are substantial, third party beneficiaries may have little incentive to sue. One reason for this is that each beneficiary's litigation costs may exceed P_I/n. A second reason is that it may be relatively expensive to be the first person to litigate any given issue. Not only do doctrines such as issue estoppel allow subsequent litigants to economize on litigation costs, but there may also be some benefit in observing an opponent's tactics in a previous proceeding. For both these reasons, then, third party beneficiaries may be reluctant to initiate individual proceedings to enforce their rights to payment in the event of a modification.

The concern about the incentive to initiate proceedings disappears to the extent that third party beneficiaries can sue collectively by bringing a class action, which permits litigation costs to be shared across a large number of individuals. However, this gives rise to another crucial concern: If the rights of beneficiaries under the third party beneficiary technique can be enforced collectively through a class action, they can also be compromised in the same fashion—class counsel and the lead plaintiff in a class action can, subject to court approval, settle a case for less than the amount to which the class members are legally entitled.[122] Consequently, a side effect of allowing third party beneficiaries under a third party beneficiary scheme to enforce their rights by way of a class action would be to allow negotiations in which the principals offer to purchase beneficiaries' collective consent to a modification. Allowing this sort of collective negotiation would substantially eliminate the transaction costs and holdout problems that are the keys to the effectiveness of this type of anti-modification device (i.e., one that requires the consent of multiple third parties to any modification).

By contrast, the representative trustee technique provides a greater likelihood of modifications being sanctioned, because a trustee appears to have strong incentives both to initiate and maintain a lawsuit against the principals. As far as incentives to initiate a suit are concerned, class actions and suits by a representative trustee seem like equivalents. Like the participants in a class action, the trustee can economize upon litigation costs by bringing a single action on behalf of all beneficiaries. Moreover, the trustee's incentives to initiate a suit should be at least as strong as those of any given class counsel, since the trustee would face a serious risk of being held liable for breach of trust if it failed to sue for P_1 upon becoming aware of a contract modification. Trust law permits any individual beneficiary to initiate a claim for breach of trust on behalf of the entire class of beneficiaries.[123] This means that a regretful principal would only have to persuade a single beneficiary to initiate an action against the trustee.

[122] *Cf.* FED. R. CIV. P. 23(e) (prohibiting class action settlement absent court finding that proposed agreement is "fair, reasonable, and adequate").

[123] *See* RESTATEMENT (SECOND) OF TRUSTS § 214 (1959); *see also* Washington v. Reno, 35 F.3d 1093, 1102 n.9 (6th Cir. 1994) (applying Restatement rule); Price v. Akaka, 928 F.2d 824, 827 (9th Cir. 1990) (same); Arakaki v. Cayetano, 299 F. Supp. 2d 1107, 1110–11 (D. Haw. 2002) (limiting standing to beneficiary that is harmed by act or omission of trustee); Wisener v. Burns, 44 S.W.3d 289, 295 (Ark. 2001) (applying Restatement rule); Roth v. Lehmann, 741 S.W.2d 860, 862 (Mo. Ct. App. 1987) (same).

In the event of being held liable for breach of trust, the trustee would be required to compensate the beneficiaries for their loss and, if it were a professional trustee as recommended above, would suffer considerable harm to its reputation. Beneficiaries affected by a breach of trust are also entitled to have a trustee ordered to turn over any benefit—such as a side-payment from the principals to the contract—derived from its breach of trust.[124] These remedies are likely to be particularly effective against a wealthy trustee.

A representative trustee should also have relatively strong incentives to maintain and refrain from settling a lawsuit. A representative trustee could be given authority to initiate, but not settle, a lawsuit on behalf of the beneficiaries. Moreover, in cases where the parties have adopted a representative trustee structure and the incumbent trustee is not inclined to sue the principals, a single beneficiary can seek to have the court remove the trustee and appoint another trustee who is inclined to act.[125] It is also worth noting that the principals cannot escape liability by inducing a trustee to agree to release them from liability.[126] As settlors of the trust, the principals would be aware that any such release amounts to a breach of trust, and for that reason would not be permitted to enforce the release.[127] Thus, a suit brought by a representative trustee is unlikely to be compromised.

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124 *See* Pension Benefit Guar. Corp. v. Greene, 570 F. Supp. 1483, 1503 (W.D. Pa. 1983) (holding payment of prejudgment interest appropriate to compensate for unjust enrichment of trustee); *In re* Estate of Swiecicki, 477 N.E.2d 488, 491 (Ill. 1985) (holding trustee must distribute to beneficiaries profits derived from use of their funds); Schug v. Michael, 245 N.W.2d 587, 591–92 (Minn. 1976) (same); Holmes v. Jones, 318 So. 2d 865, 869 (Miss. 1975) (same); Pollock v. Brown, 569 S.W.2d 724, 730 (Mo. 1978) (same); *In re* Eisenberg, 719 P.2d 187, 190–92 (Wash. 1986) (same); *see generally* RESTATEMENT (SECOND) OF TRUSTS §§ 205–06 (1959) (explaining that trustee may be held liable for personal profit resulting from breach of trust).

125 *See* 4 SCOTT & FRATCHER, *supra* note 98, § 282.4; GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 519 (rev. 2d ed. 2004).

126 *See* Hart & Moore, *supra* note 16, at 130–31 (discussing possibility of collusion between principals and any person appointed to represent third parties in multi-party version of third party technique). This observation highlights the importance of ensuring that a representative trustee is used to ensure commitment.

127 SCOTT & FRATCHER, *supra* note 98, § 322 (citing O'Reilly v. Miller, 52 Mo. 210 (1873); Green v. Beatty, 1 N.J.L. 142 (N.J. 1792); Timan v. Leland, 6 Hill 237 (N.Y. 1843); McClaughry v. McClaughry, 15 A. 613 (Pa. 1888); Culina v. Guliani, [1971] 22 D.L.R.3d 210 (Can.)).

V
POSITIVE IMPLICATIONS

A. *Prima Facie Evidence That the Demand for Anti-Modification Clauses Is Low*

Several of the theoretical analyses outlined in Part I suggest that a fairly large number of contracting parties ought to find the representative trustee technique an attractive way of making their contracts immutable. However, I am not aware of any instance in which the representative trustee technique has been employed by contracting parties as a method of forestalling contract modifications.[128] This apparent state of affairs is difficult to reconcile with the proposition that there is a significant demand for enforceable anti-modification clauses. It is, however, possible that the technique has been employed without coming to the attention of the academic community. Moreover, there are at least two alternative explanations for the apparent lack of interest in the representative trustee technique. The first possibility is that the representative trustee technique is ineffective. The second possibility is that it is truly novel.

B. *Is the Representative Trustee Technique Ineffective?*

It is possible that contracting parties have not adopted the representative trustee technique because it is a poor substitute for an enforceable anti-modification clause. One reason for this might be fear that the technique is legally unenforceable. The arguments for and against this view are set out above. In light of those arguments, and in the absence of any cases directly on point, it is difficult to imagine that there could be the kind of almost universal conviction that the technique is ineffective that would be required to explain a complete absence of interest in even attempting to adopt it.

Another possibility is that the costs of adopting the representative trustee technique are simply too great, either in the sense that the costs always outweigh the benefits or that the costs borne by the *first* person to adopt the technique are greater than the costs borne by

[128] My knowledge base here is admittedly limited. I am relying in part on the reactions of members of the audiences listed in the initial footnote to which this Article was presented. These audiences consisted primarily of legal academics and economists. However, a group of senior practitioners (visiting alumni) happened to be in attendance during the presentation at Georgetown University. I also contacted a small group of senior New York corporate attorneys and asked whether they had ever seen a contract in which a company attempted to use a requirement that shareholders provide unanimous consent to any modifications, or any other devices designed to preclude joint modifications.

later adopters (thus giving rise to a classic externality).[129] In any event, the enforcement costs associated with the representative trustee technique should be no higher than those associated with an enforceable anti-modification clause.

The potential costs associated with the representative trustee technique fall into two categories. The first category comprises, for lack of a better term, the "enforcement costs" associated with implementing the representative trustee technique. It seems implausible that the enforcement costs associated with the representative trustee technique will be exorbitant. The main reason for this is that if the technique works as intended, all sensible parties should be deterred from attempting to modify their contracts, so representative trustees should not anticipate the need to incur any significant enforcement costs.

The second category of costs can be labeled "drafting" costs. Even after an innovative contractual concept has been discovered, considerable thought and effort may be required to draft language that expresses the relevant concept unambiguously and does not run afoul of obscure legal doctrines. This problem is exacerbated in situations where the provision subject to change is so tightly integrated with other familiar provisions that it is impossible to evaluate the significance of an innovation without re-examining all of the other provisions as well. The costs of drafting an innovative provision are also likely to be high if interests in the contract are to be sold, either directly (as in the case of contracts creating securities to be issued to the public) or indirectly (as in the case of contracts that represent a material portion of the assets of a public company), to a large number of parties who will all want to satisfy themselves that they understand the legal effects of the contract.

The costs of drafting the specific contractual provisions and trust indenture required to implement the representative trustee technique also should not be substantial. The obligation to transfer benefits to the trustee can be expressed in a single line and the novel portions of the requisite trust instrument should not require significantly more space (or drafting effort). Moreover, once drafted, the relevant lan-

[129] *See* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interaction Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 291–92 (1985) (discussing identification and coordination costs associated with novel contract terms); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 729–36 (1997) (describing externalities that may discourage investments in drafting novel contractual terms).

guage should become boilerplate that can be used to serve the needs of a large number of contracting parties.

Nevertheless, the incremental drafting costs associated with converting an existing contract into an immutable contract will not necessarily be trivial. Introducing an anti-modification device into an existing form of agreement might require adjustments to a wide range of provisions designed to respond to the same incentive problems as the anti-modification device. However, the theoretical literature suggests that if they are attractive at all, anti-modification devices should typically be attractive in settings where parties have invested in drafting very sophisticated contracts.[130] In those situations the incremental costs of using the representative trustee technique may not be material. It also seems plausible that many of these sophisticated contracts would be adopted by parties to relatively unique transactions who would not expect to be able to learn a great deal from the terms of previous transactions and so there would be little reason to avoid being an early adopter.

For these reasons, concerns about enforcement costs or drafting costs can only explain complete avoidance of the representative trustee technique if, contrary to the tenor of recent theoretical analyses, the potential gains from barring contract modifications are always small.

C. *Is the Representative Trustee Technique Novel?*

Another possibility is that contracting parties have not adopted the representative trustee technique because they have been unaware of its existence. The fact that the representative trustee technique has not, to my knowledge, previously been mentioned in the academic literature lends credence to this suggestion. Only the most committed adherents to free market ideology believe that private actors in competitive markets instantly discover all value-enhancing contractual techniques.[131] The more plausible view recognizes that market forces may create incentives to *search* for value-enhancing contractual innovations (although these incentives may be undermined by free-rider problems and herding behavior), but even then it may still take time for innovations to be discovered.[132] Ultimately, however, this claim is difficult to accept because the key conceptual and technical elements

130 *See* Schwartz & Watson, *supra* note 6, at 21 (predicting that parties are more likely to use terms that restrict renegotiation when they use more sophisticated contracts).

131 For a catalogue of varying degrees of faith in the effects of market forces on contractual terms, see Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off Between Individual and Collective Rights*, 77 N.Y.U. L. REV. 1040, 1077–78 (2002).

132 *Id.* at 1078–79.

of the representative trustee are familiar components of widely used financial contracts.

The representative trustee technique embodies a number of key conceptual elements. One of these is the idea of conditioning the ability to modify a contract upon obtaining the consent of a large number of persons. This concept is not only widely discussed in the academic literature; it also ought to be familiar to any practitioner familiar with debt agreements governed by U.S. law. However, there are crucially important differences between a multi-party debt agreement and the type of multi-party agreement embodied by the representative trustee technique. First, all of the parties whose consent is required to modify a multi-party debt agreement also hold primary rights, and owe certain duties, under the contract. In other words, a debt agreement is in essence a multi-party contract between A and $B_1 \ldots B_n$ where each one of $B_1 \ldots B_n$ holds and owes primary rights and duties under the contract as well as holding a secondary right to veto a contract modification. By contrast, if the parties adopt the representative trustee technique, then primary and secondary rights and obligations are more clearly separated. Although all parties concerned—i.e., A, B, and $C_1 \ldots C_n$—hold secondary rights to veto modifications, primary rights and obligations will only be held and owed by A and B. This distinction is significant because the representative trustee technique avoids the search costs and the negotiation costs associated with distributing primary rights and duties to a broad set of actors.

The idea of unbundling primary rights and duties from rights to veto modifications is only one of the distinctive conceptual features of the representative trustee technique. A second is the idea of using a trust rather than a contract to distribute veto rights. Although they may initially appear novel these concepts are also not particularly original. They are both actually widely used by Canadian practitioners in the course of structuring transactions known as "securitizations."

A securitization is a transaction that, reduced to its basic elements, involves transferring financial assets from a firm, typically called the originator, to another entity, the purchaser, in exchange for cash.[133] The purchaser raises the cash by issuing securities to outside investors.[134] In order to ensure that the returns earned by the inves-

[133] *See* Steven L. Schwarcz, Structured Finance § 1:1, at 1-2 to 1-4 (3d ed. 2002).
[134] *See id.* § 1:1.

tors depend principally[135] upon the value of the purchased assets, it is important that the purchaser engage in a very limited number of other activities so as to avoid generating additional claims against its assets. It is also important that the purchaser remains in existence, i.e., refrains from unauthorized voluntary dissolution, until it has performed all of its obligations to the originator and the investors.

In many Canadian securitizations the purchaser is, largely for tax reasons, organized as a trust. However, a defining feature of a noncharitable trust is that it must have beneficiaries.[136] Securitizations are typically structured so as to ensure that all of the value realized from the purchased assets (net of administrative costs) is either distributed to the investors or returned to the originator. Consequently, the beneficiaries of a purchaser organized as a trust typically have virtually no economic stake in the transaction. Nevertheless, as a matter of law, their presence is essential. In addition, under English law, which has been followed in Canada, another mandatory feature of a trust is that regardless of the terms of the instrument creating the trust, the beneficiaries, acting unanimously, have the power to terminate the trust.[137] In the context of a securitization, such action on the part of the beneficiaries of a purchaser trust could dangerously upset the expectations of the originator and the investors. In order to avoid this scenario, it is common to organize the trust so that it has a large number of beneficiaries, e.g., all of the members of an organization such as the local United Way.[138] This indirectly ensures that the pur-

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[135] In many transactions the investors are protected to some extent by some form of "credit enhancement," such as over-collateralization, a reserve account, a guarantee, or a letter of credit offered by a third party.

[136] Wood v. R., [1977] 9 A.R. 427, 435 (Alta. Sup. Ct.) (Can.), *available at* 1977 A.R. Lexis 3865; Dionisio v. Mancinelli, [2004] 12 E.T.R.3d 296, 300 (Ont. Super. Ct.) (Can.).

[137] For the English position, see Saunders v. Vautier, (1841) 49 Eng. Rep. 282, 282 (A.C.) (allowing sole beneficiary to terminate trust as soon as beneficiary achieved age of legal majority, despite condition of original trust that beneficiary reach age twenty-five before receiving property); Tod v. Barton, [2002] EWHC (Ch) 264, [8], [38] (stating and applying English rule of *Saunders v. Vautier*: "beneficiaries who are sui juris and together entitled to the whole beneficial interest can put an end to the trust and direct the trustees to hand over the trust property"); Don King Prods. Inc. v. Warren, (1999) 3 W.L.R. 276, 304 (C.A.) (U.K.) (holding that rule of *Saunders v. Vautier* does not apply where subject matter of trust is nonassignable contract and trustee has outstanding obligations to be performed); Goulding v. James, (1997) 2 All E.R. 239, 247 (C.A.) (U.K.) (applying rule of *Saunders v. Vautier*); Napier v. Light, (1974) 236 E.G. 273, 278, (1975) 119 S.J. 166, *available at* 1974 WL 41282 (C.A.) (U.K.) (distinguishing *Saunders v. Vautier* power to terminate trust from power to grant tenancy); *In re* Beresford Estate, [1966] 57 D.L.R. (2d) 380, 383 (Can.) (applying principle of *Saunders v. Vautier* to charitable gifts).

[138] *See, e.g.*, CIBC Mellon Trust Co., Declaration of Trust Creating SCORE Trust, at 1 (Ont. Sec. Comm'n, Oct. 18, 2001), *available at* http://www.sedar.com/search/search_en.htm (search public documents with company name "Score Trust" and filing date Oct. 18, 2001, for 60kb file entitled "Other Material Contracts") (defining beneficiaries of

chaser trust fulfills its obligations to refrain from unauthorized outside activities or voluntary termination.[139]

The fact that Canadian securitizations use trusts organized in this fashion means that Canadian practitioners have developed and put into practice all of the fundamental conceptual elements of the representative trustee technique, since they are essentially using a trust to achieve a broad distribution of the secondary right to veto contract modifications without simultaneously distributing any primary contractual rights. The key difference between these securitizations and the representative trustee technique is that in the securitization context, the veto rights pertain to primary rights held by the originator in relation to the trustee. By contrast, in the representative trustee structure, the beneficiaries' veto rights pertain to yet another veto right held by the trustee. In other words, the representative trustee technique introduces an intermediary between the holders of the primary and secondary rights; but this hardly seems like a major conceptual leap.

In summary, therefore, the representative trustee technique can be regarded as a synthesis of three concepts. The first concept, familiar from multi-party debt agreements, is that of distributing secondary rights broadly so as to increase modification costs. The second and more technical concept, familiar to Canadian practitioners, is the idea of using a trust to distribute secondary rights broadly yet inexpensively. The third concept is the separation of a contract's primary rights and duties from a secondary right to veto modifications and can be found in both the academic literature discussing the third party technique and, albeit in a slightly different form, in Canadian securitizations. Thus, all three of the essential conceptual components of the representative trustee technique seem to be familiar to sophisticated Canadian practitioners.

Ironically, because Canadian law only permits the enforcement of contracts by third party beneficiaries in a limited set of circumstances, it is not absolutely clear that the representative trustee technique

trust as any one or more members of United Way of Greater Toronto). The United Way of Greater Toronto funds approximately 200 organizations. United Way Toronto, *Where the Money Goes*, http://www.unitedwaytoronto.com/who_we_help/who_we_help_index.html (last visited Feb. 10, 2006).

139 This strategy is typically unnecessary in transactions governed by U.S. law, which has traditionally made it possible to condition the ability to terminate a trust upon the consent of both the settlor(s) and the beneficiaries. *See* Claflin v. Claflin, 20 N.E. 454, 455 (Mass. 1889) (upholding testator's restrictions on payment to beneficiary); RESTATEMENT (SECOND) OF TRUSTS §§ 337–40 (1959) (discussing rights of settlor and beneficiaries to terminate trust).

would be enforceable under Canadian law.[140] But given the high degree of integration between the Canadian and U.S. markets for legal services—for instance, several leading Canadian law firms have branch offices in New York and London and routinely advise American and English clients on cross-border transactions—it is highly implausible that truly valuable contractual innovations would not spread rapidly from Canada to the United States and England.[141] Consequently, it seems reasonable to presume (but not conclude with certainty) that if there were truly a significant demand for the representative trustee technique, American and English practitioners would have been quick to learn about the technique and satisfy the demand.

If, however, this conjecture is incorrect and the representative trustee technique is in fact both novel and effective, then soon after knowledge of the technique becomes widely available it will be quite straightforward to assess the demand for the technique as well as, to some extent, the demand for enforceable anti-modification clauses and immutable contracts.

VI
Normative Implications

Thus far, we have seen that although certain theorists have argued that there is unsatisfied demand for anti-modification clauses, these claims are difficult to reconcile with the apparent absence of evidence of such demand, in the form of attempts to adopt either anti-modification clauses or the representative trustee technique. For the reasons set out in the preceding section, this evidence is far from conclusive, and the very process of publicizing these conjectures might set in motion the process of disproving them. But taking the existing evidence at face value for a moment, it is worthwhile to ask: What are the normative implications of this state of affairs? Does this mean that courts should or should not enforce simple anti-modification clauses? Should the rule against enforcement of anti-modification

140 *See* Fraser River Pile & Dredge Ltd. v. Can-Dive Servs. Ltd., [1999] S.C.R. 108, 126 (Can.) (outlining exceptional circumstances under Canadian law in which contract may confer rights upon third parties).

141 Of the thirty largest Canadian law firms in 2005, eight maintained offices in New York City. *See* Lexpert Financial, Canada: The 30 Largest Law Firms, http://www.lexpert.ca/files/DirectoryTop30.pdf (last visited Feb. 10, 2006). *See* Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 826–869 (1994) (appendix) (providing country- and firm-specific data on growth of international law practice through 1994).

clauses be extended to bar use of the representative trustee technique?

It is not immediately obvious that the answer to the empirical question has anything do with these normative questions. The best-known normative theories of contract law are based on concerns about autonomy and welfare.[142] According to both sets of theories, the principal criterion for enforceability is not whether a court believes a contract is likely to benefit the parties, but, roughly speaking, whether all relevant parties possess such a belief and manifest that belief by fulfilling the conditions required for formation of an enforceable contract. From both perspectives there is a strong prima facie case for enforcing contracts that employ third party anti-modification devices. But the proper treatment of other anti-modification devices (such as anti-modification clauses) is less clear, because neither autonomy-based nor welfare-based theories offer obvious methods for determining which agreement should prevail when two or more conflicting agreements satisfy the basic criteria of enforceability. At first glance, though, one might conclude that this is essentially a philosophical question that can be resolved without reference to empirical analyses of issues such as the level of demand for anti-modification devices.[143]

For those who favor welfare-based theories of contract law, however, this conclusion is simply wrong. From a welfare-based perspective, even if some actors stand to receive benefits from being permitted to use anti-modification devices, those benefits have to be weighed against any corresponding costs imposed upon other actors. Actors may find it useful to use immutable contracts for purposes that are, on balance, harmful to society.[144] Therefore, from a welfare-based perspective it is appropriate to have the enforceability of anti-modification devices turn upon the likelihood that they will be used for benign as opposed to malign purposes.

As we have already seen, anti-modification clauses might be used for the malign purpose of discouraging competitors from entering a market, to the detriment of customers. However, although this prospect suggests that anti-modification devices should be subject to scru-

142 For a leading autonomy-based theory, see generally CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981). For a leading exposition of a welfare-based view, see generally Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

143 For a brief philosophical analysis, see Jolls, *supra* note 6, at 233–36.

144 The earliest analysis of the potential uses of immutable contracts focused on these types of applications. SCHELLING, *supra* note 16, at 24–25.

tiny on a case-by-case basis under antitrust laws, it does not provide much basis for a blanket prohibition upon their enforcement.

From a welfare-based perspective it is also relevant that there are situations in which parties would choose to make their contracts immutable if it were possible, but in which those parties would be better off if immutability were not possible.[145] The best known of these situations is where parties adopt excessively immutable contracts because one party wishes to send a credible signal about privately held information.[146] For example, the developer in our earlier example might offer to sign an immutable contract to demonstrate that it is not trying to lowball the retailer, even though both parties would be better off with a more flexible arrangement. The normative implications of this possibility are unclear, however, because it is difficult for lawmakers to distinguish the circumstances in which immutable contracts are and are not welfare-maximizing.

There is, however, another concern that might support regulation of the use of anti-modification devices in much the way that Anglo-American law seems to do. This concern arises in cases where the net benefits to the contracting parties of using an anti-modification device are negative, but the costs and benefits are distributed asymmetrically across the parties. In other words, even though the parties would not find it mutually beneficial to include an anti-modification device in their contract, one party would benefit from the inclusion of such a provision. Typically this will be because the party in question anticipates that it will have limited bargaining power at the time when the contract is likely to be renegotiated. Under these conditions, the party that stands to benefit from the use of the provision will—so long as it believes that there is at least some chance of acceptance—have an incentive to propose inclusion of an anti-modification device in the contract. This in turn gives rise to two further possibilities. First, parties will waste valuable time and resources deliberating upon and negotiating over the possibility of using such a device before ultimately rejecting the idea. Second, unsophisticated actors may assent to contracts that include anti-modification devices without fully appreciating the legal or economic consequences of their actions. It seems safe to say that both of these consequences ought to be regarded as undesirable.

To illustrate this point, it makes sense to consider the plight of a party less sophisticated than the typical mass-market retailer or

[145] *See generally* Schmitz, *supra* note 22 (arguing that it may be socially advantageous to maintain current limitations on immutable contracts).

[146] *Id.* at 316–17 (mentioning problem of asymmetric information and discussing situation in which party's wealth constraint makes immutable contracts undesirable).

software developer. Imagine a landlord and a prospective sharecropper negotiating the terms of their relationship.[147] The parties have agreed that the sharecropper's remuneration will be linked to the annual crop in order to enhance her efforts to maximize the yield. Making the sharecropping agreement immutable would reinforce this incentive effect by countering incentives for the parties to replace the sharecropper's variable payment with a fixed payment after the sharecropper has finished exerting effort that will increase the value of the crop but before that value becomes known. Suppose, however, that the prospective sharecropper is sufficiently risk-averse that the costs to her of bearing the additional risk associated with an immutable contract exceed the potential benefits to the landlord in terms of reinforced incentives. Even if he is aware that this might be the case, the landlord may still have an incentive to propose the inclusion of an anti-modification device in the contract. For instance, the landlord may believe that the sharecropper is most likely to seek to renegotiate the contract when labor is scarce and the landlord has little bargaining power. Under these circumstances, the landlord has little to gain from permitting the contract to be modified and so has an incentive to try to include some sort of anti-modification device in the contract. If the sharecropper is unsophisticated the landlord may attempt to slip the device into the contract without being noticed. But even if the sharecropper is relatively sophisticated, the landlord has an incentive to propose the inclusion of an anti-modification device and then stick to his guns for a certain period of time in order to ensure that the sharecropper is not overstating either her degree of risk-aversion or beliefs about the riskiness of the production process in an attempt to secure a better bargain.

It is important to recognize that even if anti-modification devices are susceptible to abuse in this fashion, it does not necessarily follow that they should be prohibited outright. An alternative approach is to make it so costly to employ an anti-modification device that only parties who stand to benefit significantly from their use will have an incentive to propose their inclusion in contracts. As Lon Fuller famously observed, forcing parties who wish to opt out of default rules to comply with costly "formalities," thereby making the defaults somewhat "sticky," can serve a useful "cautionary" function.[148] This

[147] This illustration is based upon one discussed by Jolls, *supra* note 6, at 211–15.

[148] *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941). Similarly, Ayres and Gertner suggest that sticky default rules can be used to encourage parties to provide information to uninformed parties and to discourage parties from entering into contracts that usually, but not always, create net social costs. *See* Ayres & Gertner, *supra* note 3, at 124–25.

is arguably the approach that Anglo-American law has adopted by simultaneously refusing to enforce simple anti-modification clauses, but permitting parties who are sufficiently knowledgeable and motivated to use the more costly representative trustee technique.

Of course, it is virtually impossible to say whether current law strikes an optimal balance between, on the one hand, making the potential benefits of anti-modification devices accessible to parties who stand to derive net benefits from binding themselves to immutable contracts and, on the other hand, discouraging abuse of the ability to propose the creation of such contracts. For example, making it costly to employ anti-modification devices is not appropriate if it is actually the case that the potential benefits of anti-modification devices are always small for any given set of contracting parties but are widely distributed. Furthermore, there is no denying the fact that enforcing simple anti-modification clauses would be highly desirable from a purely academic perspective. Having even one jurisdiction experiment with alternative approaches to the regulation of anti-modification devices would provide additional information on the demand for immutable contracts and so might provide invaluable insights into the validity of many of the theoretical arguments canvassed above. In light of these considerations, the only normative claim being advanced here is a modest one, namely, that there is a plausible justification for the current Anglo-American approach to the regulation of anti-modification devices.

VII
Conclusion

This Article advances three main claims. The first is that the representative trustee technique offers an effective method of significantly increasing the costs of contract modifications and thus circumventing the rule against enforcement of anti-modification clauses. The second claim is that the conceptual building blocks of the representative trustee technique are all familiar, or at least accessible, to sophisticated practitioners. A third claim, which is necessarily advanced somewhat more tentatively, is that contracting parties have shown little or no interest in adopting the representative trustee technique. Taken together, these propositions suggest that the principal reason why the technique has not been employed by contracting parties is because they do not find it useful. This would be consistent with the notion that factors such as the inherent costs of immutable contracts, the practical difficulties inherent in enforcing any sort of anti-modification device, and the existence of substitutes all limit the appeal of anti-modification clauses. This in turn casts doubt on the merits of proposals to enforce simple anti-modification clauses and provides a limited justification for the current position under Anglo-American law.