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REVISITING *AUSTIN V. LORAL*: A STUDY IN ECONOMIC DURESS, CONTRACT MODIFICATION AND FRAMING

Meredith R. Miller*

I. INTRODUCTION

*Austin Instrument, Inc. v. Loral Corp.*¹ is a favorite among Contracts casebooks² because the New York Court of Appeals held that it was a “classic”³ example of economic duress. The close division of judicial opinion suggested, however, that there was a more complex story behind the Court of Appeals’ recitation. Indeed, revisiting the case reveals a rich and intricate story.

In July 1965, Loral Corporation (“Loral”), a publicly traded defense industry giant, entered into a contract with the government to supply radar sets for the United States’ military efforts in Vietnam (the “First Government Contract”).⁴ Loral needed materials to manufacture the radar sets and, in November 1965, entered into a subcontract with Austin Instrument, Inc. (“Austin”), an “infinitely smaller” manufacturer, to provide precision gear parts (the “First Subcontract”).⁵ As the conflict in Vietnam gradually escalated, the government’s need for radar sets

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1. *Austin v. Loral*, 29 N.Y.2d 124 (1971).

2. Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1462 (1995). *Austin Instrument, Inc. v. Loral Corp.* appeared as a main case in seven of the thirteen contracts textbooks reviewed by the author.

3. *Austin*, 29 N.Y.2d at 131. Indeed, the front page of the New York Law Journal reported with the headline: *Court Cites ‘Classic Example’ of Duress in Contract Case*, N.Y.L.J., July 9, 1971, at 1.

4. *Id.* at 128.

5. *Id.*

increased. In May 1966, the government awarded Loral another contract to supply more radar sets (the "Second Government Contract").⁶

With the escalation of Vietnam came a market shift in the defense industry.⁷ The price of Austin's precision gear parts saw a substantial market increase.⁸ Austin's materials and labor costs also rose, however, causing it significant losses under the First Subcontract.⁹ Thus, Austin apparently threatened to stop production under the First Subcontract unless Loral agreed to roughly \$22,000 in price increases, and to award Austin another subcontract for the parts Loral needed under the Second Government Contract (the "Second Subcontract").¹⁰ In July 1966, because Loral feared late deliveries to the government and the consequences of a liquidated damages clause, Loral surrendered to Austin's threat and agreed to the price increases.¹¹ In July 1967, once Austin's performance under the Second Subcontract was complete, Loral sought to recover the price increases on the First Subcontract.¹² Loral claimed that it acquiesced to Austin's demands under economic duress.¹³

Statistically, contractual duress is a losing claim.¹⁴ Nevertheless, despite early losses, Loral managed to secure a win at the New York Court of Appeals. Loral's duress claim lost at the trial court after a 5-day trial. Loral lost its appeal to the Appellate Division by a 3-to-2 vote. Again closely divided, the Court of Appeals reversed by a 4-to-3 vote, holding that Loral was precluded from exercising its "free will" when it agreed to the price increases, making out a "classic" case of duress. However "classic" the Court of Appeals majority thought the case for duress was, it was undeniably a close call. Although Loral ultimately won on its claim of duress, Austin did win the "popular vote" of all the judges by a count of 7 votes for Austin, 6 for Loral.

6. *Id.* at 129.

7. See text accompanying note 380, *infra*.

8. *Id.*

9. *Id.*

10. *Id.* at 129.

11. *Id.*

12. *Id.* at 130.

13. *Id.*

14. In published state cases from 1996 through 2003, contractual duress was discussed in eighty-eight opinions but the court decided in favor of duress in only nine of those cases. See Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 463 (2005).

In light of the closeness of the case, the Court of Appeals' decision raises many questions. Why were Austin and Loral litigating so fiercely over roughly \$22,000? Was it possible that the threat of Austin, a small, privately held company, could coerce Loral, a large, publicly traded company? What influence did the conflict in Vietnam have on the decision? Parts II and III of this article explore these and other questions by reconstructing and retelling the story of *Austin v. Loral*. From the Court of Appeals' opinion, it would seem that Austin had no purpose in making the threat other than to extort more money than Loral had agreed to pay under the First Subcontract.¹⁵ Yet, in revisiting the case, a theme emerges that Austin's threat to stop production (assuming for now that it can be called a "threat") was prompted by the market shifts in the defense industry and Austin's significant losses under the First Subcontract.¹⁶

While the dispute in *Austin v. Loral* concerned economic duress, it was also a case of contract modification.¹⁷ Austin was asking Loral to adjust the price terms under the First Subcontract. The reconstructed story shows that if Austin had reframed the legal dispute as a question of contract modification it might have fared better at the Court of Appeals. Part IV of this article begins by defining and discussing "framing"—that is, the attorney's technique of presenting the facts and the legal issues in terms most favorable to her client. This legal technique draws parallels to theories of cognitive linguists that describe framing as the process of conceptualizing and communicating ideas.¹⁸ In that context, linguists theorize that framing can be employed to control how certain ideas or values are communicated, allowing the audience to come to a favorable interpretation of the facts and rule out other, unfavorable interpretations.¹⁹

15. 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, 383-84 (1994). Though, some scholars have observed that the opinion of the Appellate Division majority hints at a very different depiction of the facts; the Appellate Division notes that Austin's threat came at a "time of continual rising of material and manufacturing costs." See, e.g., MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 72 (4th ed. 2001).

16. See text accompanying note 380, *infra*.

17. See CHIRELSTEIN, *supra* note 15, at 72.

18. See GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* 3-4 (2d ed. 2002) [hereinafter *MORAL POLITICS*].

19. *Id.* at 372-73; GEORGE LAKOFF, *DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE* 17-18 (2004) [hereinafter *FRAME THE DEBATE*].

Part IV presents the frames of contract modification and economic duress, and discusses the doctrinal differences between them at the time of *Austin v. Loral*. Even though the contract involved a sale of goods,²⁰ the courts made no reference to Uniform Commercial Code ("U.C.C.") § 2-209, which addresses contract modifications and appears to apply squarely to the situation.²¹ The absence of reference to the U.C.C. is probably because the parties did not frame the litigation as a question of modification but, rather, solely as an issue of economic duress. Had Austin reframed the dispute as one about modification, the Court of Appeals might well have asked a different question, dictated by the comments to U.C.C. § 2-209: whether Austin acted in good faith in requesting modification of the First Subcontract.²² In assessing whether Austin was acting in good faith, the market changes and Austin's significant losses under the First Subcontract would have been doctrinally relevant.

While Austin could have reframed the legal dispute, it also could have argued for a more sensible doctrine of economic duress, one that did not solely focus on Loral's lack of choices. Part V engages in the current debate concerning revision of the duress doctrine, with particular attention to the context of contract modification. In the context of contract modification, the Second Restatement provides an economic duress inquiry that collapses into whether (1) the threatening party ("A") acted in good faith and (2) the threatened party ("B") had no reasonable alternative to acquiescing to the threat.²³

Part V provides a critique of the duress doctrine's inquiry into B's choices and chiefly argues that it is redundant with B's lawsuit for duress—if B had another, reasonable alternative, B would not have surrendered to A's threat and would have simply sued for breach of contract. Instead, the article proposes an inquiry solely into whether A acted in good faith. In the modification context, borrowing from the comments to U.C.C. § 2-209, a good faith inquiry would look to whether A had a commercially legitimate reason for the threat and whether the resulting modification is fair in relation to that reason.²⁴ The good faith inquiry could incorporate as one

20. U.C.C. § 2-105 (2003) defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale" The precision gear parts appear to fall within this definition.

21. CHIRELSTEIN, *supra* note 15, at 72. The U.C.C. was adopted in New York in 1962. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 4 (5th ed. 2000).

22. U.C.C. § 2-209 cmt. 2 (1970).

23. RESTATEMENT (SECOND) OF CONTRACTS §§ 89, 175, 176 (1981).

24. See Henry Mather, *Contract Modification Under Duress*, 33 S.C. L. REV. 615, 619 (1982).

suggested factor the economic incentives of A in making the threat and, in that connection, would more fairly balance the interests of both A and B.²⁵ Using the context of *Austin v. Loral* as an example, Part V discusses refocusing the duress doctrine to ask solely whether A (or, Austin) made the threat in good faith.

II. THE STORY OF *AUSTIN V. LORAL*

This reconstruction of the story of *Austin v. Loral* is pieced together in large part from the record on appeal to the New York Court of Appeals. The record contains the transcript of the five-day bench trial before Thomas A. Aurelio, as special referee, in Supreme Court in New York County.²⁶ The story is also reconstructed by reference to the parties' appellate briefs, periodical and media sources, and telephone conversations with various individuals connected to the dispute, including the parties' counsel.

Loral was represented by Alvin A. Simon, who, at the time, was a solo practitioner specializing in government contracts.²⁷ Loral was Simon's largest client.²⁸ Austin was represented by the now defunct law firm Salon, Ortner, Yavers, Dershowitz and Raybin. Morris Dershowitz,²⁹ a partner in the firm, questioned all of the witnesses on behalf of Austin.

The trial transcript demonstrates heated but civil interactions between the parties' attorneys. The witnesses' testimony for both sides was, at times, uncooperative and acerbic; nevertheless, this article treats the witness' testimony as fact unless it was refuted or internally inconsistent. Much of the dispute between Austin and Loral was in the characterizations

25. See generally Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 755 (2005). See also *infra* Part V.C.

26. The court heard testimony on December 9, 11, 15, 16, and 17, 1969.

27. Telephone Interview with Alvin A. Simon, Counsel to Loral (June 27, 2005) [hereinafter 6/27/05 Simon Interview]. Simon, who was trained as an engineer, worked for Loral in that capacity from 1959 to 1961. *Id.* When Simon graduated from New York University School of Law in 1961, he was employed by Loral as an attorney. *Id.* From 1966 to 1983, he worked as a solo practitioner; then, until his retirement in 1996, he went back to employment with Loral. *Id.*

28. *Id.*

29. Morris Dershowitz, a graduate of Brooklyn Law School, was admitted to the New York Bar in 1942. Coincidentally, he is the uncle of Professor Alan Dershowitz of Harvard Law School. Telephone Interview with Morris Dershowitz, Counsel to Austin (June 27, 2005).

of unrefuted occurrences, and this article reconstructs the story of the case by elaborating upon these divergent characterizations.

A. THE RISE OF LORAL ELECTRONICS SYSTEMS: A "PHENOMENAL HORATIO ALGER LIKE GROWTH"

In 1948, Loral Electronics Corporation³⁰ was founded to produce electronic equipment for military use.³¹ Loral primarily manufactured "devices for display of information, navigation equipment, counter-measure systems and data handling systems."³² From humble beginnings, the company grew rapidly during the 1950s and early 1960s.³³

Loral's sales fell after the United States' "hot war 'policing'" of Korea ended in 1956.³⁴ Loral's president responded to the sales slump by leading the company into fields of defense research and development, a diversification that began to pay off a few years later.³⁵ In 1959, Loral's sales reached over \$7 million, and then sales "just took off," gradually reaching \$41 million in 1962.³⁶ By 1962, Loral's net income exceeded \$1.77 million.³⁷ In 1963, when Loral went public on the New York Stock Exchange, one *New York Times* account described Loral's development as a "phenominal [sic] Horatio Alger-like growth."³⁸

30. The name "Loral Electronics Corporation" was eventually changed to "Loral Corporation" in 1964. See MOODY'S INDUS. MANUAL 177 (1965). In 1996, Lockheed Martin Corporation acquired Loral in a "complex deal" valued at more than \$10 billion. See James Sterngold, *Lockheed to Acquire Loral in a Deal Worth \$10 Billion*, N.Y. TIMES, Jan. 9, 1996, at 47. As part of the deal, Loral's interest in satellite communications were split off into a new company named "Loral Space & Communications Corp." See *Loral Leftover Could Be Winner—Communications Satellite Business May Become Lucrative*, BALTIMORE SUN, Jan. 10, 1996, at 1C.

31. See David Lidman, *Personality: From Lower East Side to the Top*, N.Y. TIMES, Feb. 23, 1963, at 9 (describing the rise and success of Loral's chairman and president, Leon Albert, from humble beginnings).

32. MOODY'S INDUS. MANUAL 177 (1965).

33. See Lidman, *supra* note 31, at 11.

34. *Id.*

35. *Id.*

36. See *id.* In 1960, Loral's sales reached \$17.5 million. In 1961, Loral's sales rose to \$35 million. By 1962, Loral had roughly \$41 million in sales. See MOODY'S INDUS. MANUAL 177 (1965).

37. MOODY'S INDUS. MANUAL 177. (1965)

38. See Lidman, *supra* note 31, at 9.

The mid-1960s continued to see a gradual rise in Loral's net sales, which grew to nearly \$61 million in 1967.³⁹ Undoubtedly, the escalation of the conflict in Vietnam in the mid-1960s influenced this continued growth of Loral's business.

B. THE USE OF RADAR IN VIETNAM

Through its various subsidiaries, Loral manufactured radar sets that were crucial to the military effort in Vietnam.⁴⁰ Radar, an abbreviation of "radio detection and ranging," is "an electronic instrument used to detect and locate moving or fixed objects."⁴¹ It is used to "determine the direction, distance, height, and speed of objects" that are beyond the range of human vision.⁴² Radar sets work by sending radio signals against an object and analyzing the direction of, and time for, the signal to be reflected.⁴³ Radar is invaluable to the military for both early warning and targeting, and it is used in, among other things, air defense, intelligence gathering and weapon fire control.⁴⁴ Radar was widely used by both the North Vietnamese and the United States in the air war in Vietnam.⁴⁵

One of Loral's subsidiaries, Loral Electronics Systems,⁴⁶ produced a specific type of radar set, the Doppler. Some radar sets measure the distance or speed of objects using electronic pulses.⁴⁷ A Doppler radar set uses a continuous signal of energy rather than pulses, which allows the military to measure the velocity of targets.⁴⁸ These radar systems, which Loral manufactured, played an important role in the U.S. efforts in Vietnam.⁴⁹

39. MOODY'S INDUS. MANUAL 168 (1968). In 1965, Loral's net sales were roughly \$46 million. In 1966 they rose to \$58 million, and in 1967 Loral's net sales were roughly \$61 million. See MOODY'S INDUS. MANUAL 587 (1967). In 1965 and 1966, Loral's net income was roughly \$1.7 million and \$1.5 million, respectively. *Id.*

40. See MOODY'S INDUS. MANUAL 587 (1967).

41. G.D. Thome, *Radar*, in 16 WORLD BOOK ENCYCLOPEDIA 64 (2004).

42. *Id.*

43. *Id.*

44. *Id.*

45. WEBSTER'S NEW WORLD DICTIONARY OF THE VIETNAM WAR 337 (Marc Leepson & Helen Hannaford eds., 1999).

46. With Loral Electronics Corporation, collectively referred to as "Loral."

47. Thome, *supra* note 41, at 68-69.

48. *Id.*

49. Loral also produced countermeasure systems. See MOODY'S INDUS. MANUAL 177 (1965). Countermeasure systems were employed by the U.S. Air Force and Navy aircraft jet fighters to "jam" defensive radar, and by U.S. naval vessels patrolling the coasts of Vietnam to detect radar

C. AUSTIN INSTRUMENT, INC.: "AN INFINITELY SMALLER COMPANY"⁵⁰

Austin Instrument, Inc. was a privately held New York gear manufacturer founded by Edmund Krauss in early 1955.⁵¹ Krauss, Austin's president and sole shareholder, immigrated to the United States in 1939 and founded Austin as a small machine shop.⁵² Eventually, Austin branched out into precision gears.⁵³ In 1965, Austin had roughly 40 to 50 employees⁵⁴ and did roughly \$800,000 to \$1,000,000 in sales a year.⁵⁵ The bulk of Austin's business was subcontracting work on defense industry prime contracts.⁵⁶ Austin and Loral began doing business in the late 1950s;⁵⁷ Loral was one of Austin's frequent customers.⁵⁸

During the 1960s, Austin was a substantially smaller company than Loral. Interestingly, however, by the time of the appeal to the New York Court of Appeals in the early 1970s, Loral was suffering a financial slump that would lead it to the edge of bankruptcy.⁵⁹

D. JULY 1965: LORAL'S FIRST GOVERNMENT CONTRACT FOR RADAR SETS

In mid-1965, Loral submitted a bid to the government to manufacture Doppler radar sets for the U.S. Navy's efforts in Vietnam. Loral was the

signals. See WEBSTER'S NEW WORLD DICTIONARY OF THE VIETNAM WAR, *supra* note 45, at 337. "Jamming" uses special electronic devices to confuse the radar of enemies. *Id.*

50. Brief of Appellee-Austin at 38, *Austin* [hereinafter Austin Br.].

51. Record on Appeal to New York Court of Appeals at 526-27, *Austin* [hereinafter Record] (Trial Tr. of Edmund Krauss Testimony [hereinafter Krauss Tr.]); Telephone Interview with Alvin Krauss, son of Edmund Krauss (June 23, 2005) [hereinafter 6/23/05 Krauss Interview]. Alvin Krauss eventually joined his father at Austin.

52. Record, *supra* note 51, at 570 (Krauss Tr.); 6/23/05 Krauss Interview.

53. 6/23/05 Krauss Interview, *supra* note 51.

54. Record, *supra* note 51, at 627 (Krauss Tr.); 6/23/05 Krauss Interview, *supra* note 51.

55. Record, *supra* note 51, at 639 (Krauss Tr.). Austin was a flourishing and active company until it closed its doors in 1998. 6/23/05 Krauss Interview, *supra* note 51.

56. Record, *supra* note 51, at 308 (Trial Tr. of Albert Laskow Testimony [hereinafter Laskow Tr.]). Albert Laskow was Senior Buyer and Purchasing Agent for Loral; he purchased items and components required to rebuild Loral's end products. *Id.* at 88. In this effort, he supervised and directed mechanical buyers. *Id.*

57. 6/23/05 Krauss Interview, *supra* note 51.

58. *Id.*

59. In 1970, despite \$50 million in sales, Loral reported net losses. MOODY'S INDUS. MANUAL 296 (1971). In 1972, Loral was on the verge of bankruptcy when Bernard Schwartz purchased a controlling interest and built Loral into a \$3 billion "aerospace dynamo." See Andy Pasztor & Jeff Cole, *Loral Chief Bernard Schwartz Seeks One More Feat: Salvaging Globalstar*, WALL ST. J., Jan. 26, 2001, at A1; Dave Eisenstadt, *Orbiter of Power*, MOTHER JONES, May 1, 1997, available at www.motherjones.com/news/special_reports/coinop_congress/97mojo_400/profile1.html (last visited Apr. 21, 2006).

lowest bidder and, on July 15, 1965, the U.S. Navy awarded Loral a contract to manufacture and deliver a quantity of Doppler navigation radar sets.⁶⁰ The original contract price was \$3,960,166,⁶¹ but through various modifications, and the government's exercise of an "add-on" option, the order increased by roughly 300 radar sets⁶² and the total contract price ultimately reached \$6,013,228.⁶³ At the time, the contract represented roughly thirty percent of Loral's total production volume, a significant portion of its business.⁶⁴

The First Government Contract contained specific delivery requirements with stringent default and liquidated damages provisions. Under the liquidated damages clause, for each day Loral was late on a delivery date under the contract, Loral would owe the government 0.5% of the contract price for that item, not to exceed ten percent of the contract price for that item.⁶⁵ The contract also included the government's standard default clause, which allowed the government to terminate the contract if Loral failed to make deliveries or even if it "fail[ed] to make progress as to endanger performance."⁶⁶ Under the default clause, in addition to liquidated damages and the loss of any costs incurred in beginning to

60. Record, *supra* note 51, at 53, 55 (Trial Tr. of Harry Zweiman Testimony [hereinafter Zweiman Tr.]). Harry Zweiman, Loral's Assistant Manager of Contract Administration, testified for Loral concerning the relevant specifics of the First Government Contract. *Id.* at 24.

61. *Id.* at 58 (Zweiman Tr.).

62. *Id.* at 60, 65, 68.

63. *Id.* at 68.

64. *Id.* at 468 (Trial Tr. of Jules Frohmann Testimony [hereinafter Frohmann Tr.]). Jules Frohmann was Loral's Manager of Operations and was responsible for making sure Loral's products were delivered to its customers. *Id.* at 463.

65. *Id.* at 293 (Laskow Tr.). The liquidated damages clause in the First Government Contract provided:

[L]iquidated damages imposed in accordance with paragraph F of the clause of this contract entitled "Default" shall be at the rate of 1/2 of one percent of the contract price of any article not delivered by the contract delivery date for each day of delay after the delivery date fixed in the contract, provided, however, that in no event shall the liquidated damages as to any article exceed 10 percent of the contract price of that article.

Brief of Appellant-Loral at 11, *Austin* [hereinafter Loral Main Br.].

66. Loral Main Br., *supra* note 65, at 12-13; Reply Brief of Appellant-Loral at 34, *Austin Instrument, Inc. v. Loral Corporation*, 29 N.Y.2d 124 (1971). In effect, the government could terminate the contract upon any indication or threat of default, without first waiting for Loral's default to actually occur.

perform under the contract, Loral would be liable to the government for any replacement costs.⁶⁷

Additionally, the contract incorporated by reference the Armed Services Procurement Regulations ("ASPR").⁶⁸ The ASPR contained a provision that barred the Department of Defense from doing further business with any firm that had a "history of failure to perform, or of unsatisfactory performance in accordance with the terms of one or more contracts."⁶⁹ Thus, if Loral were to default on its contract, it could be placed on what was known as a "barred list" and never obtain another government contract.⁷⁰

Under the First Government Contract, Loral's delivery requirements were staggered, with the first radar sets due for delivery in May 1966.⁷¹ The next delivery under the First Government Contract was due in June 1966, and the final delivery was due in April 1967.⁷²

E. NOVEMBER 1965: LORAL'S FIRST SUBCONTRACT WITH AUSTIN

In order to produce the radar sets under the First Government Contract, Loral needed to purchase approximately 800 to 1,000 different component parts from some 500 to 600 subcontractors.⁷³ A subset of these components consisted of forty precision gear parts.⁷⁴ Loral sent out its standardized Request for Quotation form ("RFQ") to roughly thirty vendors, soliciting quotes for the gear parts.⁷⁵

Loral sent the RFQ only to vendors on its "approved vendor list," which was compiled and updated by Loral's representatives.⁷⁶ To certify vendors for approval, Loral representatives visited the vendors' plants periodically to inspect their facilities and to ensure that they had the specialized equipment necessary to perform in accordance with military standards and specifications.⁷⁷ Austin was one of the precision gear

67. Loral Main Br., *supra* note 65, at 13.

68. Record, *supra* note 51, at 28 (Zweiman Tr.).

69. Loral Main Br., *supra* note 65, at 14.

70. *Id.*

71. Record, *supra* note 51, at 292 (Laskow Tr.).

72. *Id.*

73. *Id.* at 91, 303.

74. *Id.* at 91.

75. *Id.* at 89, 91, 92.

76. *Id.* at 229, 786.

77. *Id.* at 229, 786.

manufacturers on Loral's approved vendor list, and Austin was one of the vendors who received Loral's RFQ.

All of the solicited, approved vendors responded to the RFQ for the gear parts,⁷⁸ including Austin.⁷⁹ Austin was the lowest bidder on twenty-three of the gear parts and, in November and December of 1965, Loral awarded Austin nine purchase orders, which covered these twenty-three parts. The price of the purchase orders totaled approximately \$71,624.⁸⁰ This subcontract was also substantial business for Austin—it constituted roughly eight percent of Austin's production volume.

Similar to Loral's delivery obligations under the First Government Contract, Austin was required to make its deliveries to Loral under the First Subcontract on a staggered basis, with its first delivery due to Loral in January 1966.⁸¹ This gave Loral a four to four-and-one-half month "lead time" to manufacture the "end item," the radar sets.⁸² Loral needed sufficient "lead time" because Austin's gear parts were the first items to go on the assembly line to produce the radar sets.⁸³

Austin was delinquent in meeting each of its delivery dates under the First Subcontract—even though the First Subcontract called for the first delivery to Loral in January 1966, Austin did not begin delivery on some of the items until May,⁸⁴ which diminished Loral's lead time to manufacture the radar sets. Loral's first shipment of radar sets was due to the government that same month, but it nevertheless managed to make timely deliveries by "working around the clock."⁸⁵

78. *Id.* at 97.

79. *Id.* at 658 (Krauss Tr.). Austin responded to the RFQ in October 1965. *Id.*

80. *Id.* at 833 (Loral's Ex. T) (Exhibit T is labeled: "Compilation of each purchase order by part and price, both before and after alleged coercion"). Loral awarded the purchase orders for the remaining seventeen gear items to a Florida vendor, Space Instruments, Inc. *Id.* at 206, 225-26 (Laskow Tr.). There was no written subcontract separate and apart from the executed purchase orders; the nine purchase orders themselves constituted the First Subcontract.

81. *Id.* at 652 (Krauss Tr.).

82. *Id.* at 467 (Frohmann Tr.)

83. *Id.* at 373 (Trial Tr. of Leon Goldberg Testimony [hereinafter Goldberg Tr.]). Leon Goldberg was Senior Mechanical Buyer for Loral. *Id.* at 340; *see infra* note 96.

84. *Id.* at 655-58 (Krauss Tr.).

85. *See Austin v. Loral*, 29 N.Y.2d 124, 132 (1971).

Although Austin was late with deliveries, there was no question that it was a competent and qualified vendor.⁸⁶ Commonly, military subcontractors were late in making deliveries.⁸⁷

F. MAY 1966: LORAL'S SECOND GOVERNMENT CONTRACT FOR RADAR SETS

Between the award of the First Government Contract in July 1965 and the commencement of Loral's first shipment obligations in May 1966, the conflict in Vietnam continued gradually to escalate.⁸⁸ Indeed, around this time, President Johnson supported increased military action in Vietnam.⁸⁹ This increase in military effort, in turn, caused a shift in the market for radar sets and the gear parts used to manufacture them. Thus, the market demand for Loral's radar sets increased.⁹⁰ During this time, the market prices for Austin's gear parts also rose, but so did its labor and manufacturing costs.⁹¹

On May 3, 1966, Loral was awarded a Second Government Contract for the production of another quantity of the same radar sets.⁹² At least in terms of the hardware, Loral's Second Government Contract was identical to the First.⁹³ As with the First Government Contract, Loral sent out its RFQ form to some thirty approved vendors and solicited quotes for the forty precision gear parts.⁹⁴ Austin came in as the lowest bidder on twenty-three of the items.⁹⁵

G. THE JULY 1966 DEALINGS BETWEEN LORAL AND AUSTIN

On July 1, 1966, as he had done many times, Leon Goldberg, a Senior Mechanical Buyer for Loral,⁹⁶ visited Austin's plant to meet with Austin's

86. Record, *supra* note 51, at 308 (Laskow Tr.).

87. *Id.* at 143.

88. See *Eisenhower Backs Vietnam Strength*, N.Y. TIMES, Oct. 1, 1966, at 6 [hereinafter *Eisenhower Backs Vietnam Strength*] (describing escalation of conflict in Vietnam in 1965 and 1966 as gradual).

89. See John D. Pomfret, *Johnson Warns Enemy*, N.Y. TIMES, June 19, 1966, at 1; see also Tom Wicker, *Johnson and His Use of U.S. Power*, N.Y. TIMES, May 4, 1965, at 20 (reporting Johnson's pledge not to be driven out of South Vietnam); *Eisenhower Backs Vietnam Strength*, *supra* note 88, at 6 (reporting Eisenhower's desire to "take any action to win" in Vietnam).

90. Record, *supra* note 51, at 160 (Laskow Tr.).

91. *Id.* at 185-87.

92. *Id.* at 57 (Zweiman Tr.).

93. *Id.* at 68.

94. *Id.* at 122 (Laskow Tr.).

95. *Id.*

96. *Id.* at 339 (Goldberg Tr.). Goldberg described his job: "My job is to procure mechanical sub-assemblies and the related components for radar anti-submarine warfare, which ultimately go into our final systems, which we manufacture." *Id.* at 340.

president, Edmund Krauss.⁹⁷ Goldberg went to Austin “for a two-fold purpose.”⁹⁸ First, Goldberg wanted to expedite delivery of the items on which Austin was already delinquent.⁹⁹ Second, Goldberg wanted to negotiate the prices Austin submitted on the second RFQ.¹⁰⁰

Krauss testified that, at the July 1 meeting, Goldberg told him that Austin was not being considered for a second subcontract, when other Loral personnel had promised Austin would get the job.¹⁰¹ Krauss believed that Austin was not going to be awarded a second subcontract because of unspecified personal problems between Krauss and Albert Laskow,¹⁰² at the time Loral’s Senior Buyer and Purchasing Agent.¹⁰³

At the July 1 meeting, Goldberg informed Krauss that Loral would award Austin a second subcontract for only the twenty-three items on which Austin was lowest bidder.¹⁰⁴ In response, Krauss stated that Austin wanted to be awarded a second subcontract for all forty parts.¹⁰⁵ Goldberg took Krauss’s offer back to Loral’s management.¹⁰⁶ Because of Austin’s history of delinquency under the First Subcontract, Loral’s management decided to award Austin purchase orders only for the twenty-three items on which Austin was the lowest bidder.¹⁰⁷

On Friday, July 15, 1966, Goldberg went back to Austin’s plant. Goldberg explained:

I advised Mr. Krauss[] of Loral’s position; and he advised me that he still wanted the entire package of 40 items, and he would not take anything less than that. In other words, he was not—he wouldn’t be satisfied to

97. *Id.* at 342; *Id.* at 526 (Krauss Tr.).

98. *Id.* at 342 (Goldberg Tr.).

99. *Id.*

100. *Id.*

101. *Id.* at 687 (Krauss Tr.).

102. *Id.* at 688.

103. *Id.* at 88 (Laskow Tr.).

104. *Id.* at 343 (Goldberg Tr.).

105. According to Goldberg, Krauss offered to give Loral a ten percent across the board reduction if Austin was awarded a second subcontract for all forty parts. *Id.* at 343. According to Krauss, however, at this meeting, he never offered Loral a ten percent across the board reduction. *Id.* at 689 (Krauss Tr.). In all events, the Special Referee found that by mid-July the 10% across the board reduction was “long since forgotten.” *Id.* at 838 (Trial Ct. Opn. [hereinafter Aurelio Opn.]).

106. *Id.* at 344 (Goldberg Tr.).

107. *Id.* at 136, 345 (Laskow Tr. and Goldberg Tr.).

accept just the items that he was low bidder on. He wanted the entire package.¹⁰⁸

Goldberg testified that he did not ordinarily work on Saturdays; nevertheless, the next day (Saturday, July 16), Goldberg went back to Austin's plant for a meeting with Krauss.¹⁰⁹ Among others on behalf of Loral, Laskow attended this Saturday meeting with Goldberg.¹¹⁰

According to Laskow and Goldberg, at the July 16 meeting, Krauss "threw [them] for a loop" and threatened to stop production of the parts under the First Subcontract unless Loral acceded to three demands: (1) a retroactive increase of ten percent on all items Austin already delivered under the existing First Subcontract, (2) various, itemized price increases for parts Austin had not yet manufactured under the existing First Subcontract and (3) a second subcontract awarding Austin purchase orders for all forty gear parts.¹¹¹

Krauss did not deny making these demands but, rather, characterized them as a matter of negotiation.¹¹² Krauss testified that the First Subcontract was a losing proposition for Austin—at that point, to the tune of \$70,000.¹¹³ When asked on direct examination what occurred at the July 16 meeting, Krauss testified:

We discussed the job; and I tried -- as always, we are the vendor. We are the ones that are putting in all the money in the job, on a piece of steel, and we are at the mercy of our customers. So, we, as always—my policy always was—we were a two-man shop, and today we are 125 people—is that the customer is always right. We try to negotiate this and explain [to] them that we are losing a fortune, and we cannot afford it, and we are trying to negotiate the price.

I pointed out some of the jobs, which you are getting \$2 . . . should bring \$15 to \$20.¹¹⁴

Krauss continued to explain that Austin's three demands were a matter of negotiation for a second subcontract, taking into account its significant losses under the First Subcontract.

108. *Id.* at 345 (Goldberg Tr.).

109. *Id.* at 346

110. *Id.*

111. *Id.* at 347-48, 138-39 (Goldberg Tr. and Laskow Tr.).

112. *Id.* at 550 (Krauss Tr.).

113. *Id.* at 550, 688, 691.

114. *Id.* at 549-50.

The testimony of Loral's own personnel confirmed that there was an increase in defense industry demand due to the conflict in Vietnam—part of Loral's case for duress depended upon the increase in demand and the military exigencies. Laskow testified:

There are certain things which are common knowledge in any industry. In our industry, at that particular period in our political stature of the country, we were at war in Viet Nam. It increased in tempo; and, as a result, most machine shops and gear suppliers felt the impact of this. And, consequently they were faced with the problem of turning out more orders than they could possibly handle. Therefore, as a result, the price structure radically changed at that time.¹¹⁵

Indeed, between Austin's response to the RFQ for the First Subcontract in October 1965 and the second RFQ in June 1966, the same gear parts saw substantial market increases—anywhere from 30% to 150%.¹¹⁶

When asked to describe what happened at the Saturday meeting, Laskow testified:

We tried to reason with Mr. Krauss[], but he was firm and adamant. . . . He told us he knew very well we couldn't obtain these gears for the time we needed them from anyone else. The Viet Nam War was at its peak. It was common knowledge in the industry that everyone was up to their ears in work, and they couldn't possibly give us deliveries.

In spite of this, we were going to make every effort to obtain some commitment from other suppliers. [Mr. Krauss] was very firm. . . . We had no alternative.

Finally, we argued with him for hours and left.¹¹⁷

Consequently, the parties departed the Saturday, July 16 meeting in discord.

On Monday, July 18 and Tuesday, July 19, 1966, Laskow and other Loral personnel called around to eight approved precision gear vendors in attempt to procure a replacement that could rapidly supply the gear parts for the First Government Contract.¹¹⁸ Loral called only those vendors that

115. *Id.* at 159-60 (Laskow Tr.).

116. *Id.* at 405 (Goldberg Tr.).

117. *Id.* at 143 (Laskow Tr.).

118. *Id.* at 229.

it had approved and that had copies of the drawings of the precision gear parts from previous submissions in response to the RFQs.¹¹⁹ When pressed why Loral did not call more than eight potential vendors, Laskow testified:

Very few suppliers had the capability to make these parts. You must understand the complexity of these parts—the specifications involved—only a limited number of suppliers had the ability to provide parts like that.¹²⁰

To the contrary, of course, Austin built a case that there were many more gear suppliers that Loral could have contacted to obtain these precision parts.¹²¹ For example, Krauss testified that the “Thomas Register of American Manufacturers” contained a section listing “hundreds” of gear manufacturers.¹²² For Loral, Laskow did not deny that there were other precision gear manufacturers; Laskow testified that, on July 18 and 19, he contacted only those manufacturers who were approved by Loral and those he already knew manufactured these particular precision gears.¹²³ Moreover, for each of the eleven gear manufacturers that Krauss testified that Loral could have called, Laskow provided an explanation why each vendor was not a viable replacement option.¹²⁴

The foremost concern for Loral was timing. Because of Austin’s delinquencies under the First Subcontract, much of Loral’s four-month “lead time” to build the radar sets had elapsed.¹²⁵ Of the eight vendors that Loral called, the earliest any of the vendors could promise initial deliveries of the precision parts was in twelve or fourteen weeks (i.e., at earliest, around the week of October 3).¹²⁶ The rest of the vendors could, at best, promise initial deliveries in twenty to twenty-two weeks.¹²⁷ Because of the

119. *Id.* at 312.

120. *Id.* at 326.

121. *See, e.g., Id.* at 586 (Krauss Tr.).

122. *Id.* at 586-87.

123. *Id.* at 228, 229, 786 (Laskow Tr.).

124. *Id.* at 787-92. Of the eleven gear manufacturers that Krauss testified that Loral could have contacted to procure a replacement, Laskow testified that four of them could not deliver in time, two did not make “non-standard parts,” two had been removed from Loral’s approved vendor list for poor quality, one had gone out of business, one had previously advised Loral it was too busy to take on new work and one had previously advised Loral that the required material was too abrasive and would damage its equipment. *See* Loral Main Br., *supra* note 65, at 31-32.

125. Record, *supra* note 51, at 217-18 (Laskow Tr.).

126. Loral Main Br., *supra* note 65, at 24; Record, *supra* note 51, at 35a (Loral’s Response to Bill of Particulars).

127. Loral Main Br., *supra* note 65, at 24; Record, *supra* note 51, at 35a (Loral’s Response to Bill of Particulars).

already diminished “lead time,” these initial delivery dates would not have allowed Loral to timely deliver the completed radar sets to the Navy under the First Government Contract.

However, Austin’s witnesses testified that it was possible to have the gear parts delivered in four to six weeks if Loral would “pay the price”—i.e., a premium for expedited delivery.¹²⁸ Concerned about making timely deliveries under Loral’s First Government Contract, Laskow and the others inquired only whether the vendors could complete the job quickly, and did not discuss price.¹²⁹

In the midst of Loral’s attempts to find a replacement, Krauss visited Loral’s plant on Tuesday, July 19, and reiterated Austin’s demands and, according to Loral, again threatened to stop production on the First Subcontract.¹³⁰ While Krauss did not deny making the demands, he did, however, deny that he ever threatened to stop *production* of the parts under the existing First Subcontract.¹³¹ Rather, Krauss testified that he informed Loral that he could not *deliver* parts.¹³² When asked the reasons Krauss gave why Austin would not continue deliveries under the First Subcontract, Laskow testified:

The only reason [Mr. Krauss] gave us was that he was not making enough money on the parts that he was manufacturing; that he could make more money doing similar parts for other customers; and this was obviously because the Viet Nam War started and customers were paying any price to get these.¹³³

Krauss still denies to this day that he threatened to stop production and still maintains that he was simply negotiating for better prices on the First Subcontract and to obtain a second subcontract.¹³⁴ Krauss confirmed that Austin did not deliver a shipment of 100 gear parts to Loral on July 18, 1966, but he testified that the shipments were halted because Austin’s plant was closed for vacation.¹³⁵

128. Record, *supra* note 51, at 762 (Trial Tr. of Testimony of Jack Sherin [hereinafter Sherin Tr.]). Sherin was Austin’s Manufacturing Manager. *Id.* at 748-50.

129. *Id.* at 794-95 (Laskow Tr.).

130. *Id.* at 138-39, 258.

131. *Id.* at 551, 553 (Krauss Tr.).

132. *Id.* at 551.

133. *Id.* at 158 (Laskow Tr.).

134. 6/23/05 Krauss Interview, *supra* note 51.

135. Record, *supra* note 51, at 530, 533-35 (Krauss Tr.).

Austin began its vacation period that Monday, July, 18, 1966, which lasted through Monday, August 2.¹³⁶ During this vacation period, Austin kept only a skeleton work crew and productions and deliveries were halted.¹³⁷ Krauss testified that this two-week period was the only time when production was stopped on Loral's gear parts.¹³⁸ Krauss testified that he told Loral about the vacation period:

I told [Loral] that we are negotiating this contract, in the midst of negotiations, and all that, and [Austin is] having a vacation time period, and [Austin] cannot put overtime in there, and to put more time in there while [Austin doesn't] have anybody in there, and [Austin] cannot deliver for a few days until we are straightening out our problems of getting the prices and all our problems resolved.¹³⁹

From Loral's perspective, Austin had halted production under the First Subcontract, and Loral had no feasible replacement vendor. Jules Frohmann, at the time Loral's Manager of Operations,¹⁴⁰ testified:

I had a couple of types of alternatives. One, I guess I co[u]ld terminate Austin Instrument at that point in time. However, with the lead time involved, to again get new parts, which would run you anywhere from close to 14 or 15 weeks at a minimum, I would find myself in a long gap, and I would be unable to make my deliveries again.

The other kind of alternative would be to continue with Austin and also place an order elsewhere. But, during these 14 or 15 weeks while we were waiting for deliveries elsewhere, Austin would be delivering parts; and what would I do with all the parts I had from the second contractor? So, I had two alternatives completely unsati[s]factory to me. So, I had to pay Austin his increased price and continue.¹⁴¹

Loral did not request that the government provide an extension of the delivery requirements under the First Government Contract.¹⁴² Rather, faced with these "unsatisfactory" alternatives, Loral decided to acquiesce to Austin's demands.

136. *Id.* at 552.

137. *Id.* at 530.

138. *Id.* at 553.

139. *Id.* at 534-35.

140. *Id.* at 464 (Frohmann Tr.).

141. *Id.* at 483-84.

142. *Id.* at 515.

H. LORAL'S ACQUIESCENCE: "WE HAVE FEVERISHLY SURVEYED OTHER SOURCES OF SUPPLY"

Loral agreed to award Austin a second subcontract for all forty required gear parts.¹⁴³ Loral also agreed to the retroactive and prospective price adjustments on the items under the First Subcontract.¹⁴⁴ However, Loral did not quietly acquiesce to the price increases under the First Subcontract.

On July 22, 1966, Loral sent a three-page letter to Austin, to the attention of Krauss.¹⁴⁵ The letter, which is signed by Frohmann as Loral's Manager of Operations, was actually drafted for Frohmann's signature by Loral's attorney, Alvin A. Simon.¹⁴⁶

The July 22 letter began by detailing the purchase orders under the First Subcontract, by item number, part number, quantity on order, unit price and quantity delivered to date.¹⁴⁷ Loral noted to Austin that the gear parts were "vital and indispensable for the fabrication and manufacture . . . of Radar Dopplers" under the First Government Contract "involving millions of dollars."¹⁴⁸

The letter then skillfully continued to recap the events leading to Loral's acquiescence:

It is common knowledge that these Radar Dopplers are used in military aircraft, are in very short supply and critical to the current military operations in which this Country is presently engaged. Nevertheless, work on the subcontract parts and components on order with you has been stopped.

Your reason, to state your position as conveyed to us by telephone and in conferences, is that these Purchase Orders or Fixed-Price Subcontracts were placed and accepted by you some 8 months ago; that your costs of manufacture have risen since then and that even though you have made partial deliveries under the subcontract, items or components are partially fabricated in your shop to various degrees of completion, you have notified us that

143. *Id.* at 185-87 (Laskow Tr.).

144. *Id.* at 302.

145. *Id.* at 827 (Loral's Ex. Q). The July 22, 1966 letter is reproduced in its entirety *infra* in Appendix 1.

146. 6/27/05 Simon Interview, *supra* note 27; Record, *supra* note 51, at 827; *see infra* Appendix 1.

147. Record, *supra* note 51, at 827; *see infra* Appendix 1.

148. Record, *supra* note 51, at 827; *see infra* Appendix 1.

further work on these items or components will leave you with a loss at the subcontract prices agreed upon, which you refuse to incur.

You have, therefore, advised us simply and unqualifiedly, as mentioned, that further work on these subcontracts has been stopped and that such work will not be resumed unless we agree to an increase in the subcontract prices by paying you an additional 10% on the parts and components already delivered and paid for, and also increase the unit prices on all undelivered components[.]¹⁴⁹

Next, the letter continued by explaining why Loral acquiesced:

We are obliged to tell you that, aside from the drastic consequences to which we open ourselves were we to default on our Radar Doppler . . . Prime Contract with the Government because of your failure to deliver the subcontract parts and components to us at the prices undertaken, a critical U.S. military operation may be jeopardized.

As matters stand, the success or failure of our contract performances and of this critical military operation depends upon timely receipt by us of the balance of the subcontract parts and components on which you have stopped work and refused to deliver.

We have feverishly surveyed other sources of supply and find that because of the prevailing military exigencies, were they to start from scratch as would have to be the case, they could not even remotely begin to deliver on time to meet the delivery requirements established by the Government in its Radar Doppler Prime Contract with us.

Accordingly, we are left with no choice or alternative but to meet your conditions.¹⁵⁰

In addition to Loral's shrewd characterization of the events leading to its acquiescence, the July 22 letter set forth a schedule detailing the prospective price increases on each of the undelivered items.¹⁵¹ The schedule shows that the increases on many of the items were substantial, averaging a sixty-seven percent increase per item and ranging from a 19%

149. Record, *supra* note 51, at 827; see *infra* Appendix 1.

150. Record, *supra* note 51, at 827; see *infra* Appendix 1.

151. Record, *supra* note 51, at 827; see *infra* Appendix 1. The schedule in the July 22 letter does not represent all of the increases because, in a letter later that week, Austin added three more items that are not listed in this schedule. Record, *supra* note 51, at 829 (Loral's Ex. R). This July 27 letter is reproduced in its entirety *infra* in Appendix 2.

increase on one item to a 123% increase on another.¹⁵² Indeed, the total prospective increases amounted to approximately \$19,000 and, when combined with the approximately \$3,000 in retroactive increases, totaled roughly \$22,000, or an almost 30% increase on the original \$71,624 contract price.¹⁵³

More compelling than the numbers, perhaps, is the artful choice of wording in Loral's correspondence to Austin. Loral is certain to point out a few times in the three-page letter that the radar sets are "vital and indispensable," "in very short supply" and "critical to the current military operations."¹⁵⁴ Loral wrote that Austin "simply and unqualifiedly" threatened to stop work under the First Subcontract, which could have "drastic consequences" for Loral.¹⁵⁵ And, the line of the letter that is likely indelible in the minds of many first-year Contracts students: Loral has "*feverishly* surveyed other sources of supply" and "because of the prevailing military exigencies" a replacement vendor "could not even remotely begin to deliver on time to meet the delivery requirements established by the Government," leaving Loral with "no other choice" than to acquiesce to Austin's demands.¹⁵⁶

The lawyerly style of Loral's July 22 letter stands in contrast to Krauss' testimony about the sophistication level of Austin's operations. Krauss explained that Austin "did not have no lawyers."¹⁵⁷ Krauss made clear: "I don't have anybody . . . I don't have no legal staff and I don't have no departments."¹⁵⁸

After the July 22 letter, the parties had a telephone conversation about the increases, which Austin referenced in its letter to Loral, dated July 27, 1966.¹⁵⁹ Austin did not disclaim that it coerced Loral to agree to the demands, at least not in writing. Austin's letter served to (1) add certain price increases that Loral had omitted from the July 22 letter and (2) make

152. See *infra* Appendix 1 (setting forth the schedule at the beginning of the July 22 letter). The smallest price increase was from \$4.10 to 4.90 and the largest increase was from \$1.90 to \$4.25.

153. Record, *supra* note 51, at 833 (Loral's Ex. T).

154. *Id.*

155. *Id.*

156. *Id.* (emphasis added).

157. Record, *supra* note 51, at 627 (Krauss Tr.).

158. *Id.*

159. *Id.* 829 (Loral's Ex. R); see *infra* Appendix 2.

other itemized corrections to quantities shipped.¹⁶⁰ The letter closed by asking Loral to mail delivery schedules, and assuring that Austin would “make every effort to meet them.”¹⁶¹

Loral responded to Austin in an August 4, 1966 letter.¹⁶² Much of the letter quibbled about whether certain items were delivered as Austin claimed, and it also continued to further build Loral’s record for a claim of duress.¹⁶³ Loral stated:

For the reasons outlined in our July 22 letter, we reiterate that we find ourselves in no position to take issue with either the price increases or other conditions you have specified as the basis for continuing with performance of the Purchase Orders or subcontracts between us.¹⁶⁴

The parties then executed the amended purchase orders, thereby modifying the First Subcontract in writing. The parties also revised Austin’s delivery schedules. Despite Loral’s need for quick deliveries, it allowed Austin delivery extensions, with some deliveries under the amended purchase orders extended until mid-September 1966.¹⁶⁵ Questioning Laskow concerning Loral’s claim of time exigencies in light of the delivery extensions Loral gave to Austin, Austin’s attorney pressed:

Q: Would it appear to an impartial observer that your time wasn’t that critical that you could not accept a September 19th delivery on some of these parts?

A: If the observer was impartial and would listen to all the evidence I presented, he would recognize that it would have been unreasonable for me to expect delivery sooner, in spite of the fact that I needed it sooner.¹⁶⁶

Incidentally, none of Loral’s letters attempted to build a record for coercion in its agreement to award Austin all forty gear parts in the Second Subcontract. Eventually, in Loral’s complaint, it never claimed duress in

160. Record, *supra* note 51, at 829; see *infra* Appendix 2.

161. Record, *supra* note 51, at 829; see *infra* Appendix 2.

162. Record, *supra* note 51, at 831 (Loral’s Ex. S). The August 4, 1966 letter is reproduced *infra* in Appendix 3.

163. Record, *supra* note 51, at 831 (Loral’s Ex. S). The August 4, 1966 letter is reproduced *infra* in Appendix 3.

164. Record, *supra* note 51, at 831 (Loral’s Ex. S). The August 4, 1966 letter is reproduced *infra* in Appendix 3. Loral is also careful to point out to Austin that:

The opening paragraph of our July 27 letter speaks of your acceptance of the terms and conditions of our July 22 letter. We call attention to the fact that it is, rather, we who find ourselves without choice but to accept your terms and conditions.

165. Record, *supra* note 51, at 323 (Laskow Tr.).

166. *Id.* at 323-24.

entering into the Second Subcontract, just the First. Loral did not claim duress as to the portion of the Second Subcontract that awarded Austin the seventeen items for which Austin was not the lowest bidder.

Also, there were sizeable price increases under the Second Subcontract for the same gear parts that Austin agreed to manufacture under the First Subcontract.¹⁶⁷ On cross-examination, Austin's attorney shared the following exchange with Laskow about the price increases between the First and Second Subcontracts and Loral's agreement to award Austin all forty items in the Second Subcontract:

Q: I was asking if you had any personal knowledge at this point of the price differential between Item A on the first contract and Item A on the second.

A: From my knowledge, it was higher on the second contract. Would that be adequate to satisfy you?

Q: What was the reason for giving a price increase on the second contract?

A: There were many reasons. One is—the most obvious reason is the fact that you cannot buy an automobile for the same price today as you did two years ago. The cost of labor and materials have risen since the first contract. There are other reasons; but that's one.

* * *

Q: Didn't you just say now that you gave [Mr. Krauss] the full amount and the higher prices because there was a gun to your head on the second contract?

A: I did not.

Q: What did you say?

A: You asked two questions. Why did we pay a higher price for the same items. I said for many reasons. One was that the first contract was lower than the market of the second contract. And the second reason, why did we place all forty items? Because I could have bought all of the—part of the forty items cheaper elsewhere, but I had no choice. I figured he had a gun to my head. Unless I took all forty items, he would not start production on my parts.¹⁶⁸

167. *Id.* at 183-84.

168. *Id.* at 186-87.

In sum, Loral's position was that the price increases between the First and Second Subcontracts simply reflected market increases.¹⁶⁹ As for awarding all forty items to Austin under the Second Subcontract, Laskow appeared to testify that Loral did so under duress, but Loral's complaint did not claim economic duress in executing the Second Subcontract.¹⁷⁰

After August 4, the parties went about performance on their respective subcontracts and prime contracts. Toward the end of Austin's performance of the Second Subcontract, Loral began to withhold payments owed to Austin.¹⁷¹ When Austin made its final deliveries to Loral under the Second Subcontract, Loral (concededly) owed Austin roughly \$17,756.¹⁷² On July 21, 1967, three days after Austin completed performance of the Second Subcontract, Loral wrote to Austin:

We are advised that such price increases [on the First Subcontract] may not be retained. We must accordingly notify you that unless these price increases are credited or refunded to us in full, appropriate action will be taken to secure our legal rights in this matter.¹⁷³

Austin never disclaimed the coercion in writing and refused to refund the increases on the First Subcontract.¹⁷⁴

III. THE LITIGATION: COERCION OR COMMERCIALLY UNDERSTANDABLE RENEGOTIATION?

On September 7, 1967, Austin commenced suit against Loral in New York Supreme Court, Nassau County, to recover the unpaid \$17,756.¹⁷⁵ On the very same day, Loral commenced suit against Austin in New York Supreme Court, Westchester County, to recover the roughly \$22,000 in increases on the First Subcontract, alleging that it agreed to the price increases under duress.¹⁷⁶ The parties agreed to consolidate the actions in

169. *Id.* at 405 (Goldberg Tr.).

170 Loral's attorney did not claim duress in entering into the Second Subcontract because Austin's threat was to breach the First Subcontract. Loral's attorney believed a duress claim as to the Second Subcontract was weak and did not want to "muddy the waters" for the strong duress claim concerning the price increases under the First Subcontract. 6/27/05 Simon Interview, *supra* note 27.

171. *Id.*

172. Record, *supra* note 51, at 18 (Trial Tr., Att'y Colloquoy).

173. *Id.* at 817 (Austin's Ex. 6). The July 21, 1967 letter is reproduced in its entirety *infra* in Appendix 4.

174. Loral Main Br., *supra* note 65, at 51.

175. Record, *supra* note 51, at 13a, 14a (Austin's Complaint).

176. *Id.* at 9a, 9b (Loral's Complaint).

New York County.¹⁷⁷ Based upon the record on appeal to the New York Court of Appeals, it does not appear that the parties engaged in motion practice prior to the commencement of the trial on December 9, 1969.

A. THE PRINCIPLES OF ECONOMIC DURESS

It bears noting that, at all stages of the litigation, the doctrine of economic duress was not in question. At the trial court and the appellate courts, some basic legal principles regarding economic duress were treated as settled and were unanimously enunciated by the courts. These principles were, namely, that: (1) a contract is voidable on grounds of duress when the threatened party was forced to agree to the threat by means that preclude the threatened party from exercising its “free will,” (2) a threat by one party to breach a contract by not delivering required items, though wrongful, does not in itself constitute duress, (3) it must appear that the threatened party cannot obtain the goods from any other source and (4) in order to establish duress, the threatened party must demonstrate that an ordinary remedy for breach of contract would not have been adequate.¹⁷⁸ The following description of the litigation proceeds against this doctrinal backdrop.

B. TRIAL AND REFEREE’S OPINION: “NO BASIS FOR A FINDING OF DURESS”

The five-day bench trial before Thomas A. Aurelio, as special referee, ended on December 17, 1969. Aurelio was a seasoned supreme court justice in New York County, who had been nominated to the court in 1943.¹⁷⁹ As the result of a coin toss, Austin was designated plaintiff, and Loral defendant, for the purposes of the trial.¹⁸⁰

Roughly three months after the trial ended, on March 25, 1970, Aurelio entered judgment against Loral and filed a decision with the New York County Clerk’s office.¹⁸¹ Aurelio held that Loral failed to establish that it

177. *Id.* at 837 (Aurelio Opn.).

178. See *Austin v. Loral*, 29 N.Y.2d 124, 130-31 (1971); *Austin Instrument, Inc. v. Loral Corp.*, 316 N.Y.S.2d 528, 531-33 (App. Div. 1970); Record, *supra* note 51, at 840-43 (Aurelio Opn.).

179. Aurelio’s rise to the bench was fraught with controversy. In 1943, a conversation recorded by federal prosecutors through electronic surveillance made front-page news. Aurelio was caught thanking Frank Costello, a top New York City crime boss with extensive ties to Tammany Hall, for Costello’s support of his nomination to the bench. In the taped conversation, Aurelio also promised Costello his “undying loyalty.” *Gangster Backed Aurelio for Bench, Prosecutor Avers*, N.Y. TIMES, Aug., 23, 1943, at 1.

180. Record, *supra* note 51, at 837 (Aurelio Opn.).

181. *Id.*

agreed to the price increases under economic duress.¹⁸² Aurelio found that, when Loral wrote its July 22 letter, it was not in default under the First Government Contract and Loral “explicitly admitted . . . that it had never received any warning from the government of threatened termination of either of its two contracts.”¹⁸³ Based on these facts, the special referee found that “whether Loral was then faced with an immediate emergency may not be said to be free from doubt.”¹⁸⁴

Even assuming the presence of an emergency, the referee held that Loral did not satisfactorily prove that it could not have procured the precision gear parts from another vendor.¹⁸⁵ Aurelio noted that “[a]ll Loral did was make a few telephone calls to other possible sources of supply” and, on the facts, this effort was “neither reasonable nor commensurate with the urgency and gravity of the situation which Loral asserts it was confronted and, therefore, wholly insufficient to support a finding that the items were not obtainable elsewhere.”¹⁸⁶

The referee “noted” that “Loral had a high regard for Austin’s know-how and its good quality workmanship in manufacturing these gears and for that reason leaned towards preferring to do business with Austin, other things being equal.”¹⁸⁷ Aurelio thus held that “[t]he conclusion becomes inescapable that Loral weighed all the considerations and determined as a matter of business judgment to continue with Austin and acted voluntarily.”¹⁸⁸

When this decision was issued, Loral’s attorney, Alvin A. Simon, was “shocked.”¹⁸⁹ Simon went to the president of Loral and told him that the decision was wrong and offered to waive attorneys’ fees if Loral permitted him to take an appeal.¹⁹⁰ Loral’s president gave Simon his blessing to

182. *Id.* at 837-44.

183. *Id.* at 841.

184. *Id.*

185. *Id.* at 842.

186. *Id.*

187. *Id.* at 843.

188. *Id.* Aurelio also determined that Loral’s placing of the purchase orders for the Second Subcontract and the increase of the prices under the First Subcontract were “part and parcel of the same transaction.” *Id.* Given this conclusion, Aurelio held that Loral could not disaffirm the contract in part by rejecting the price increases. *Id.* This issue of partial disaffirmance, though briefed by the parties, was not addressed by either of the appellate courts.

189. Telephone Interview with Alvin A. Simon, Counsel to Loral (June 10, 2005).

190. *Id.*

litigate the appeal.¹⁹¹ Simon filed an appeal on behalf of Loral in the Appellate Division, First Department. The fact that Simon waived his attorneys' fees helps explain why Loral continued to litigate this \$22,000 case at what, after a five-day trial, would otherwise appear to be a loss. Austin defended the appeals not based upon financial reasons, but rather as a matter of principle.¹⁹²

C. LORAL'S APPEAL TO THE APPELLATE DIVISION: 3-TO-2 AFFIRMANCE IN FAVOR OF AUSTIN

The Appellate Division issued its decision on December 17, 1970, exactly one year after the trial ended.¹⁹³ Justice Samuel W. Eager, who was joined by Justices Arthur Markewich and James B. M. McNally,¹⁹⁴ authored the majority decision affirming the judgment against Loral.¹⁹⁵

The majority concluded that "the findings of the referee are fully supported by the evidence except insofar as the same may be inconsistent with the findings herein set forth."¹⁹⁶ The factual findings of the Appellate Division majority did not necessarily conflict with those of the referee, but the Appellate Division did provide a somewhat more detailed recitation of the facts. For example, the majority noted that "Austin claimed that it was losing a substantial sum on the existing job; that it could not afford this; and that the prices being paid to it were only a fraction of what it was entitled to."¹⁹⁷ The majority also noted "parenthetically" that "it is well known that in this time of continual rising of material and manufacturing

191. *Id.*

192. Telephone Interview with Alvin Krauss, son of Edmund Krauss (Aug. 1, 2005).

193. *Austin Instrument, Inc. v. Loral Corp.*, 316 N.Y.S.2d 528 (App. Div. 1970).

194. Justice Eager wrote the decision while he was nearing the end of his twelve-year term on the bench; he served on the Appellate Division from 1960 to 1972. Judges of the Appellate Division, First Department, at <http://www.courts.state.ny.us/courts/ad1/centennial/justices.shtml> (last visited Apr. 21, 2006).

Justice McNally, who concurred with Eager, was also a veteran of the bench; he served on the Appellate Division from 1957 to 1972. *Id.* See also Alfred E. Clark, *James McNally Was a Justice in the State's Appellate Division*, N.Y. TIMES, June 11, 1982, at D18.

The other member of the majority, Arthur Markewich, was more recently elevated to the Appellate Division in 1968. See Eric Pace, *Arthur Markewich, 86, A Justice on Panel That Disbarred Nixon*, N.Y. TIMES, Feb. 26, 1993, at A17.

195. *Austin*, 316 N.Y.S.2d at 529.

196. *Id.* at 530.

197. *Id.*

costs, renegotiation of contract prices does sometimes occur in business and commercial dealings."¹⁹⁸

The Appellate Division majority elucidated some other key factual points. Concerning Austin's work stoppage, the majority found that, "[a]lthough there was sufficient evidence to support a finding that Loral was told [in mid-July 1966] that deliveries would be stopped, the situation was still fluid in the sense that Austin could be prevailed upon to resume normal deliveries following the vacation period."¹⁹⁹ Moreover, the majority characterized Loral's July 22 and August 4 letters as "self-serving" and found that the letters "indicate that [Loral] was deliberately acting with the intent of attempting to lay the basis for an alleged cause of action for economic duress" and Loral's actions were, therefore, voluntary.²⁰⁰

Further, expressly as a matter of fact, the Appellate Division majority also found that "Loral was at no time under any immediate urgency or government pressure for deliveries under the Navy contract" because Loral had not defaulted on the First Government Contract and had not received "any warning or notice from the government of dissatisfaction."²⁰¹ The court noted that Loral did not find it necessary to contact the government to seek an extension of time to make its deliveries.²⁰² In this connection, the majority held that Loral's "self-imposed, undisclosed and subjective fears do not constitute an act of duress . . . cognizable in law."²⁰³

The majority additionally noted that, after Loral agreed to the price increases, Loral extended Austin's delivery requirements under the First Subcontract until September 1966.²⁰⁴ Based upon these circumstances, the majority determined that "Loral was acting calmly and with considerable deliberation rather than because of an immediate urgency due to fear of government reprisals."²⁰⁵ Thus, the court held that, under the circumstances, Loral was acting of its own "free will" and Austin's threat to stop work under the First Subcontract did not constitute a basis for actionable duress.²⁰⁶

198. *Id.*

199. *Id.* at 530-31.

200. *Id.* at 531.

201. *Id.*

202. *Id.*

203. *Id.* (quoting *Joseph F. Egan, Inc. v. City of New York*, 17 N.Y.2d 90, 98 (1970)).

204. *Id.* at 531.

205. *Id.*

206. *Id.* at 531, 533.

The Appellate Division majority determined that “Austin was a responsible manufacturer and it was not established that its claims for retroactive price increases were made other than in good faith.”²⁰⁷ The majority echoed Aurelio’s determination that Loral did not make sufficient efforts to locate other possible vendors to supply the precision gear parts, and held that Loral could have procured another vendor and sued Austin for breach of contract.²⁰⁸

Yet, the two-Justice dissent, written by Justice Aron Leonard Steuer and joined by Justice Emilio Nunez,²⁰⁹ would have held that Loral acquiesced to Austin’s demands under economic duress.²¹⁰ Justice Steuer’s dissent began by stating that the facts were “virtually undisputed” and no “serious question of law” existed; however, the difficulty was in applying the law to the facts.²¹¹ The dissent appeared to adopt Loral’s characterization of certain undisputed facts.

First, the dissent viewed Loral’s efforts to procure a replacement vendor in a different light than the majority. The dissent determined that, while Loral only made a few telephone calls to find a replacement vendor, it was uncontroverted that Loral called every source known to it, and Austin did not suggest any additional sources Loral could have called.²¹²

Second, the dissent noted that there was no dispute that Loral was in serious danger of default under the First Government Contract, and no dispute concerning the effect of such a default on Loral’s ability to do business with the government in the future.²¹³ Moreover, in response to the suggestion that Loral should have requested an extension of time from the

207. *Id.* at 532.

208. *Id.*

209. Justice Steuer was also a veteran of the bench at the time of the decision, serving on the Appellate Division from 1961 to 1974. See Judges of the Appellate Division, First Department, <http://www.courts.state.ny.us/courts/ad1/centennial/justices.shtm> (last visited Apr. 21, 2006); see also Elizabeth Kolbert, *Aron Steuer, Served as Appellate Justice in New York Court*, N.Y. TIMES, Dec. 10, 1985, at B10.

Justice Nunez, who served on the Appellate Division from 1969-1977, was the first Latino judge on the New York State Supreme Court and, later, Appellate Division. See Lawrence Van Gelder, *Emilio Nunez is Dead at 91; Pioneering Hispanic Judge*, N.Y. TIMES, July 8, 1995, at 26; Judges of the Appellate Division, First Department, <http://www.courts.state.ny.us/courts/ad1/centennial/justices.shtm> (last visited Apr. 21, 2006).

210. *Austin*, 316 N.Y.S.2d at 534.

211. *Id.*

212. *Id.* at 535.

213. *Id.*

government, the dissent stated that this point was "merely an argument, not proof" and, in any event, "too tenuous to consider."²¹⁴ Thus, the Appellate Division dissent would have held that Loral "did all it could to find a substitute supplier and it was faced with a situation in which an action for breach of contract would not provide adequate relief."²¹⁵

Additionally, the dissent took issue with the majority's depiction of Loral as acquiescing to Austin's threat because Loral wanted Austin, not some other vendor, as Loral's supplier.²¹⁶ The dissent pointed out that Loral protested its acquiescence in writing.²¹⁷ The dissent also observed that the majority disregarded the "ineluctable fact that what precipitated [Austin's] demands was the fact that [Loral] did not want [Austin] as supplier for a substantial number of items."²¹⁸

D. THE ARGUMENTS TO THE COURT OF APPEALS

The two-Justice dissent permitted Loral to appeal as of right to the New York Court of Appeals.²¹⁹ Loral did not challenge the standards for economic duress set forth by the courts below. Rather, Loral challenged the application of those standards to the facts of the case. The theme of Loral's brief capitalized on the concept that the key element in a case of duress is the state of mind of the person alleged to be threatened.²²⁰ Loral's primary arguments on appeal were that: (1) the courts below did not apply the proper legal criteria in finding that Loral did not face an immediate and critical emergency, (2) by all legal standards, Loral made every reasonable effort to obtain the precision gear parts elsewhere, (3) the legal conclusion that Loral was acting voluntarily was unsupported and unwarranted and (4) Loral promptly disaffirmed by sending Austin the July 1967 letter three days after Austin completed deliveries under the Second Subcontract.²²¹

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. See N.Y. C.P.L.R. 5601(a) (McKinney 1962).

220. Loral Main Br., *supra* note 65, at 14.

221. See *id.* at i-ii. Though the Court of Appeals did not treat these arguments as central to the appeal, Loral also argued that: (1) it was bound by a duty to mitigate damages at the same time it was looking to procure an alternative vendor, (2) the First and Second Subcontracts were two separate transactions, and Loral could thus disaffirm one and not the other and (3) the Appellate Division affirmance was based upon a general misconception of the facts. *Id.*

Austin responded by arguing that Loral's "story is terrifying, but it is entirely lacking in credibility."²²² Central to Austin's theory was the rule that the Court of Appeals should not disturb a finding of fact if there is evidence to sustain it.²²³ With this rule in mind, Austin contended that the Court of Appeals should not disturb the findings that (1) Loral did not face an immediate emergency and (2) the precision gear parts were available to Loral through other sources.²²⁴ Austin's premise was that it had not applied undue economic pressure but, rather, it had simply attempted to renegotiate the First Subcontract.

Notably, a theme of Austin's brief was that of David versus Goliath. Austin painted itself as "infinitely smaller" than Loral.²²⁵ While there was a relative size difference between the companies during their 1966-1967 dealings, any imbalance of power that could have been attributed to this size difference appears to have been offset by the fact that Austin's gear parts were complex and only a limited number of suppliers had the ability to produce them to military specifications.

E. THE NEW YORK COURT OF APPEALS DECISION: 4-TO-3 FOR REVERSAL IN FAVOR OF LORAL

The New York Court of Appeals at the time consisted of Chief Judge Stanley H. Fuld and Associate Judges Adrian P. Burke, John F. Scileppi, Francis Bergan, Matthew J. Jasen, Charles D. Brietel and James Gibson.²²⁶

222. Austin Br., *supra* note 51, at 12.

223. *Id.* at 16-17.

224. *Id.* at 5-11. Austin's other, arguably peripheral, contentions were that: (1) Loral's mitigation of damages argument was irrelevant because there was no claim of breach of contract and (2) because the First and Second Subcontracts were part of the same renegotiation, Loral had to affirm or disaffirm in toto. *See id.* at 20, 23, 34.

225. *Id.* at 14, 18 ("Loral attempted to paint a picture in which it, a multi-million-dollar corporation, was victimized by one of its subcontractors. The trier of facts and the majority simply did not believe its trumped-up claims.") Austin argued:

Loral, a corporation whose government sales have aggregated hundreds of millions of dollars, whose stock is traded on the New York Stock Exchange, is asking this Court to invoke the extraordinary remedy of economic duress to abrogate a written contract it entered into with Austin, an infinitely smaller company.

Id. at 38.

226. Interestingly, Alvin Krauss suggested that there was suspicion that the Court of Appeals reversal could be explained by the fact the judges were law school classmates of Loral's attorney. 6/23/05 Krauss Interview, *supra* note 51. It is worth noting, however, that Loral's counsel, Alvin A. Simon, graduated from New York University Law School in 1961. None of the New York Court of Appeals judges in either the majority or dissent

At the time the case was argued, transcripts and other recordings were not taken at oral argument before the court. Alvin Simon, attorney for Loral, remembers exhausting his allotted oral argument time on one issue.²²⁷ When his time was up, Simon asked Chief Judge Fuld whether he could have a few more minutes to address one other issue.²²⁸ Apparently exasperated, Judge Fuld looked around at his colleagues.²²⁹ Judge Fuld told Simon to "go ahead," then he exited the courtroom.²³⁰ Mr. Simon left oral argument thinking that Judge Fuld was, for sure, one vote he did not have.²³¹ The opposite turned out to be true.

Joined by Judges Burke,²³² Scileppi,²³³ and Gibson,²³⁴ Chief Judge Fuld wrote for the majority, which reversed the Appellate Division and held that Loral had surrendered to Austin's threat under economic duress.²³⁵

Chief Judge Fuld's background was as a "hard-nosed prosecutor."²³⁶ Fuld practiced privately from 1926 to 1935.²³⁷ In 1935, Thomas E. Dewey,

attended New York University Law School, and all of the judges attended law school many years before Mr. Simon. See Historical Society of the Courts of New York, at <http://www.courts.state.ny.us/history/Judges.htm> (last visited Apr. 21, 2006).

227. Telephone Interview with Alvin A. Simon (June 10, 2005), *supra* note 189.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Judge Adrian Burke was elected to the New York Court of Appeals in 1955 and served until 1973. See Wolfgang Saxon, *Burke, 95, Appeals Court Judge, Dies*, N.Y. TIMES, Sept. 9, 2000, at B8. Both before and after serving on the New York Court of Appeals, Burke served as Corporation Counsel of the City of New York; first, under Mayor Robert F. Wagner in 1954, then again, under Mayor Abraham D. Beame in 1974. *Id.* (Judges were elected to the New York Court of Appeals until 1977. In 1977, after a New York Constitutional amendment, the Court of Appeals was composed by the Governor's appointment, with confirmation by the State Senate. See New York State Court of Appeals Jurisdiction and History, at <http://www4.law.com/ny/Courts/docs/cap/juris&hi/1847cour.htm> (last visited Apr. 21, 2006).)

233. Judge John F. Scileppi served on the New York Court of Appeals from 1962 to 1972. Dan Fagin, *J.F. Scileppi, Top State Court Judge*, NEWSDAY, Nov. 30, 1987, at 29. Prior to his election to the court, Scileppi served as Deputy State Attorney General and, then, as a judge in Supreme Court in Queens County. *Id.*

234. Judge James Gibson served on the New York Court of Appeals from 1969 to 1978. Bruce Lambert, *James Gibson, 90, Former Judge on New York's High Court, Dies*, N.Y. TIMES, June 1, 1992, at B10. Prior to his tenure on the court, Gibson served as District Attorney of Washington County and a judge in both the Supreme Court and the Appellate Division. *Id.*

235. *Austin v. Loral*, 29 N.Y.2d 124, 131 (1971).

236. Douglas Martin, *Stanley Fuld, Former Judge, Is Dead at 99*, N.Y. TIMES, July 25, 2003, at A21.

a Columbia Law School classmate and then special prosecutor of rackets in Manhattan, hired Fuld as an investigator.²³⁸ Fuld's specialty was developing theories to prosecute racketeers and individuals with connections to Tammany Hall.²³⁹ When Dewey was elected Manhattan District Attorney, he appointed Fuld to head the Indictment Bureau and, in 1939, Fuld became chief of the Appeals Bureau.²⁴⁰ In 1942, after Dewey became governor of New York, he supported Fuld's bid for a seat on the Court of Appeals.²⁴¹ Fuld was the youngest person ever appointed to the New York State Court of Appeals.²⁴² Fuld also holds the record for longest tenure on the Court of Appeals, having retired in 1973.²⁴³ Indeed, these facts, among others, are why Chief Judge Judith Kaye observed that, "[t]o write of Stanley Fuld is to write only in superlatives."²⁴⁴

In Judge Fuld's some 28 years on the New York Court of Appeals, he wrote more than 800 opinions,²⁴⁵ won an unwavering reputation as a "consummate jurist"²⁴⁶ and left an indelible mark on many areas of law, including various aspects of contract law.²⁴⁷ Unsurprisingly, Judge Fuld's majority opinion in *Austin v. Loral* is used as a main case in a majority of Contracts casebooks.²⁴⁸

237. *Id.*

238. *Id.*

239. *Id.* Chief Judge Fuld's background prosecuting mob bosses is interesting when placed in contrast to Special Referee Aurelio's suspected connections to Tammany Hall; this is especially so in light of Fuld's effective reversal of Aurelio's decision. See *supra* note 179.

240. Martin, *supra* note 235, at A21.

241. *Id.* See also Judith S. Kaye, *Tribute to Judge Fuld*, 104 COLUM. L. REV. 270 (2004).

242. Kaye, *supra* note, 241, at 270.

243. *Id.*

244. *Id.*

245. Martin, *supra* note 236, at A21.

246. Sidney Stein, *Stanley H. Fuld: A Life Lived in the Law*, 104 COLUM. L. REV. 258 (2004). See also Charles D. Breitel, *Chief Judge Stanley H. Fuld*, 25 SYRACUSE L. REV. 1 (1974); Adrian P. Burke, *Chief Judge H. Stanley Fuld*, 71 COLUM. L. REV. 542 (1971); William O. Douglas, *Chief Judge Stanley H. Fuld*, 71 COLUM. L. REV. 531 (1971); Kenneth R. Feinberg, *New York's Court of Appeals and Stanley H. Fuld: An Appreciation*, 48 SYRACUSE L. REV. 1477 (1998); Michael I. Sovern, *Chief Judge Stanley H. Fuld*, 71 COLUM. L. REV. 545 (1971); Jack B. Weinstein, *The Honorable Stanley H. Fuld*, THE HIST. SOC'Y OF THE CTS. OF THE ST. OF N.Y., Vol. 1, No. 2, at 1 (Spring/Summer 2004).

247. Indeed, Judge Fuld averages 1.69 opinions as "main cases" (as opposed to "note cases") in contracts casebooks. See Cunningham, *supra* note 2, at 1380, 1462 (charting contract casebooks that use Fuld's decisions as main cases).

248. *Id.* at 1462.

Judge Fuld began the majority opinion in *Austin v. Loral* by noting that there was no material disagreement concerning the facts or the law, and reiterating the observation of Justice Steuer's dissent that the difficulty was in the application of the law to the facts.²⁴⁹ In a footnote, the majority noted that the issue was reviewable by the court because it was one of law, not of fact.²⁵⁰ The court then framed the question as whether, "accepting the facts found . . . the courts below properly appl[ied] the law to them."²⁵¹ Addressing this question, the majority held that the Appellate Division did not properly apply the law to the facts because "the evidence makes out a classic case, as a matter of law, of . . . duress."²⁵²

First, the majority determined that Austin's threat (to stop deliveries unless Loral agreed to the price increases) "deprived Loral of its free will."²⁵³ In this connection, the majority held that it was "perfectly reasonable for Loral, or any other party similarly placed, to consider itself in an emergency, duress situation."²⁵⁴ The majority placed a great deal of significance on the facts that Loral was dealing with the government, that Loral needed the precision gears to meet its deadlines under the First Government Contract and that Loral would suffer the consequences of the default and liquidated damages clauses if it was delinquent in its deliveries.²⁵⁵ The court noted that, "Loral did a substantial portion of its business with the Government, and it feared that a failure to deliver as agreed upon would jeopardize its chances for future contracts."²⁵⁶ The majority did not give much credence to Austin's argument that Loral's extensions of the delivery dates under the First Subcontract negated Loral's claim that it direly needed the parts.²⁵⁷

The majority also rejected Austin's argument that Loral's claim of economic duress was insufficient because Loral should have contacted the government and asked for an extension of the delivery dates while Loral

249. 29 N.Y.2d at 130.

250. *Id.* at 131, n. 5.

251. *Id.* (citing COHEN & KARGER, POWERS OF THE NEW YORK COURT OF APPEALS 492 (1952)).

252. *Id.* at 131.

253. *Id.*

254. *Id.*

255. *Id.* ("As bearing on this, Loral's relationship with the Government is most significant.").

256. *Id.*

257. *Id.* at 132. The majority noted that a "Loral official" testified that the extensions were a matter of formality and, in any event, when the deliveries were made, Loral had to "work around the clock" to get the job done in time. *Id.*

looked for a replacement vendor.²⁵⁸ The court noted that Loral could not be certain when it would obtain the substitute parts, making it nearly impossible to know how long of an extension it needed.²⁵⁹ The majority additionally observed that “Loral was anxious to perform well in the Government’s eyes” and it “was producing a needed item of military hardware.”²⁶⁰

Second, the court held that Loral had met its burden of demonstrating that it could not obtain the precision gear parts from another source within a reasonable time.²⁶¹

As Loral was producing a highly sophisticated item of military machinery requiring parts made to the strictest engineering standards, it would be unreasonable to hold that Loral should have gone to other vendors, with whom it was either unfamiliar or dissatisfied, to procure the needed parts. As Justice Steuer noted in his dissent, Loral “contacted all the manufacturers whom it believed capable of making these parts,” and this was all the law requires.²⁶²

Next, the majority held that the legal remedy in a suit against Austin for breach of contract would have been inadequate under the circumstances because Loral would still have had to procure the parts elsewhere and would have suffered the consequences of the default and liquidated damages provisions of the First Government Contract.²⁶³ Judge Fuld wrote that “Loral actually had no choice, when the prices were raised by Austin, except to take the gears at the ‘coerced’ prices and then sue to get the excess back.”²⁶⁴

Finally, the majority held that Loral promptly acted to make its duress claim known because, had Loral made its claim known any sooner, it could have faced another threat by Austin to stop deliveries—the very untenable situation that influenced Loral to acquiesce in the first place.²⁶⁵

Judge Bergan,²⁶⁶ joined by Judges Breitel²⁶⁷ and Jasen,²⁶⁸ wrote for the dissent. The dissent saw the question before the court as one of fact which

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 133 (internal citation omitted).

263. *Id.*

264. *Id.*

265. *Id.*

266 Judge Francis Bergan served on the New York Court of Appeals from 1963 to 1972. Wolfgang Saxon, *Francis Bergan, 95, Ex-Judge; Shaped New York's Constitution*, N.Y.

“should not be open for resolution” by the Court of Appeals.²⁶⁹ The dissent began: “Whether acts constituting economic duress produce or do not produce the damaging effect attributed to them is normally a routine type of factual issue.”²⁷⁰ And, in this case, Judge Bergan noted that, “[w]hen the testimony of the witnesses who actually took part in the negotiations for the two disputing parties is examined, sharp conflicts of fact emerge.”²⁷¹

The dissent stated that, on appeal, it was “needful to look at the facts resolved in favor of Austin most favorably [to Austin.]”²⁷² The dissent commented that Austin was attempting to renegotiate the First Subcontract and that it was not threatening Loral to stop deliveries under the First Subcontract but, rather, requesting an accommodation while Austin’s plant was closed for vacation.²⁷³

The dissent also observed that the “demonstration is replete in the direct testimony of Austin’s witnesses and on cross-examination of Loral’s principal and purchasing agent that the availability of practical alternatives was a highly controverted issue of fact.”²⁷⁴ Because Austin asserted and Loral admitted that there were many gear suppliers listed in the Thomas Register, it was “at least a fair issue of fact whether under the circumstances such conduct was reasonable and made what might otherwise have been a commercially understandable renegotiation an exercise of duress.”²⁷⁵

TIMES, Apr. 13, 1998, at B7. Prior to joining the court, Bergan served as a judge in the Appellate Division and in four other lower courts. *Id.* Interestingly, Bergan went from high school directly to Albany Law School; it was not until 1948, while serving as a State Supreme Court Justice, that he received a bachelor’s degree in Spanish. Paul Grondahl, *Judge Francis Bergan Dies at 95*, ALBANY TIMES UNION, Mar. 24, 1998, at B1.

267. Judge Charles D. Breitell was elected to the New York Court of Appeals in 1967; he was elected Chief Judge in 1973; he retired in 1978. Eric Pace, *Charles D. Breitell, Chief Appeals Judge in 1970’s*, N.Y. TIMES, Dec. 3, 1991, at B12. From 1934 to 1950, Breitell also worked for Thomas E. Dewey when Dewey was New York City’s special rackets prosecutor and, then, Manhattan District Attorney. *Id.* From 1950 to 1973, Breitell served as a Supreme Court Justice. *Id.* After his retirement from the Court of Appeals, Breitell was affiliated with the Manhattan law firm Proskauer, Rose, Goetz & Mendelsohn from 1978 to 1985. *Id.*

268. Judge Matthew J. Jasen was elected to the Court of Appeals in 1967 and retired in 1985. Historical Society of the Courts of New York, <http://www.courts.state.ny.us/history/Judges.htm> (last visited Apr. 21, 2006).

269. *Austin v. Loral*, 29 N.Y.2d 124, 134 (1971).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at 135.

Austin sought leave to reargue, which the Court of Appeals denied.²⁷⁶ Austin and Loral never did business again.²⁷⁷

IV. A STUDY IN FRAMING

In *Austin v. Loral*, the legal elements of a cause of action for economic duress were not seriously contested by the parties or the courts. Rather, as Justice Steuer observed, the heart of the dispute was in the application of the principles of economic duress to the undisputed facts.²⁷⁸ The reconstructed story shows that the events leading to the modification of the First Subcontract were largely undisputed; however, the parties provided sharply contrasting characterizations of those events. Austin made efforts to favorably characterize the facts; but presented within a frame of economic duress, its characterization of the facts was not doctrinally relevant. This part of the article explores the significance of issue framing. Given the doctrinal differences between U.C.C. modification and common law duress at the time of *Austin v. Loral*, a shift in Austin's framing of the legal dispute might have changed the outcome in the Court of Appeals.

"Framing" describes the technique attorneys use to present the facts and the law in terms most favorable to their clients.²⁷⁹ The same technique has alternatively been described as "characterizing."²⁸⁰ The idea of framing

276. *Austin Instrument v. Loral Corp.*, 29 N.Y.2d 749 (1971).

277. 6/23/05 Krauss Interview, *supra* note 51.

278. While there was disagreement among the judges concerning whether the determinations were questions of law or fact, the sometimes-elusive line between law and fact is a subject for an entirely separate article. It appears that the events were, for the most part, unrefuted, but the dispute was in the characterization of those events. Perhaps the question then becomes whether the choice between competing characterizations of unrefuted occurrences is itself a question of law or fact.

279. See generally Jennifer Jaff, *Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning*, 36 J. LEGAL EDUC. 249 (1986); see also Muriel Morisey, *Liberating Legal Education from the Judicial Model*, 27 SETON HALL LEGIS. J. 213, 253-56 (2003) ("A primary goal in framing the issue will be anticipating and reinforcing the client's legal arguments."); Kathryn Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 23-30 (1998) ("Framing or characterizing the issue in law is an extremely important tool of advocacy because it dictates what facts are relevant, what law applies, and who wins."); Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 37, 63-68 (2001) (discussing significance of technique of framing legal issues).

280. See generally Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372 (1996). This article uses the terms "characterizing" and "framing"

is not new or novel; it is one of the bases of legal education and the practice of law. Framing occurs at two general levels in any dispute.²⁸¹ First, the legal question is framed. Second, the answers to that question, or the facts, are characterized to fit within the doctrinal framework of the question. These two levels of framing do not necessarily occur in linear order—an initial grasp of the facts will guide the formulation of the legal question and, after its formulation, the legal question might warrant revision as the facts become known.²⁸²

The ability to “frame the legal issue” is among the basic skills that law students develop to “think more like a lawyer.” It is the process of defining the parameters of a legal dispute in terms of a more doctrinally sustainable theory based on the facts. Likewise, “characterizing the facts” is the attorney’s rhetorical process of presenting a client’s perspective of a set of circumstances.²⁸³

In *Austin v. Loral*, the parties perceived and, thus, characterized the same events in a different manner. Austin took steps to characterize the events as a matter of commercially understandable renegotiation, while Loral took the steps to characterize the same set of circumstances as coercive. Both sides made efforts to favorably characterize the facts; however, Austin failed to frame the legal issue in a manner that made its characterization of the facts doctrinally relevant. Tellingly, the market shifts and Austin’s losses under the First Subcontract were not even mentioned in the Court of Appeals decision.²⁸⁴

interchangeably; though, it tends to use the term “framing” to describe the presentation of the law and the term “characterizing” to describe the presentation of the facts.

281. See Little, *supra* note 280, at 376.

282. Parenthetically, there is an interesting connection between the stages of framing a legal question and the discussion of how reducing a client’s story to the fit it within the limits of legal discourse can marginalize and ignore the narratives of minorities and poor people. See generally Christopher P. Gilkerson, *Poverty Law Narrative: The Critical Perspective and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Stanchi, *supra* note 279. Another effect of legal framing can be that the attorney gets locked into one frame of the legal question and, thereby, fails to uncover other facts that could be relevant to another legal question with better frames the client’s situation. See Kim Scheppele, *Foreward: Telling Stories*, 87 MICH. L. REV. 2073, 2097 (1989) (noting that rules of legal relevance can limit evidence gathering).

283. See Little, *supra* note 280, at 376.

284. Moreover, it should be noted that the court’s scope of review is limited to the legal arguments raised by the parties; therefore, the Court of Appeals did not construct its own frame for the dispute. See, e.g., *Matter of Hoffbauer*, 47 N.Y.2d 648, 654 (1979) (“our review is confined solely to the legal issues raised by the parties.”).

The legal technique of framing draws parallels to theories of cognitive linguists. Cognitive linguists seek to understand the nature of language by researching how the mind operates on an unconscious level.²⁸⁵ They explore how we conceptualize our “everyday lives” and how we use language to think and talk about concepts.²⁸⁶ Using this information, cognitive linguists such as George Lakoff have theorized about “frames,” or “mental structures which shape the way we see the world.”²⁸⁷ “Framing” can be described as the process of selectively packaging and communicating concepts to fit what is already “instantiated” in the synapses of our brains.²⁸⁸ In this context, framing can use what we know about how our brains function to present concepts in a way that allows favorable interpretations of facts and rules out unfavorable ones.²⁸⁹

Once a person is operating within a frame, she will only accept the facts that fit within that frame.²⁹⁰ “Reframing” is the process of using new or different concepts to change the structures that shape how we see things.²⁹¹ Although the ideas of framing and reframing have been used by cognitive linguists in academic circles for some time, they have only more recently been popularly applied to the work of politicians in attempt to control public opinion of political issues.²⁹²

In the political context, Lakoff provides the term “tax relief” as a classic example of framing often used by political conservatives.²⁹³ When the word “relief” is used, taxation is metaphorically perceived as an affliction, and the party trying to take away taxes is perceived as a hero.²⁹⁴

285. See LAKOFF, MORAL POLITICS, *supra* note 18, at 4. Cognitive linguists do not mean the term “unconscious” in the Freudian sense of repressed ideas; rather, they use the term to indicate “common sense reasoning” of which we are unaware. *Id.*

286. *Id.* at 3.

287. *Id.* at xv. A “frame” has also been described as any “system of concepts related in such a way that to understand any one of them you have to understand the whole structure in which it fits.” WILLIAM CROFT & ALAN D. CRUSE, COGNITIVE LINGUISTICS 15 (2004).

288. See LAKOFF, FRAME THE DEBATE, *supra* note 19, at 17.

289. *Id.*

290. *Id.* at 16-17. Lakoff states that ideas come in the form of frames and, when we have frames available, words come readily. *Id.* 23-24. When the words do not come easily, it is because we lack a simple, fixed frame to evoke the two or so words to describe the idea—this is a phenomena described by cognitive linguists as “hypocognition.” *Id.*

291. *Id.* at xv.

292. See generally *id.*; Matt Bai, *The Framing Wars*, N.Y. TIMES MAGAZINE, July 17, 2005, at 38.

293. LAKOFF, FRAME THE DEBATE, *supra* note 19, at 4.

294. *Id.*

Lakoff notes how, in response, political progressives began to use the conservatives' term "tax relief" and, using the term, tried to argue against it.²⁹⁵ He posits that this was a failure of progressives to reframe the issue and that, by using the language of the conservatives' frame, the progressives only ended up reinforcing that frame and the conclusion that "tax relief" was needed.²⁹⁶ A parallel can be made to the legal techniques of framing and what occurred in *Austin v. Loral*; rather than reframing the issue as one of contract modification, Austin used Loral's frame of economic duress and tried to refute it. By using Loral's frame of economic duress, Austin served to reinforce that frame and lost the case at the Court of Appeals.

Moreover, cognitive psychologists and behavioral economists have recognized several biases in human decision-making,²⁹⁷ one of which is that people make decisions based upon the way choices are framed.²⁹⁸ For example, in one experiment, patients suffering from lung cancer were given statistical information about the outcomes of two alternative medical treatments, either surgery or radiation therapy.²⁹⁹ Half of the patients were presented with the choice of alternative treatments in terms of survival rates, and the remaining patients were presented with the same choice between treatments in terms of mortality rates.³⁰⁰ When the choice

295. *Id.*

296. *Id.* at 4, 33.

297. See Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783, 787-93 (2003). These "biases" are a wide range of systematic errors that our minds commonly use to make decisions. *Id.*

298. See Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251 (1986) [hereinafter *Rational Choice*]; Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981) [hereinafter *Psychology of Choice*].

299. See Tversky & Kahneman, *Rational Choice*, supra note 298; Tversky & Kahneman, *Psychology of Choice*, supra note 298.

300. The patients were given statistical information about the outcomes of two treatments. The same statistics were presented to two sets of patients, but one set received the statistical information in terms of mortality rates and the other in terms of survival rates. The following frames were presented to the patients:

Problem 1 (Survival Frame)

Surgery: Of 100 people having surgery 90 live through the post-operative period, 68 are alive at the end of the first year and 34 are alive at the end of five years.

Radiation Therapy: Of 100 people having radiation therapy all live through treatment, 77 are alive at the end of one year and 22 are alive at the end of five years.

Problem 2 (Mortality Frame)

Surgery: Of 100 people having surgery, 10 people die during surgery or the post-operative period, 32 die by the end of the first year and 66 die by the end of five years.

between treatments was framed in terms of survival rates, significantly fewer patients chose radiation than when that same choice was framed in terms of mortality rates.³⁰¹ This study demonstrated that different representations of the same choice can lead decision makers to different preferences. Behavioral economists Amos Tversky and Daniel Kahneman have pointed to this study, among others, to question the rationality of human decision-making and assess how we approach risk on a psychological level.³⁰²

The studies also bear on judicial decision-making to the extent that they underscore the significance of characterization. Indeed, if the same event can be perceived in more than one way,³⁰³ these studies emphasize the importance of characterization in convincing the fact-finder of the client's version of "what happened." In *Austin v. Loral*, both parties had competing perceptions of the same events, and much of the dispute was in convincing the judges to adopt one of the versions of the story. Loral offered a view of the facts that fit more neatly within the legal frame presented. This orderly package of facts and law likely appealed to the judges that decided in Loral's favor.

Further, cognitive scientists have coined the term "frame blindness," which is described as "setting out to solve the wrong problem because you have, with little thought, created a mental framework for your decision that causes you to overlook the best options or lose sight of important objectives."³⁰⁴ The theory of frame blindness is relevant to the present discussion because it might explain why Austin failed to reframe the issue as one of contract modification. Although contract modification was a

Radiation Therapy: Of 100 people having radiation therapy, none die during treatment, 23 die by the end of one year and 78 die by the end of five years.

Rational Choice, *supra* note 298, at S254.

301. Under the survival frame, 18% of the patients chose radiation; under the mortality frame, 44% of the patients chose radiation. *Id.* at S255. Tversky and Kahneman noted that "[t]he advantage of radiation therapy over surgery evidently looms larger when stated as a reduction of the risk of immediate death from 10% to 0% rather than an increase from 90% to 100% in the rate of survival." *Id.*

302. See *id.*; *Psychology of Choice*, *supra* note 298. See also Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 739 (2003); Weinstein, *supra* note 245.

303. See Little, *supra* note 280, at 376.

304. Rand, *supra* note 302, at 739 (quoting J. EDWARD RUSSO & PAUL J.H. SHOEMAKER, *DECISION TRAPS: THE TEN BARRIERS TO BRILLIANT DECISION-MAKING AND HOW TO OVERCOME THEM* 2 (1989)).

plausible and available doctrinal framework, it could be that Austin set out to disprove duress because this is the way Loral originally framed the problem, blinding Austin to other ways to frame the issue.

Building upon the concepts of legal and cognitive framing, the following sections of this article explicate the frames of economic duress and contract modification at the time of *Austin v. Loral*. The doctrinal differences between the two frames demonstrate why it would have been more effective for Austin to reframe the dispute as one of contract modification.

A. THE COMMON LAW DOCTRINE OF ECONOMIC DURESS

In *Austin v. Loral*, the courts and litigants agreed that economic duress is demonstrated when A has forced B to enter into a contract by means of an improper threat that precluded B from exercising its “free will.” Consistent with these common law parameters and the definition of duress originally found in the First Restatement of Contracts,³⁰⁵ scholars have descriptively generalized the duress doctrine as a two-part inquiry.³⁰⁶ One part of the duress doctrine traditionally focuses on A’s threat (the “proposal prong”), and the second part assesses B’s choices in the face of that threat (the “choice prong”).³⁰⁷ The choice prong generally looks to whether B’s “will” was “overborne” by A’s threat.³⁰⁸ The proposal prong commonly

305. RESTATEMENT (FIRST) OF CONTRACTS § 492(b) (1932) provides that duress is: [A]ny wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.

306. See ALAN WERTHEIMER, COERCION 30 (1987) (discussing the two parts of the analysis as the “choice prong” and the “proposal prong”). See also Mitchell Berman, *The Normative Functions of Coercive Claims*, 8 LEGAL THEORY 45, 46-49 (2002); Robert A. Hillman, *Policing Contract Modifications Under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 882 (1979) (describing two elements as “choice” and “means” questions).

307. See WERTHEIMER, *supra* note 306, at 30. To be consistent with the terminology used in the First and Second Restatements of Contracts, this article uses the term “threat” to describe A’s proposal. The term “threat” is not used to indicate a conclusion that A’s proposal was improper or coercive. The term “threat” is often used to indicate coercion, as juxtaposed to the term “offer,” which is intended to indicate the absence of coercion. Here, the term “threat” is used more loosely, and, by simply using that terminology, the article does not intend to convey the conclusion that A’s (or Austin’s) threat was improper or coercive. See also Bar-Gill & Ben-Shahar, *supra* note 25, at 721 n.5 (explaining looser use of term “threat” in analysis).

308. See WERTHEIMER, *supra* note 306, at 31-38 (discussing RESTATEMENT (FIRST) OF CONTRACTS § 492(b)).

asks whether A's threat was "wrongful."³⁰⁹ Traditionally, if A's threat was wrongful, and B's will was overborne, the contract is voidable at B's option.³¹⁰

The proposal prong of duress jurisprudence attempts to determine whether A's threat was wrongful—that is, whether it crossed the line from a legal application of economic pressure to an illegal one.³¹¹ The impropriety of A's threat has traditionally been assessed solely in terms of the threat's effect on B, and without reference to A's reasons for making the threat.³¹²

From the instant Loral sent Austin the July 22, 1966 letter, Loral framed the legal issue as one of economic duress. Likewise, Loral's brief capitalized on the duress doctrine's focus on the state of mind of the person alleged to be threatened.³¹³ Austin did not reframe the legal issue; it only presented competing characterizations of the facts. Loral's characterizations of the facts could be summarized as follows:

Loral had stringent delivery requirements under the First Government Contract and could not afford to pay liquidated damages for late deliveries or to lose the government's business. The First Government Contract was a substantial portion of Loral's business. Loral was concerned that its deliveries to the government would be late because Austin's delinquencies in delivering the gear parts had diminished Loral's "lead time." Austin, capitalizing on Loral's vulnerability, threatened to stop production unless

309. RESTATEMENT (FIRST) OF CONTRACTS § 492(b); see also WERTHEIMER, *supra* note 306, at 38-46 (discussing inquiry as assessing whether "proposal" was "wrongful").

310. See RESTATEMENT (FIRST) OF CONTRACTS § 492(b), *supra* note 309.

311. Notably, economic pressure is employed as a matter of business practice and is inherent in varying degrees in any negotiation or offer to contract. Therefore, the line between proper and improper economic pressure is obscure. Despite decades of scholarly efforts to distinguish between coercive "threats" and noncoercive "offers," no unifying theory has emerged. See Bar-Gill & Ben-Shahar, *supra* note 25, at 719-20 (citing Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD 440, 458 (Sidney Morgenbesser, et al. eds., 1969); Charles Fried, *CONTRACT AS PROMISE* 95-99 (1981); WERTHEIMER, *supra* note 306, at 204-06; Peter Westen, "Freedom" and "Coercion"—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 570-89 (1985)). See also John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 289 (1947) ("The history of generalization in this field offers no great encouragement for those who seek to summarize results in any single formula.").

312. Indeed, scholars have advocated for a shift in the focus of the general duress inquiry to A's incentives in making the threat. See Bar-Gill & Ben-Shahar, *supra* note 25 at 722; Mather, *supra* note 24, at 626-28 (1982). See also discussion *infra* in Part VI.

313. Loral Main Br., *supra* note 65, at 14.

Loral agreed to the price increases and other demands. Austin stopped production in late-July. Loral called around to the eight vendors known to it, but could not find a replacement supplier to provide the gear parts quickly enough to make the delivery dates under the First Government Contract. The gear parts were complex parts that few suppliers had the capability to manufacture. Thus, Loral had no choice but to agree to the price increases.

Austin's characterizations of the same facts could be summarized as follows:

Austin did not threaten Loral to stop production but, rather, exerted an ordinary amount of business pressure in attempt to renegotiate the deal. Austin attempted to negotiate a better position after losing a lot of money under the First Subcontract. The First Subcontract was a substantial portion of Austin's production volume. Austin did not stop production in late-July because of Loral's failure to acquiesce to the demands but, rather, production slowed down because it was the beginning of Austin's vacation period. Before Austin's plant shut down for a two-week vacation, Krauss was simply trying to minimize Austin's losses by seeing how much more Loral was willing to pay. Austin's gear parts were now worth more due to the escalation of the conflict in Vietnam and they were complex parts that few suppliers had the capability to manufacture. Loral, a large, publicly held company, could have easily found another small gear manufacturer who wanted to do business. Instead, it only called eight potential replacement vendors and did not discuss pricing.

Loral's characterization of the story placed it squarely within the frame of common law economic duress because it established that Austin's threat was wrongful and Loral had no choice but acquiescence. The Court of Appeals held as a matter of law that "a mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress."³¹⁴ But the opinion then went on to focus on the options available to Loral in response to Austin's threat, and it appears that Loral's lack of options was what, in turn, made Austin's threat wrongful.

Austin did not provide the Court of Appeals with a legal frame in which the market shifts and its substantial losses under the First Subcontract were doctrinally relevant. Focused solely on Loral's predicament in the face of the threat, the Court of Appeals did not factor in Austin's unfortunate circumstance. Austin's characterization of the story was sympathetic within the economic duress frame, but its story fit more

314. *Austin v. Loral*, 29 N.Y.2d 124, 130 (1971).

squarely within the language of a modification frame. Within the U.C.C. modification frame, the “defense” of common law duress would not have been available to Loral. Instead, Loral would only have been able to defeat the modification by demonstrating that Austin acted in bad faith, which would have at least made the market shifts and Austin’s losses relevant to the analysis.³¹⁵

B. U.C.C. § 2-209 CONTRACT MODIFICATION

Contract modification under the U.C.C. does not expressly address duress; instead, it looks to the good faith of the person requesting the modification.³¹⁶ The party requesting the modification is the threatening party in an alleged duress situation, and the article will continue to refer to this party as A. Unlike the economic duress doctrine, the good faith inquiry, which is defined below, looks to A’s reasons for making the threat (or, request for modification).

In adopting U.C.C. § 2-209, the drafters abandoned the traditional pre-existing duty rule, which required additional consideration to modify a contract.³¹⁷ U.C.C. § 2-209(1) provides that “an agreement modifying a contract within this Article needs no consideration to be binding.”³¹⁸ U.C.C. § 2-209(1) does not expressly address the exercise of economic duress in the modification of a contract and does not mention the problem of “overreaching by a contracting party.”³¹⁹ It does, however, provide in the comments that the request for the modification must meet the “test of good faith . . . and the extortion of a ‘modification’ without legitimate commercial reason is ineffective as a violation of the duty of good faith.”³²⁰ The drafters likely intended the broad requirement of “good faith” to fill the “gap” left by the omission of reference to duress.³²¹

315. See, e.g., *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 145 (6th Cir. 1983) (“The ability of a party to modify a contract which is subject to Article Two of the Uniform Commercial Code is broader than common law, primarily because the modification needs no consideration to be binding. . . . A party’s ability to modify an agreement is limited only by Article Two’s general obligation of good faith.”).

316. U.C.C. § 2-209 cmt. 2 (2003).

317. *Id.* § 2-209 cmt. 1 ; see also Hillman, *supra* note 306, at 851-55.

318. § 2-209(1).

319. Hillman, *supra* note 306, at 850.

320. § 2-209 cmt. 2; see also Mather, *supra* note 24, at 617; Hillman, *supra* note 306, at 856.

321. Hillman, *supra* note 306, at 849 (stating that drafters apparently thought that the good faith requirement would protect against overreaching in contract modification).

The comments to Section 2-209 provide that “the test of ‘good faith’ between merchants or as against merchants includes ‘observance of reasonable commercial standards of fair dealing in the trade,’” and reference Section 2-103(1)(b).³²² Under Section 2-103(1)(b), “good faith” for purposes of Article 2 is defined as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”³²³ The comments to U.C.C. Section 2-209 specifically provide that the “test of good faith” between merchants or as against merchants “may in some situations require an objectively demonstrable reason for seeking a modification.”³²⁴ Relevant to the reconstructed story of *Austin v. Loral*, the comments also state that “matters such as a market shift which makes performance come to involve a loss” may provide an “objectively demonstrable reason” for requesting the modification.³²⁵

Professor Henry Mather has distilled the components of the Section 2-103 definition of “good faith” down to two requirements: “(1) the party requesting the amendment must have a legitimate commercial reason for requesting the amendment; and (2) the amendment terms must be fair when viewed in the context of that legitimate commercial reason and in light of reasonable commercial standards of fair dealing.”³²⁶

Had Austin reframed the case as one of contract modification, it would have employed different language to describe what happened. Austin would not have been describing its action as a “threat” or “demand;” instead, it would have been using the more temperate language of the modification frame: “request.” Moreover, the market shifts and Austin’s significant losses would have been relevant to the doctrinal frame.³²⁷

322 § 2-209 cmt. 2. The definition of “merchant” is found in U.C.C. § 2-104(1).

Professor Robert Hillman pointed out that “good faith” in the context of a contract modification may also be defined by Section 1-201(20) of the Code, which is not limited to merchants. Hillman, *supra* note 306, at 856 (referencing pre-2003 revision Section 1-201(19)). Section 1-201(20) provides more generally that “good faith” means “honesty in fact and the observance of reasonable commercial standards of fair dealing.” U.C.C. § 1-201(20). Cf. pre-revision Section 1-201(19) requiring “honesty in fact in the conduct or transaction concerned.” U.C.C. § 1-201(19) (pre-2003 revision). Thus, the Code requires more of merchants—it requires honesty in fact and, additionally, commercial reasonableness.

323. § 2-103(b).

324. § 2-209 cmt. 2.

325. *Id.*

326. Mather, *supra* note 24, at 618.

327. Austin did mention peripherally New York General Obligations Law section 5-1103, which, akin to U.C.C. section 2-209, provides that a contract modification

Within the modification frame, Austin had a ready-made argument that the market increases were a commercially legitimate reason to request modification of the First Subcontract and, thus, made in good faith. While the U.C.C. does not address duress, at least the Court of Appeals would have been presented with a doctrinal frame in which to view Austin's significant losses. Indeed, the Appellate Division majority was inclined to view the facts in this light and, even absent the presentation of the doctrinal frame of contract modification, the Appellate Division majority mentioned that Austin appeared to be acting in "good faith."³²⁸

V. TOWARD A GOOD FAITH INQUIRY

The study of the modification and duress frames in the context of *Austin v. Loral* elucidates the recent debate concerning the doctrine of economic duress. The study suggests that the duress doctrine should be restated as a good faith inquiry in the contract modification context. Indeed, rather than reframing the legal issue, Loral could have argued for a more sensible duress doctrine that did not solely focus on B's lack of choices.

This part of the article assesses certain critiques of the choice prong of economic duress in the context of the reconstructed story of *Austin v. Loral*. It then addresses the modification and duress provisions under the Second Restatement of Contracts, which were not in existence at the time of *Austin v. Loral*. Finally, based upon the addition of the definition of "improper threat" under the Second Restatement and strong critiques of the choice prong of the doctrine, the article proposes that, in the context of contract modification, the duress inquiry solely ask whether A can be said to have acted in good faith in seeking the modification.

does not require consideration to be binding so long as the modification is in writing and signed by the party against whom it is sought to be enforced. Austin argued tangentially that section 5-1103 "is a recognition of the fact that there are many reasons, both business and moral, why contracts are amended in what might at first blush appear to be a one-sided fashion." Austin Br., *supra* note 50, at 25-26. Thus, Austin did not frame the case in a contract modification paradigm, but did attempt to use section 5-1103 to underscore the innocent reasons for its demands. Notably, section 5-1103 does not mention duress or the test of good faith. See N.Y. GEN. OBLIG. LAW § 5-1103 (McKinney 1963).

328. *Austin Instrument, Inc. v. Loral Corp.*, 316 N.Y.S.2d 528, 532 (App. Div. 1970).

A. A CRITIQUE OF THE CHOICE PRONG OF ECONOMIC DURESS

There are strong arguments that the traditional "free will" inquiry employed in the choice prong of economic duress does not describe our current understanding of the situation B faces.³²⁹ Scholars have argued that the idea that B lacks "free will" in the face of A's threat is an "artificial construct,"³³⁰ especially when A's proposal is not a physical threat and B is a volitional, corporate actor.

In response to A's threat, B is faced with a choice between two alternatives: either (1) surrender to the threat or (2) refuse to surrender to the threat and face the adverse consequences of that refusal.³³¹ B is "presented with unwanted, unpleasant alternatives, but is free to choose and act upon the least obnoxious of them."³³² In this connection, Professor Grace Giesel argues that the modern duress paradigm is not about the absence of B's "free will" but, rather, a situation of "constrained choice."³³³ Rather than engage in a metaphysical debate concerning the definition of "free will," and how that might differ from a situation of "constrained choice," this article will simply point out that the term "free will" does not seem to align with how we conceptualize the duress situation—it no longer befits modern sensibilities to use "free will" language to frame the inquiry.

The unsuitability of the "free will" frame is exemplified by Loral's struggle to articulate an argument that its "will" was "overborne." When Austin threatened to stop production of the gear parts, Loral essentially faced two choices. First, Loral could refuse to surrender to the threat and terminate the First Subcontract with Austin. This option was unattractive because, as Frohmann (Loral's Manager of Operations) testified, Loral

329. See WERTHEIMER, *supra* note 306, at 33-36; Giesel, *supra* note 14, at 445-46; P.S. Atiyah, *Economic Duress and the 'Overborne Will'*, 98 L. Q. REV. 197, 201 (1982) ("[T]he 'overborne will' theory should now be consigned to the historical scrapheap.").

330. See WERTHEIMER, *supra* note 306, at 33.

331. Giesel, *supra* note 14, at 446; Bar-Gill & Ben-Shahar, *supra* note 25, at 718.

332. Michael Philips, *Are Coerced Agreements Involuntary?*, 3 LAW & PHIL. 133, 134 (1984); see also Giesel, *supra* note 14, at 472 ("As long as the bargainer chooses between options by means of rational thought, the bargainer exercises free will."); see also WERTHEIMER, *supra* note 306, at 33 ("For even in the paradigm cases of duress, the party who acts under duress is engaged in a volitional and rational action."); Atiyah, *supra* note 328, at 201 ("A rule which declares that it only operates when a person has no choice, but then requires examination of the choices open to him, does not inspire confidence among rational beings.").

333. Giesel, *supra* note 14, at 448; see also John Dalzell, *Duress By Economic Pressure*, 20 N.C. L. REV. 237, 238 (1942); Philips, *supra* note 331, at 134 ("[B] is a victim of imposed conditions of choice, but still he may choose.").

would not have enough lead time to manufacture the radar sets. Second, Loral could surrender to Austin's threat, pay the price increases and agree to award all forty parts under the Second Subcontract. This option was also unattractive to Loral because it meant paying more than it originally agreed for the same parts under the First Subcontract, and awarding Austin the Second Subcontract for items on which Austin was not the lowest bidder.

Frohmann also mentioned a hybrid of the two options, which was to temporarily acquiesce to the threat and continue the First Subcontract with Austin while simultaneously entering into another subcontract for the parts with another supplier.³³⁴ This way, Loral would have the gear parts (though, for the higher price) during the twelve to fourteen weeks it would take for the new supplier to begin making deliveries. This option was also unsatisfactory because it would leave Loral paying for and receiving a surplus of gear parts.³³⁵

Faced with these "unsatisfactory" choices, Loral made a measured decision to agree to the price increases and Austin's other demands. In its brief to the New York Court of Appeals, Loral argued:

What [Loral] did, as "a matter of business judgment" was to decide not to commit economic suicide and nothing more. Can this court really believe that [Loral's] submission to [Austin's] coercive demands was made in the exercise of its free will; any more than a hold-up victim with a gun to his head can be said to part with his wallet voluntarily, simply because he recognizes the utter futility of further protestations.³³⁶

Even after characterizing its acquiescence as a matter of business judgment, Loral strained to describe the situation as an absence of its "free will."³³⁷

334. Record, *supra* note 51, at 483-84 (Frohmann Tr.).

335. *Id.*

336. Loral Main Br., *supra* note 65, at 44.

337. Loral argued nonsensically that other cases had recognized "[t]he myriad manifestations of the 'voluntary' nature of involuntary payments." *Id.* (citing *Kilpatrick v. Germania Life Ins. Co.*, 153 N.Y. 163 (1897) and *Adams v. Irving Nat'l Bank*, 116 N.Y. 608 (1889)). This argument is puzzling because Loral was attempting to force its version of the facts into the confines of an unsuitable "free will" frame. While this article does not address the metaphysical debate over what may or may not be an exercise of "free will," it is worth noting that Professor Giesel questions whether a corporation can be said to have "free will." Giesel, *supra* note 14, at 473 ("A free will test is particularly useless, and particularly ridiculous, when the free will in question is that of an entity such as a corporation.").

In place of the "free will" terminology, Professor Giesel advocates for the Restatement (Second) of Contracts § 175(1) inquiry. The Second Restatement asks whether B had "no reasonable alternative" to surrendering to A's threat.³³⁸ The Second Restatement adopted this "no reasonable alternative" inquiry in substitution of the "free will" analysis used in the First Restatement because of the "vagueness and impracticality"³³⁹ of the "free will" approach.

Austin v. Loral exemplifies why the "no reasonable alternative" test better aligns with how we conceptualize the issue of duress. Because Loral chose acquiescence to Austin's threat as a matter of business judgment, the question is more aptly whether Loral had any reasonable alternative to this choice. Indeed, although phrased as a "free will" inquiry, it appears that the Appellate Division and New York Court of Appeals actually framed the question as whether Loral had any reasonable alternative to acquiescence. Although the Court of Appeals nominally held that Austin "deprived Loral of its free will,"³⁴⁰ the court supported this conclusion with the determination that "Loral actually had no choice . . . except to take the gears at the 'coerced' price and then sue to get the excess back."³⁴¹ Presumably, the Court of Appeals did not mean that Loral had "no choice" in a literal sense.³⁴²

Noticeably, however, "it does not follow" that a "no reasonable alternative" inquiry is "easily or always correctly applied."³⁴³ For example, in *Austin v. Loral*, the courts were closely divided concerning whether Loral made reasonable efforts to obtain a replacement vendor to supply the gear parts. There was discernable disagreement among the judges whether Loral's eight phone calls was sufficient effort to procure a replacement vendor, which has direct bearing on whether Loral had any alternatives to

338. Giesel, *supra* note 14, at 448.

339. RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (1981); *see also* Giesel, *supra* note 14, at 459-60.

340. *Austin v. Loral*, 29 N.Y.2d 124, 131 (1971).

341. *Id.* at 133.

342. *See* WERTHEIMER, *supra* note 306, at 35. Wertheimer notes:

Now it is obvious that in *some* sense, Loral had a choice—it could have defaulted under the Navy contract and sued Austin for breach of contract. But the court understood that "no choice" should not be taken literally. It did not mean that it was logically or psychologically impossible for Loral to have done otherwise or that Loral had been driven to undertake some irrational action. It meant that Loral had had "no *reasonable* choice" or "no *acceptable* alternative."

(emphasis in original) (footnotes in original omitted).

343. *Id.* at 37.

acquiescence. In light of the closeness of this inquiry alone, the difficulty in applying the “no reasonable alternative” test is apparent.

Most importantly, however, it seems that the traditional common law focus on B’s options is itself misguided. It has been suggested that this inquiry is redundant because, if B had another, reasonable option, B would not have surrendered to A’s threat and would have simply sued for breach of contract.³⁴⁴ The very fact that B has surrendered suggests that, at least from B’s perspective, it had no reasonable alternative to acquiescence. This was certainly the case from Loral’s vantage point.

Thus, although the “no reasonable alternative” test is perhaps a better articulation of how we conceptualize the choice prong of the duress doctrine, the choice prong is misguided because it is redundant of B’s efforts in claiming economic duress.

B. THE SECOND RESTATEMENT APPROACH TO MODIFICATION AND DURESS

The Second Restatement of Contracts had not yet been adopted at the time of *Austin v. Loral*.³⁴⁵ Nevertheless, it is important to note the Second Restatement’s changes to the definition of duress and its treatment of contract modification.

Section 175 of the Second Restatement defines economic duress, and essentially sets forth the proposal and choice prongs already outlined, with some language changes: (1) A makes an “improper threat” that (2) leaves B with “no reasonable alternative” and, thus, induces B to surrender to A’s threat.³⁴⁶ Unlike the First Restatement, Section 176 of the Second Restatement sets out to define an “improper threat.”³⁴⁷ Section 176(1)(d)

344. Bar-Gill and Ben-Shahar suggest that the requirements that B had no reasonable alternative to surrendering to the threat and that B had no adequate remedy are redundant to the extent that B would not have acquiesced if a reasonable alternative or remedy existed. See Oren Bar-Gill & Omri Ben-Shahar, *The Law of Duress and the Economics of Credible Threats*, 33 J. LEGAL STUD. 391, 393 (2004) (“Duress jurisprudence, which focuses on the availability of ‘reasonable alternatives’ and on the adequacy of remedies, is misguided if only because it is redundant: if the threatened party had adequate alternatives or fully compensatory remedies, she would not have surrendered to the threat.”).

345. The Second Restatement of Contracts was “adopted and promulgated” by the American Law Institute on May 17th, 1979. See RESTATEMENT (SECOND) OF CONTRACTS VII (1981).

346. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) provides:

If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

347. RESTATEMENT (SECOND) OF CONTRACTS § 176 provides that:

identifies "a breach of the duty of good faith and fair dealing under a contract" as one example.³⁴⁸ In defining a breach of the duty of good faith and fair dealing under Section 176(1)(d), the Restatement comments quote verbatim much of the good faith analysis in the comments to U.C.C. section 2-209. The comments also refer to the contract modification paradigm under section 89.

Second Restatement section 89 addresses modifications of executory contracts and, like the U.C.C., does not require consideration for the modification to be enforceable.³⁴⁹ Section 89(a) provides that "[a] promise modifying a duty under a contract not fully performed on either side is binding if . . . the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made."³⁵⁰

Like the U.C.C., Restatement section 89 does not expressly mention duress, but the comments state that "[t]he limitation to a modification which is 'fair and equitable' goes beyond absence of coercion and requires an objectively demonstrable reason for seeking a modification."³⁵¹ As Professor Mather explains, section 89(a) essentially distills to two requirements for a modification to be enforceable: "(1) the reason for the amendment must relate to circumstances not anticipated when the original contract was formed; and (2) the amendment must be fair and equitable."³⁵² Professor Mather additionally notes that it appears that the modification must be fair in particular relation to the circumstances that justify it.³⁵³

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- (1) A threat is improper if
 - (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
 - (b) what is threatened is a criminal prosecution,
 - (c) what is threatened is the use of civil process and the threat is made in bad faith, or
 - (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.
 - (2) A threat is improper if the resulting exchange is not on fair terms, and
 - (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
 - (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
 - (c) what is threatened is otherwise a use of power for illegitimate ends.

348. RESTATEMENT (SECOND) OF CONTRACTS § 176(1)(d) (1981).

349. RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1981).

350. *Id.*

351. Moreover, this provision has been interpreted as prohibiting modifications obtained by duress. See, e.g., *Angel v. Murray*, 322 A.2d 630, 636 (1974).

352. Mather, *supra* note 24, at 619.

353. *Id.* at 620.

Thus, although Restatement section 89(a) does not use the U.C.C.'s term "good faith," the requirements of the comments appear to collapse into to the same rough definitional components.³⁵⁴

Thus, the section 176 comments define an "improper threat" for duress purposes by incorporating a good faith analysis from U.C.C. section 2-209 and referencing the modification inquiry under Restatement section 89. Accordingly, in the context of a contract modification, the economic duress inquiry under the Second Restatement is essentially: (1) the choice prong of common law duress and (2) a good faith inquiry. Given the redundancy of the choice prong, it seems that, to determine whether duress induced B to modify a contract, the inquiry should solely be whether A could be said to have made the threat in good faith.³⁵⁵

C. APPLICATION OF A GOOD FAITH INQUIRY

A good faith analysis would abandon the inquiry into B's choices, and solely look to whether A's threat (or request for modification) was made in good faith.³⁵⁶ A good faith inquiry remains broad and flexible.³⁵⁷ It also

354. *Id.* ("[R]eformulated, the Restatement section 89(a) bears striking resemblance to that derived from section 2-209(1) of the UCC."). Although Section 89 does not use the U.C.C. term "good faith," it appears to intend to address many of the same circumstances—such as, for example, market shifts—and, therefore, the two provisions likely overlap substantially if not entirely. See U.C.C. § 2-209 cmt. 1 (2003); RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b, Illus. 4 (1981).

355. Indeed, the prevailing theory of the proposal prong is that a threat to breach a contract is not itself improper for the purposes of duress. See RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. e (1981); see also E. ALLEN FARNSWORTH, CONTRACTS § 4.17 (2d ed. 1990); JOHN E. MURRAY, CONTRACTS § 93 (3d ed. 1990). Professor Jason Scott Johnston notes that, "since a threat to breach is not per se improper, it can only be the circumstances surrounding the threat that make it improper." Johnston, *supra* note 15, at 384. Because the duress inquiry looks to the circumstances surrounding the threat, he argues that the duress inquiry collapses into one of good faith. *Id.* Under the Second Restatement, the question does appear to partially collapse into a good faith inquiry; however, under the present formulation, it still retains an assessment of B's choices.

356. Duress is usually thought to be an affirmative defense. To the extent that a defendant raises duress as a defense, the burden would be on that defendant to demonstrate that it acted in *good faith* in seeking the modification. Moreover, in the situation where duress is used offensively – as a cause of action rather than a defense – the plaintiff would have the burden to establish that the defendant acted in *bad faith* in seeking the modification. In this context, there is no need for the choice prong to remain part of the inquiry solely for the purpose of a burden-shifting paradigm. In other words, the plaintiff need not first show that it had no reasonable alternative, with the burden of proof then shifting to the defendant to show the modification request was in good faith. Instead, the

provides a ready-made frame that takes into account A's reasons for making the threat. Indeed, as much as Austin failed to frame the issue in terms of modification, because the duress inquiry did not look to Austin's circumstances, the duress doctrine failed Austin.

In the contract modification context, good faith can be said to mean that: (1) A had a commercially legitimate reason for requesting the modification and (2) the resulting modification is fair when viewed in relation to that legitimate commercial reason.³⁵⁸ Though the good faith inquiry has been criticized as too broad, it has also been commended for its flexibility.³⁵⁹ Moreover, the good faith inquiry can be made less vague or overbroad by referring to suggested factors to be used in the determination of A's good faith.

One such suggested factor is considering (from A's standpoint) A's economic incentives in making the threat.³⁶⁰ For example, in a few recent articles,³⁶¹ Professors Oren Bar-Gill and Omri Ben-Shahar propose a "credible coercion" doctrine that focuses on A's economic incentives in

initial burden should be on the plaintiff to show that the defendant's request for a modification was in bad faith.

357. Hillman, *supra* note 306, at 877-78.

358. It should additionally be noted that, in 1979, Professor Hillman argued that the courts addressing contract modifications under the Code "have developed no clear definition of good faith." Hillman, *supra* note 306, at 862. However, the courts have since set "basic parameters." See generally Johnston, *supra* note 15, at 378-80 (discussing *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983) and *T&S Brass & Bronze Works, Inc. v. Pic-Air, Inc.*, 790 F.2d 1098 (4th Cir. 1986)). The case law shows that "courts have scrutinized the record to find evidence that the modification was not an extortionate attempt to gain a windfall, but rather was motivated by a 'precipitous market change,' such as seller cost increase, the discovery that costs were higher than anticipated, or a fall in demand below projected levels." Johnston, *supra* note 15, at 380. Conversely, "[c]ourts have found bad faith modification when the evidence has indicated that the reasons advanced for the modification request were a mere pretext." *Id.* Thus, Professor Hillman's concern that the Code does not provide enough guidance in defining "good faith" appears allayed by intervening judicial opinions.

359. Hillman, *supra* note 306, at 877-78. Professor Hillman noted that the broadness of the notion of good faith was both a strength and weakness of the Code. *Id.* The flexibility allows for an individualized assessment of the various types of circumstances that might arise. *Id.* The broadness of this approach does, however, allow for the potential of decisions based on individual values and beliefs, with absence of uniformity among them. *Id.*

360. See Bar-Gill & Ben-Shahar, *supra* note 25; Mather, *supra* note 24.

361. Bar-Gill & Ben-Shahar, *Credible Coercion*, *supra* note 25; Bar-Gill & Ben-Shahar, *The Law of Duress and the Economics of Credible Threats*, *supra* note 343; see also Oren Bar-Gill & Omri Ben-Shahar, *Threatening an "Irrational" Breach of Contract*, 11 SUP. CT. ECON. REV. 143 (2004).

making the threat without reference to whether A coerced B's assent.³⁶² Under this theory, a threat is credible if A intends to carry it out—in other words, a threat is credible when it “would be in the interest of the threatening party to bring about the threatened outcome.”³⁶³ A credible threat is to be distinguished from a bluff, which is a threat that A does not intend to carry out.³⁶⁴

Stated in economic terms, A's threat is credible if A's payoff from carrying out the threat exceeds A's payoff from not carrying it out.³⁶⁵ This doctrine of coercion looks to the credibility of A's threat as “the single decisive factor” whether B is entitled to a remedy based upon duress.³⁶⁶ The analysis solely considers the credibility of A's threat in economic terms, and does not purport to determine whether A was overreaching or acting opportunistically.³⁶⁷ If A's threat is credible, the agreement that results from the threat should be enforced.³⁶⁸

Though seemingly counterintuitive, this theory is based upon the premise that, when A's threat is credible, B is economically better off with an enforceable contract.³⁶⁹ B is also better off because, if A thinks its threat will make the resulting contract voidable at B's option, A might not make the threat at all.³⁷⁰ Ironically, this would leave B with fewer options than if the resulting deal would be enforceable.³⁷¹

362. Bar-Gill & Ben-Shahar, *supra* note 25, at 721.

363. *Id.* at 718.

364. *Id.* at 721.

365. *Id.* at 722. Under this economic analysis, the threat is essentially credible if A's threatened breach of contract would be efficient. See Joseph M. Perillo, CALAMARI AND PERILLO ON CONTRACTS, at 619-620 (5th ed. 2003) (discussing efficient breach theory).

366. *Id.* at 721.

367. *Id.* at 742 (“[C]redible coercion criterion does not purport to answer whether an act is coercive or whether it was morally wrong. It is wholly possible that an act of coercion could be both credible and morally wrong.”).

368. *Id.* at 720.

369. *Id.* at 718.

370. *Id.* at 719. For example, if Austin thought the modification resulting from its threat would not be enforceable under a duress theory, Austin might not make the threat at all. Instead of making the threat, Austin might simply breach. This would leave Loral with fewer options than if Loral believed the resulting contract would be enforceable.

371. *Id.*

Application of the credible coercion analysis to *Austin v. Loral* might lead to a different outcome than the Court of Appeals decision.³⁷² It appears that Austin's threat to stop delivery of the precision gear parts was credible in the sense defined by Bar-Gill and Ben-Shahar. The cost of Austin's labor and materials had increased and the market demand for its precision gear parts had risen substantially due the conflict in Vietnam. Between Austin's price quote in response to Loral's first RFQ and the time of Austin's threat, the market prices for each of Austin's gear parts had increased between 30% and 150%. At the time of Austin's threat, it had already lost over \$70,000 on the First Subcontract, and this subcontract was a substantial portion of Austin's production volume. Given these exogenous³⁷³ market changes, it was likely in Austin's economic interest to stop delivery of the gear parts altogether.

Unless Austin could secure more money for the gear parts, it was likely better off breaching the First Subcontract than continuing to perform at a significant loss. Assuming (as the testimony shows) that the price increases Austin demanded under the First Subcontract reflected increases in the market value of the gear parts, Loral's replacement costs for the undelivered gears would likely have been around \$19,264 (the amount Austin demanded in prospective price increases).³⁷⁴ Loral did not argue that it could not have found a replacement vendor to supply the gear parts; rather, Loral testified that it could not find a vendor to supply the gear parts in time for Loral to meet the delivery dates under the First Government Contract. In this connection, Loral's replacement costs (the difference between the prices under the First Subcontract and the prices under a contract with a replacement vendor) would likely reflect the market increase of roughly \$19,000.

However, the credibility of Austin's threat is not entirely certain because it is not clear whether Austin's breach would have made it liable for more than Loral's replacement costs. If Loral could not obtain a

372. *Id.* at 755 (discussing opposite outcome in *Austin v. Loral* under credible coercion analysis, but noting that it is not possible to determine on the facts provided in the appellate decisions).

373. Bar-Gill and Ben-Shahar describe circumstances such as market shifts, which A had no hand in creating, as "exogenously credible." In this situation, credibility is the inadvertent result of circumstances beyond A's control, not the result of A's deliberate choice. *Id.* at 732.

374. This figure does not include the amount Austin demanded in retroactive increases because these increases were for parts already delivered and, therefore, Loral presumably did not need these parts from substitute vendor.

replacement vendor to supply the gear parts in time to make its deliveries under the First Government Contract, Loral would likely suffer the consequences of the default and liquidated damages clauses. Austin would be liable to Loral for these losses only if they were foreseeable consequences of Austin's breach of the First Subcontract.³⁷⁵

It is not clear from the record whether Austin was aware of the liquidated damages and default provisions under the First Government Contract when it entered into the First Subcontract with Loral. The purchase orders that constituted the First Subcontract did not mention these provisions of the First Government Contract. Loral attempted to establish that such provisions were common to government contracts and Austin, as a government subcontractor, was aware of the provisions generally.³⁷⁶ Yet, it is not certain from the testimony whether Austin was actually aware of the terms of the First Government Contract. The credibility of Austin's threat appears to hinge upon whether it was aware of the liquidated damages and default provisions.

If Austin was not aware of these provisions, and Loral's losses under the liquidated damages and default provisions were not otherwise a foreseeable consequence of breach, Austin's threat is more likely credible. In this scenario, Austin's breach could cause it to owe Loral roughly \$19,000 in Loral's replacement costs. But, because the market had changed substantially, Austin could make up this difference by simply entering into a new contract to supply gear parts to another manufacturer at the then-market rates.³⁷⁷

375. "[D]amages are recoverable only for those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made." 11-56 CORBIN ON CONTRACTS § 1007 (citing *Hadley v. Baxendale*, 9 Exch. 341 (1854) ("Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally; i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach."))).

376. Record, *supra* note 51, at 32-39 (Loral's attorney attempted to establish that Austin was generally aware of the ASPR regulations common to all government contracts).

377. Notably, however, this analysis assigns no economic value to Austin's continued business relationship with Loral. In other words, this analysis does not take into account the disruption that Austin's breach would cause in ongoing relations with Loral but, rather, assumes that Austin is "better off" breaching the existing contract than absorbing its present losses in hopes of future, profitable contracts flowing from a continued business relationship

However, if Austin was aware of the provisions, and Loral's losses under these provisions were a foreseeable consequence of breach at the time the parties entered into the First Subcontract, Austin could be liable to Loral for extensive damages as a result of a breach of the subcontract. In this scenario, it is less likely that Austin's threat would be credible, because its payoff from walking away from the First Subcontract must also take into account compensation for Loral's losses under the liquidated damages and default provisions. Indeed, Ben-Shahar and Bar-Gill's analysis notes that an increase in liability for breach of contract diminishes the credibility of the threat.³⁷⁸

In sum, under Bar-Gill and Ben-Shahar's proposed analysis, Austin's threat appears to have been credible;³⁷⁹ however, this determination cannot be certain without more information pertaining to the foreseeability to Austin of Loral's potential liability for delinquency under the First Government Contract. Under this analysis, if Austin's threat was credible, the resulting price increases under the First Subcontract would be enforced.³⁸⁰

with Loral. See Perillo, *supra* note 365, at 620 (noting disruption of ongoing business relations when a party breaches a contract).

378. Bar-Gill & Ben-Shahar, *supra* note 25, at 735.

379. In light of the existing doctrine of duress, Austin did not build a case that its threat was credible. Austin's first line of defense was that it did not make any threat at all but, rather, simply sought to renegotiate the First Subcontract. Even assuming Austin made the threat, Austin essentially argued that it was not a threat it ever intended to carry out. Krauss testified:

I could never stop production of anything, because there are all engineering items made from a piece of steel to a specification of a customer, which we are unable to sell, even for the scrap value of the material, which is, in some cases, even 2 per cent or 5 per cent of the cost of the whole item, and it cannot be used for anything but for that customer and that particular job.

Record, *supra* note 51, at 554 (Krauss Tr.). Of course, under a doctrinal shift to a credibility analysis, Austin would want to build a case arguing just the opposite: Austin's material and labor costs increased and, if Loral wouldn't pay more for the gear parts, it made economic sense for Austin to carry out this threat.

380. One aspect of this result that does not seem equitable is the ripple affect on Loral's contract with the Navy. While it might make sense to enforce a modification that would otherwise have resulted in Austin's efficient breach of the original subcontract with Loral, the result would leave Loral in a precarious situation with the Navy. Unless the Navy was willing to modify the prime contracts with Loral, Loral would suffer losses due to the same market shifts that precipitated Austin's requests for modifications of the subcontracts. If the Navy would not agree to modify the prime contracts (or Loral was just not in a position to make such requests), Loral would suffer losses due to the market shift. However, if the Navy agreed to modify the contracts with Loral, the market shifts (and Austin's losses) would essentially be passed on to the Navy. In this connection, it is worth noting that there

Notably, the credibility analysis measures whether B is better off from a post-threat baseline—that is, whether B is better off with an enforceable deal as measured after A's threat is made.³⁸¹ When A's threat is credible, it makes sense to measure B's position from a post-threat baseline because A will likely carry out the threat whether or not B surrenders. This premise may be exemplified by the reconstructed story of *Austin v. Loral*. Measuring Loral's position from a post-threat baseline, Loral is better off with an enforceable, modified First Subcontract. Measuring from a post-threat baseline makes sense because, if Austin's threat was credible, Austin was going to breach the First Subcontract anyway. If Austin was going to breach the First Subcontract whether or not Loral acceded to the threats to stop production, Loral's pre-threat expectation of the lower prices under the original First Subcontract had become academic. Actually, both parties would end up in a better position with an enforceable modification because Austin would counteract its losses under the First Subcontract and Loral would be able to deliver the parts to the government on time. Moreover, enforcing a deal that results from a credible threat prevents the situation where Austin does not bother to make the threat but, rather, simply breaches because it thinks that the resulting modification will not be enforceable under the duress doctrine.

Although Ben-Shahar and Bar-Gill present credibility as the sole factor to determine whether to enforce a coercive contract, credibility is potentially one suggested factor in a good faith analysis, especially to the extent a good faith analysis assesses whether A had a commercially legitimate reason for the modification request.³⁸² The other piece of good faith—whether the resulting modification is fair when viewed in relation to the legitimate commercial reason—is not addressed by a straight economic inquiry.³⁸³

Perhaps the fairness of the modification can be assessed in terms of A's payoff for walking away from the original deal—that is, the fairness of the modification would be measured in relation to the amount that makes the

was not any indication in the record whether the Navy required a bond to ensure against Loral's failure to perform its obligations under the First and Second Government Contracts.

381. Bar-Gill & Ben-Shahar, *supra* note 25, at 743-44.

382. Indeed, the limitations of a straight economic analysis are, perhaps, best exemplified by the cognitive framing theories, which challenge the assumption that humans are rational decision-makers. See, Part IV, *infra*.

383. See Mather, *supra* note 24, at 648 ("Although economic analysis indicates that certain allocations are efficient, it cannot determine which of these efficient allocations are equitable.").

modification, rather than a breach of the original contract, worthwhile for A.³⁸⁴ In other words, the request for a \$1,000 price modification based upon a \$10 market increase would not likely be fair in relation to the market shift that justifies the request for the modification.³⁸⁵

This fairness principal is perhaps exemplified by the Second Subcontract in *Austin v. Loral*. Austin threatened to stop production unless Loral acquiesced to three demands. Austin's first two demands were for retroactive and prospective price increases on the First Subcontract. The third demand, however, was for an award of all forty gear parts under the Second Subcontract even though Austin was the lowest bidder on only twenty-three of those parts. The courts mentioned Austin's third demand for all forty parts in a Second Subcontract, but did not focus on this demand because Loral only claimed coercion in relation to the First Subcontract.³⁸⁶ It appears, however, that, under the traditional criteria, Loral had a viable claim for coercion as to the Second Subcontract as well—Loral only agreed to award Austin all forty parts under the Second Subcontract based on the same economic pressures that induced Loral to agree to price increases under the First Subcontract.

Had Loral challenged the Second Subcontract on the basis of duress, the enforceability of the agreement is not certain under a good faith analysis. It would seem that Loral would have a pretty strong argument that the Second Subcontract was not fair in relation to the market changes that justified the price increases under the First Subcontract because it was an entirely new contract. In this connection, the comments to Second Restatement section 176 state that A's threat of non-performance of an existing contract is "ordinarily improper" if it is used to induce B to enter into an entirely separate contract.³⁸⁷ At the same time, Austin might argue

384. Professor Mather notes that an economic analysis does not address the extent to which a modification should be enforced. Mather, *supra* note 24, at 642. Mather argues that the modification should be enforced only to the extent of the "Inducement Term." *Id.* The Inducement Term is the extent to which A is better off by breaching the contract than performing it. *Id.* at 644.

385. Although recognizing the arguments that the doctrine of duress should not look to the substantive fairness of the deal, the substance of the deal should be evaluated where it is relevant to determining good faith. See Giesel, *supra* note 14, at 483-87 (arguing that duress inquiry should not look to substance of the deal); but see RESTATEMENT (SECOND) OF CONTRACTS § 176(2), *supra* note 346 (focusing on the fairness of the exchange to determine whether the threat was improper); see also Mather, *supra* note 24, at 648.

386. See *supra* note 170 and accompanying text.

387. RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. e (1981).

that the Second Subcontract was another way to counteract the \$70,000 in losses that justified its request to modify the First Subcontract.

These factors are only suggestions and, undoubtedly, there are other factors that could be incorporated into a good faith analysis.

In sum, in the context of contract modification, it appears that the duress inquiry is most aptly reduced to whether A can be said to have made the threat in good faith. While it is not certain how a good faith analysis would play out in a wider array of cases, applying a good faith analysis in the context of *Austin v. Loral* appears to more fairly balance the parties' interests.

VI. CONCLUSION

Although the New York Court of Appeals majority held that *Austin v. Loral* was a "classic case" of economic duress, the close division of judicial opinion suggested a richer story, that perhaps the case was not so clear-cut.³⁸⁸ In reconstructing the story, it emerges that, due to the escalation of the conflict in Vietnam, the market demand for Loral's radar sets had increased and, in turn, so had the demand for Austin's gear part components. At the same time, Austin's material and labor costs had risen, and Austin was losing a substantial sum of money on the First Subcontract.

Austin mentioned the market shifts and, in doing so, characterized the undisputed events in a sympathetic way, but it did not reframe the legal issue to make this characterization doctrinally relevant. Had Austin reframed the issue as one of contract modification, it could have provided the Court of Appeals with a frame in which the market changes were doctrinally relevant and significant. Indeed, this might have changed the outcome of the case. From the time it penned the July 22, 1966 letter, Loral framed the question as one of economic duress, and Austin never attempted to reframe the dispute.

Alternatively, Austin could have argued for a more sensible common law doctrine of economic duress—one that did not solely focus on Loral's

388. "Psychological theory . . . suggest[s] that most people are inclined to avoid ambiguity by reducing conflicts in their lives to one clearly right position and one clearly wrong position. Interestingly, judicial opinions reflect this tendency, so often suggesting that the outcome of the case is clear-cut, without doubt or moral complexity." Little, *supra* note 280, at 379-80.

lack of choices. Because the court did not factor in the market increases but, rather, focused on Loral's lack of alternatives, the duress inquiry, by default, treated Loral's interests as paramount.³⁸⁹

In the contract modification context, the Second Restatement appears to be heading away from the traditional common law doctrine and toward a good faith inquiry. The combination of Restatement Sections 89, 175 and 176 distills to (1) an inquiry into B's choices and (2) whether A's threat was made in good faith. Because the inquiry into B's choices is redundant with the lawsuit, it appears that the inquiry is most appropriately whether A can be said to have made the threat in good faith. This good faith inquiry looks to whether A had a legitimate commercial reason for requesting the modification and whether the resulting modification is fair in relation to that reason. This inquiry can incorporate suggested factors, such as A's economic incentives in making the threat. In the context of *Austin v. Loral*, it appears that a good faith inquiry would have more fairly assessed the parties' interests in light of the change in circumstances.

Further research should reveal whether the case law has treated the common law doctrine of economic duress as subsumed by a good faith inquiry in the modification context. Where a request for a contract modification was made in the context of a market shift that comes to involve a loss, cases under Article Two of the U.C.C. have looked to the good faith of the party requesting the modification.³⁹⁰ Certainly, requests for contract modifications do not necessarily involve goods and, therefore, may not directly implicate the U.C.C. modification analysis. In one recent case with some factual similarities to *Austin v. Loral*, a court applied common law principles to hold that a request for a contract modification was coercive, and determined the wrongfulness of that request for the modification based on whether it was made in good faith.³⁹¹ This was due,

389. In the modification context, determining whether the doctrine of duress is applicable becomes less of line-drawing problem and more of a determination "which of the two parties' interests to treat as paramount." CHIRELSTEIN, *supra* note 15, at 69-70.

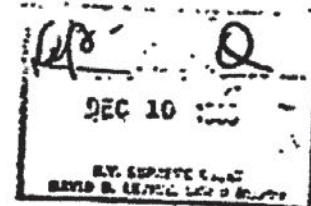
390. See, e.g., *Roth Steel*, 705 F.2d at 145; *American Exploration Co. v. Columbia Gas Transmission Corp.*, 779 F.2d 310, 313-314 (6th Cir. 1985).

391. See *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320 (Fed. Cir. 2003). *Rumsfeld* also involved a military contract – in that case, the contractor agreed to provide the government with ready-to-eat meals. *Id.* at 1323. There, the contractor claimed that it agreed to a modification of the contract under duress because the government threatened to withhold progress payments unless the contractor agreed to the modification. *Id.* at 1331. The court held that the request for modification was coercive because the threat to withhold payments was not made in good faith, but, rather, "for the sole purpose of pressuring the contractor into signing [the modification]." *Id.*

at least in part, to the Second Restatement, which already appears to collapse the duress doctrine into a good faith inquiry in the modification context. Moreover, further research should determine whether a good faith inquiry would more fairly assess the parties' interests in a wider array of circumstances.³⁹² A close analysis of *Austin v. Loral* suggests that a good faith inquiry would better balance the parties' interests by taking into account the reasons for A's (or, Austin's) threat.

392. Take for example the popular pre-existing duty case of *Schwartzreich v. Bauman-Basch, Inc.*, 231 NY 196 (1921). There, Schwartzreich, a coat designer, was paid \$90 a week by his employer. When Schwartzreich received a job offer from another employer offering to pay him \$110 a week, Schwartzreich told his boss he would breach his employment contract and terminate his employment unless he received a raise. The boss agreed to pay Schwartzreich \$100 a week to stay. When the boss later fired Schwartzreich, Schwartzreich sued for breach of their employment agreement. The employer's failed defense was the pre-existing duty rule: he argued that there was no consideration to bind the new employment agreement because Schwartzreich was already bound to perform the same work under the existing employment agreement. Imagine, however, that the employer instead asserted the defense of duress. The employer would then have to show that Schwartzreich's request for modification was in bad faith. However, it seems that Schwartzreich had a legitimate commercial reason for making the request: he could get more money elsewhere for his coat designing. Further, the resulting \$10 a week wage increase is certainly fair in relation to the \$110 Schwartzreich could have received from another employer. Indeed, a good faith inquiry appears to fairly serves both parties, and they both appear to be "better off" with an enforceable, modified employment agreement.

Appendix 1



July 22, 1966

Austin Instrument, Inc.
123 Eileen Way
Syosset, Long Island, New York

Attention: Mr. Edmund Krauss, President

Gentlemen:

We refer to Purchase Orders for subcontracts between your Company and Loral, and their related supplements. These contracts call for fabrication and delivery of various items and components identified by Part Numbers at contract prices, all as shown below under appropriate headings.

P.O. #	Item #	Part Number	Qty. on Order	Unit Price	Qty. Delivered to Date
33021	1	6776-125	1880	.97	1260
33023	1	6777-101	1393	2.89	1037
31934	1	6776-015	940	3.45	247
"	2	208-32-0901	940	3.60	212
31933	1	6776-039	940	4.10	294
"	2	6776-125	1880	1.18	694
31902	1	6776-026	940	3.95	203
"	2	6775-016	1860	1.80	808
31901	1	6771-110	1045	1.90	901
"	2	6776-112	940	1.95	293
"	3	6775-113	940	1.97	Our Records show complete
"	4	6771-112	1045	3.15	403
31245	1	6776-008	940	2.50	215
"	2	6775-010	940	2.60	214
"	3	6776-011	940	2.60	203
"	4	6776-012	940	2.55	221
31263	1	6776-026	940	2.97	260
"	2	6775-142	940	.92	234
"	3	6776-122	940	2.25	501
"	4	6776-119	940	1.03	478

Appendix 1, continued

Austin Instrument, Inc.
Attn: Mr. Edmund Kraus, President

July 22, 1966
Page 2

As these Purchase Orders on their face pages show, and as you know independently from our numerous conferences, the items or components consisting of gears, gear assemblies and machine parts are vital and indispensable for the fabrication and manufacture by us of Radar Dopplers AN/APN-153 for the United States Government under Prime Contract No. N600(19)64251 dated Ju', 15, 1965, involving millions of dollars.

It is common knowledge that these Radar Dopplers are used in military aircraft, are in very short supply and critical to the current military operations in which this Country is presently engaged. Nevertheless, work on the subcontract parts and components an order with you has been stopped.

Your reason, to state your position as conveyed to us by telephone and in conferences, is that these Purchase Orders or Fixed-Price Subcontracts were placed and accepted by you some 8 months ago; that your costs of manufacture have risen since then and that even though you have made partial deliveries under the subcontracts and received payment for them, and even though the balance of the subcontract items or components are partially fabricated in your shop to various degrees of completion, you have notified us that further work on these items or components will leave you with a loss at the subcontract prices agreed upon, which you refuse to incur.

You have, therefore, advised us clearly and unqualifiedly, as mentioned, that further work on these subcontracts has been stopped and that such work will not be resumed unless we agree to an increase in the subcontract prices by paying you an additional 10% on the parts and components already delivered and paid for, and also increase the unit prices on all undelivered components per schedule below:

<u>Part No.</u>	<u>Present Price</u>	<u>New Price</u>
6776-126	.97	1.75
6777-101	2.89	4.60
6776-015	3.43	4.90
203-32-0901	3.60	5.60
6775-009	4.10	4.90
6776-125	1.18	2.10
6775-036	3.95	5.20
6776-014	1.80	2.85
6776-110	1.90	4.25
6776-112	1.95	3.25
6776-113	1.97	3.25
6771-112	3.15	7.00
6776-008	2.50	3.70
6775-010	2.60	4.30

(Continued)

Appendix 1, continued

Austin Instrument, Inc.
Attn: Mr. Edmund Krauss, President

July 22, 1966
Page 3

<u>Part No.</u>	<u>Present Price</u>	<u>New Price</u>
6776-011	2.60	4.25
6776-012	2.55	4.25
6776-026	2.97	4.55
6776-142	.92	1.80
6776-122	2.25	3.65
6776-119	1.03	1.97

We are obliged to tell you that, aside from the drastic consequences to which we open ourselves were we to default on our Radar Doppler AN/APN-153 Prime Contract with the Government because of your failure to deliver the subcontract parts and components to us at the prices undertaken, a critical U.S. military operation may be jeopardized.

As matters stand, the success or failure of our contract performance and of this critical military operation depends upon timely receipt by us of the balance of the subcontract parts and components on which you have stopped work and refused to deliver.

We have feverishly surveyed other sources of supply and find that because of the prevailing military exigencies, were they to start from scratch as would have to be the case, they could not even remotely begin to deliver on time to meet the delivery requirements established by the Government in its Radar Doppler Prime Contract with us.

Accordingly, we are left with no choice or alternative but to meet your conditions.

We request that you advise us at the very earliest moment if the price increases mentioned and listed above reflect your new terms so that the supplemental agreements you request can be drawn.

In the interest of expedition we are hand-delivering this letter to you today.

Very truly yours,

LORAL ELECTRONIC SYSTEMS
Division of Loral Corporation

JF/el

Jules Frohmann
Manager, Operations

Appendix 2

*Precision Instruments**Austin Instrument*

YK9 (12)

AUSTIN INSTRUMENT, INC.

123 EILEEN WAY

SYOSSET, LONG ISLAND, N. Y.

WALNUT 1-2500

July 27, 1966

Loral Electronic Systems
825 Bronx River Avenue
Bronx, N.Y. 10472

Att: Mr. J. Frohmann

Gentlemen:

Confirming our telephone conversation of today, we accept the terms and conditions of your letter of July 22, 1966, including the three items which were omitted from your letter as listed below:

Part No.	Qty on Order	Qty Delivered	Present Price	New Price
6771-114	1045	621	8.00	8.90
6771-126	1045	800	8.75	11.25
6779-107	390	Complete	9.00	13.20

Please note that on P/N 6777-101, our records indicate 1009 pcs. shipped; you indicate 1007 pcs., and on P/N 6776-112, our records indicate 342 pcs. shipped; you indicate 295 pcs.

I understand that amendments to the above and the new orders will be released simultaneously. The new orders are in accordance with our quote of June 14, 1966, and include all items which we are presently manufacturing, plus P/N 6771-108, 6771-113, 6777-105, 6777-118 and 6779-120

Kindly mail delivery schedules as soon as possible, and we will make every effort to meet them.

Very truly yours,

AUSTIN INSTRUMENT, INC.

Edmund Krauss
Edmund Krauss

EK:fd

Appendix 3

**Loral Electronic Systems**

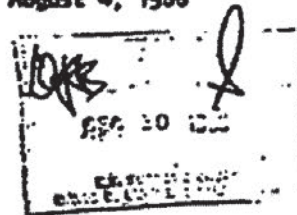
A DIVISION OF LORAL CORPORATION
825 BRONX RIVER AVENUE, THE BRONX, N. Y. 10472 ☐ TEL. 212 71 24500

August 4, 1966

Austin Instrument, Inc.
123 Eileen Way
Syosset, Long Island, New York

Attention: Mr. Edmund Krauss, President

Gentlemen:



Your July 27 letter reached us on July 29. We promptly set about preparing the supplements you require.

For the reasons outlined in our July 22 letter, we reiterate that we find ourselves in no position to take issue with either the price increases or other conditions you have specified as the basis for continuing with performance of the Purchase Orders or subcontracts between us.

We also note from your July 27 letter and telephone notification that you require your price increases to apply to three other items (P/N 6771-114, 6771-126 and 6779-107), which you state were omitted from our July 22 letter, and further, that you have added another element or condition, namely, that upon delivery to you of the contract supplements, covering all of your price increases, we simultaneously place with you Purchase Orders for added quantities of the same gears, gear assemblies and machined part components for the add-on Radar Dopplers All/APN-153 quantities ordered from us by the U. S. Government to meet its augmented military needs for this critical equipment, and that these new Purchase Orders be placed with you at prices per your quotations of June 14, 1966.

As to the purported delivery discrepancies referred to in paragraph 2 of your July 27 letter, i.e., your statement of 1009 pcs shipped as against ours of 1007 pcs received on P/N 6777-101 and 342 pcs shipped as against ours of 295 pcs received on P/N 6776-112, we would be willing to accept your figures. Actually, however, as to P/N 6777-101 (P.O.M33020), a recheck will show that the same part consists of three different classifications and that your price increase should only apply to the first classification identified in the order as item #1 relating to a quantity of 1045 pieces. Your price increases should, therefore, properly apply in this fashion: 10% price increase on the 1009 (your figure) pieces received and paid for; your new price of \$4.60, increased from \$2.89, should apply to the balance of 36 pieces still to be delivered and our applicable price increase supplement reflects this. We believe our figures to be

Appendix 3, continued

Loral Electronic Systems

Page 2

correct as to P/N 6776-112, i.e., 295 pieces received and can later send you detailed clarifying information in this regard. The applicable price increase supplement for this part, however, reflects your 342 piece figure. We urge that any questions relating to this paragraph which may cause further delay be deferred for adjustment, because we cannot over-emphasize the very critical emergency situation that confronts us.

The opening paragraph of your July 27 letter speaks of your acceptance of the terms and conditions of our July 22 letter. We call attention to the fact that it is, rather, we who find ourselves without choice but to accept your terms and conditions.

Again, in the interest of time, we are hand-delivering the Supplemental Agreements to you with this letter which cover your price increases and the new Purchase Orders for the add-on quantities. Subject to the minor adjustments referred to in paragraph 3 above, you will find they comply in all respects with your conditions and requirements.

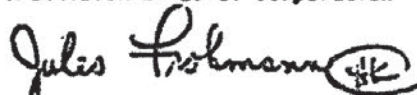
With respect to your existing delinquencies in delivery, we have also, per your request and by telegram dated July 29, 1966, extended your delivery schedules to cover past delivery slippages.

In short, the drastic and overwhelming circumstances are such that we yield to all of your terms and conditions and can only urge that you resume work immediately to enable us to meet the existing military exigencies and relieve us of the economic threat against defaulting on our own prime contract obligations with the U. S. Government for these Radar Dopplers on contracts which in the aggregate at this time run in excess of \$8,000,000.

We ask you to sign copies of the Supplemental Agreements and Acknowledgment copies of the new Purchase Orders for return to us through the bearer. We have instructed him to wait as long as it may be necessary to meet your convenience for this purpose.

Very truly yours,

LORAL ELECTRONIC SYSTEMS
A Division of Loral Corporation



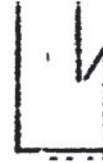
Jules Frchaam
Manager of Operations

JFK:jn
Encls.

P.S.

The add-on option quantity of 585 pieces of P/N 6777-101 appearing on former Supplement #6 of Purchase Order #33020 (unacknowledged by you) and 585 pieces of P/N 6775-126 appearing on former Supplement #2 of Purchase Order #33021 (unacknowledged by you) have been transferred to and now appear on our Purchase Order #42818.

Appendix 4

**Loral Electronic Systems**

A DIVISION OF LORAL CORPORATION

825 BRONX RIVER AVENUE, THE BRONX, N. Y. 10472 ☐ TEL 212 N 2-0500

July 21, 1967

Austin Instrument, Inc.
123 Eileen Way
Syosset, Long Island, N.Y.

Attention: Mr. E. Krauss, President

Gentlemen:

While the applicable subcontracts with your Company identified in prior correspondence for vital gear components were in the process of manufacture by you, your Company threatened stoppage unless Loral agreed to comply with your demands for retroactive and prospective price increases.

Considering the critical defense needs for the AN/APN-153 and item Radar Dopplers in which your gear components were utilized, their unavailability elsewhere in time to meet existing delivery commitments and our own obligations to the United States Government contractually, our company was forced to yield to your demands. We refer you to concurrent correspondence on the subject.

We are advised that such price increases may not be retained. We must accordingly notify you that unless these price increases are credited or refunded to us in full, appropriate action will be taken to secure our legal rights in the matter.

Very truly yours,

LORAL ELECTRONIC SYSTEMS
A Division of Loral Corporation

Jules Frohmann
Jules Frohmann
Manager of Operations

JP:fm

