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COMMENTS ON WILLIAM WHITFORD'S PAPER ON THE ROLE OF THE JURY (AND THE FACT/LAW DISTINCTION) IN THE INTERPRETATION OF WRITTEN CONTRACTS

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Bill Whitford has some valuable insights into the relatively unknown process of deliberation in the jury room when a jury is charged with the interpretation of a contract. Juries are charged with the power of interpretation in what roughly may be called a dichotomy between two kinds of jurisdictions. Courts which follow the more traditional approach permit the jury to determine the proper interpretation of a contract only if the judge without the aid of parol evidence deems the contract to be ambiguous and parol evidence is then admitted to clarify the parties' intentions. A wider role is permitted by courts that follow the *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*,[1] approach, which essentially allows the court to hear parol evidence to determine whether the writing is susceptible to more than one interpretation. If the court finds that the writing is susceptible to more than one interpretation, and parol evidence is admitted in the hearing of the jury, the jury is charged with determining the meaning of the writing.

Despite the simple wording of the rules I have just stated, Whitford finds the case law on the admission of parol evidence to be confused and rife with exceptions, qualifications, and contradictions—not much different from the chaos John Calamari and I discussed in 1967.[2] Two years ago Eric Posner used the tools of economic analysis to examine the area. He also found chaos and noted that the tools of economic analysis did not dissipate the confusion because too many variables were involved.[3]

Whitford conclusively shows that if the rules of logic were applied, the interpretation of a contract would be a factual question. If that logic were followed, the jury would always be the interpreter of the contract and would be allowed to hear all relevant evidence to aid the process of interpretation. But much law is not the product of logic. During the

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1. 442 P.2d 641 (Cal. 1968) (Traynor, C.J.).

2. John Calamari & Joseph M. Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333 (1967).

3. *See* Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998).

Enlightenment, legal scholars and philosophers, such as Hugo Grotius and Samuel Pufendorf, spun out theories of law based on pure logic. Their theories had a significant impact on the law in the European Continent. At the same time, the lawyers who practiced the common law in England and its American colonies recognized the common law to be a human artifact in which logic played only a subsidiary role.[4]

In the early days of jury trials, juries had broad autonomy to determine questions of fact and also many of the questions that we consider today to be questions of law.[5] Why have the courts curtailed this autonomy, thus allowing juries to interpret contracts only in exceptional cases? Why do we have a parol evidence rule at all? Whitford concentrates on the judicial fear that the jury will favor the little guy over the big guy. Some observers, instead, *favor* juries for the same reason. They cherish the idea that juries can serve as agents of redistribution, albeit on a haphazard basis.

If we step back for a better perspective on why we have rules excluding parol evidence, let us remember that the parol evidence rule (broadly understood to include the plain meaning rule) also applies to bench trials. Therefore, the rule can not have its only foundation in the distrust of juries.[6] The deeper distrust is the distrust of *witnesses.*

We must remember that parties were not allowed to testify in their own cases until the second half of the nineteenth century. The general

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4. In a 1797 Maryland case, William Pinkney successfully argued for the appellant. Among the arguments he made, none of which would likely be made by a lawyer today, were the following. Pinkney told the court, "*[a]bsurdity* is no argument against [a rule] if it is law, nor its *inconvenience.*" He points out the lack of the courts' authority to rectify absurdities, stating "[a] man of plain sense would be shocked at the absurdity of one third of the old common law, which has been since changed by acts of parliament, or acts of assembly; yet it was law till it was altered." He then explains his view of the philosophical foundations of law stating that "[t]he law is an artificial system, which must not be judged of by the ordinary rules of reason. It is a technical science; any known system is better than none. It is of importance to society that the rules of justice should not be fluctuating; that they should be fixed, and settled, and permanent." I have lifted this quotation from an article of mine: Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 442 (2000) (emphasis in original) (citing *Beane v. Middleton*, 4 H. & McH. 74, 78 (Md. 1797)).

5. *See* David Millon, *The Ideology of Jury Autonomy in the Early Common Law, at* http://www.ssrn.com (Nov. 14, 2000).

6. There is evidence that the distrust of juries is one of the pillars of the parol evidence rule. The parol evidence rule is not applicable in equitable actions that traditionally were tried to the chancellor without a jury. Nonetheless, chancery had many mathematical rules for the evaluation of evidence that minimized witness testimony. For example, the defendant's answer was deemed evidence that had to be rebutted by two witnesses or one witness and circumstantial evidence. But the defendant's statements in an affirmative defense were not evidence. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA §§ 1528-30 (11th ed. 1873); Denton v. M'Kenzie, 1 S.C. Eq. (1 Des.) 289 (1792); Thornton v. Gordon, 41 Va. 719 (1844).

thought was that a party's temptation to lie under oath was too great to be trusted. Indeed, some regarded it as immoral to tempt parties in this way. The same creators of the bar on party testimony—the judiciary—created the parol evidence rule. When legislation ultimately allowed party testimony, the courts, still suspicious of such testimony, created the objective theory of contract that Holmes and Williston propagated so successfully.

But other reasons for a hard parol evidence rule exist. The fear of perjury is not its only pillar. Whitford has examined the clash between a hard parol evidence rule and the channeling or earmarking function of contract formalities. For example, suppose a contract states that "time is of the essence, and we really mean it." Should one party be able to testify that the drafting party gave oral assurance that "we will never make time an issue?" Doubts concerning whether this would be admissible interferes with the ability of parties to predict the outcome of their dispute.

Whitford also brings out the disturbing fact that we have little idea of how juries decide interpretative issues. It seems unlikely that one could formulate an answer to the questions he raises by analyzing appellate cases. I thought that maybe I could by following a widely used standard form contract that contained a recognized ambiguity and then tally the result from various jurisdictions.[7] I tried this approach with one such standard form with disappointing results. Because the standard terms of these contracts were not negotiated, little relevant parol evidence was available to clarify the parties' intentions; thus, the issue was decided by appellate courts as a matter of law. Not surprisingly, the jurisdictions split on the matter.

Another line of cases may prove more fruitful. Clearly, the issue of "foreseeability" of an event is logically a question of fact. Foreseeability is relevant in determining whether a contract is discharged or reshaped by a supervening event making performance impossible or frustrating its purpose. There is a division of authority on whether the court or the jury should decide the foreseeability of such an event. A federal court, applying Kansas law, held that the issue is one of law.[8] It then gave a brief description of the leading Kansas case:

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7. The ambiguous phrase I followed involved royalties promised in natural gas leases based on the "market value" or "market price" of natural gas. The ambiguity stems from the possibility of calculating the value or price either (1) at the time of capture, or (2) at the value or price at the time a long term contract for sale of the gas was entered into. One of many such cases discussing the split of authority is *Tara Petroleum Corp. v. Hughey*, 630 P.2d 1269, 1273 (Okla. 1981). *But see* Piney Woods Country Life Sch. v. Shell Oil Co., 905 F.2d 840, 848 (5th Cir. 1990) (holding question of fact was for district judge as trier of fact).

8. The RESTATEMENT (SECOND) OF CONTRACTS states that the question of excuse for impracticability "is generally considered to be one of law rather than fact." RESTATEMENT (SECOND) OF CONTRACTS, § 261 (1981) (introductory note to Chapter 11).

> The plaintiff argued that since, pursuant to the wartime regulations, it became unlawful to drill an oil well on the land covered by the mineral deed, the application of the equitable principles of the doctrine of commercial frustration required the court to suspend the operation of the contract and extend the period of time for plaintiff to develop the mineral rights until a time when the government regulations were rescinded. The court found that the doctrine was inapplicable due to the foreseeability of the regulatory event which caused plaintiff's contractual bargain to be frustrated. Basically, the court found that even though at the time the deed was executed on May 27, 1939 the war in Europe had not even begun, the plaintiff should have had the foresight to see that the nations of Europe would soon be engaged in war, that the United States would inevitably be drawn into the conflict, and that the federal government would use its regulatory powers to preserve natural resources in such a manner as to prevent plaintiff from developing oil wells on the land subject to his mineral deed.[9]

In short, the lessee should have been gifted with omniscience or, at least, greater foresight than was possessed by the admirals at Pearl Harbor. It seems hard to believe that the court was making a finding of foreseeability rather than covertly adopting a policy of refusing to unravel contracts that had been indirectly disrupted by America's entry into World War II. A jury focusing on whether the lessee should have bargained in peacetime for a clause with respect to wartime regulatory conditions affecting mineral leases would likely have found that it would have been extremely unlikely that anyone in the position of the lessee to have bargained for such a clause.

A contrary line of cases finds the issue of foreseeability to be a jury question.[10] One of these cases involved a widespread failure of the peanut crop.[11] The jury found that the crop failure was unforeseeable.[12] In

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This quotation does not separate the various elements, such as "foreseeability," of the excuse.

9. Butler Mfg. Co. v. Americold Corp., 850 F. Supp. 952, 957-58 (D. Kan. 1994) (discussing *Berline v. Waldschmidt*, 159 P.2d 865 (Kan. 1945) (citation omitted)).

10. *See* Alimenta (U.S.A.), Inc. v. Cargill, Inc., 861 F.2d 650 (11th Cir. 1988); *see also* Mishara Constr. Co. v. Transit-Mixed Concrete Corp. 310 N.E.2d 363 (Mass. 1974); Hous. Auth. of Bristol v. E. Tenn. Light & Power Co. 31 S.E.2d 273 (Va. 1944); *cf.* Oosten v. Hay Haulers Dairy Employees & Helper Union, 291 P.2d 17 (Cal. 1955) (question of fact); Mitchell v. Ceazan Tires, Ltd., 153 P.2d 53 (Cal. 1944) (question of law).

11. *See Alimenta*, 861 F.2d at 652.

12. *See id.* at 652, 654.

upholding the jury finding of excusable nonperformance, the court summarized the evidence on foreseeability as follows:

> [Plaintiff] first argues that the issue of foreseeability of crop failure should not have gone to the jury. We find that there was sufficient evidence to submit this case to the jury. First, the evidence demonstrated that for the twenty years preceding the 1980 crop there had been a surplusage of domestic peanuts. Secondly, there was evidence that pre-harvest forward sales contracts are customary in the peanut industry. This contracting practice reflects the need to sufficiently schedule production to comport with the capacity of peanut shelling plants .... Thirdly, improved agronomic and irrigation methods contributed to the industry's expectations of a continued surplusage of peanuts. There was evidence that the shortage of peanuts in 1980 was unprecedcnted and unforeseen by many if not all experts. The unforeseeability was also demonstrated by the effect of the drought on the peanut market prices: price of peanuts increase often exceeded one dollar per pound. In view of the evidence introduced during trial, it was proper for the trial court to submit the issue of the foreseeability of the crop failure to the jury for its determination.[13]

I suspect that if a thorough review were made of cases where the doctrine of impracticability, impossibility, or frustration was raised, one would find that juries were more likely to accept the excuse than courts. My intuition (which could be wrong) tells me that juries would be reluctant to find an unexcused breach where the nonperforming party was clearly a victim of circumstances out of its control.

My final thought is based on Wisconsin Law School's tradition of empirical studies. Surely, someone at Wisconsin could design an empirical study to determine if jurors determine issues of fact differently than judges who often, by legal alchemy, transmute questions of fact into questions of law.

13. *Id.* at 653-54.

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