

#47

3/5/76

Memorandum 76-31

Subject: Study 47 - Oral Modification of Contracts (Assembly Bill 2581)

Attached are extracts from the Minutes of the Northern and Southern Sections of the State Bar Committee on Administration of Justice disapproving the recommendation on oral modification of contracts.

An examination of the reasons given reveals that there is a failure of the State Bar Committee to appreciate that the Commission has changed its prior recommendation. The Commission now recommends, consistent with the Commercial Code provision, that a written contract can be modified orally unless the contract contains a provision requiring modifications to be in writing, providing that the statute of frauds must be satisfied if the contract as modified is within the statute of frauds.

The staff suggests that the State Bar Committee be sent a copy of the printed approval recommendation on this subject with a letter noting that it is substantially different in substance than the recommendation disapproved by the State Bar in early 1975.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

AGENDA ITEM 29.10(a) - ORAL MODIFICATION OF CONTRACTS

(SOUTH)  
(1/2/6/7)

ACTION TAKEN:

Dissapprove (No dissent)

DISCUSSION:

Mr. Rove reported orally and noted the background of this LRC proposal. The members felt that the exceptions to the general rule concerning modification of a written contract are well known and understood and an attempt to codify those exceptions runs the risk of not including all those exceptions. It was also felt that any new legislation would lead to litigation over interpretation.

The reasons set forth above were substantially the same reasons that the members gave in early 1975. There have been no changes requiring a change in position since then.

AGENDA 29.10A - ORAL MODIFICATION OF CONTRACTS

(2/5/76) (NORTH)

ACTION TAKEN:

Disapprove LRC proposal (no dissent).

DISCUSSION:

Mr. Reed reported orally and by memorandum dated January 20, 1976, pointing out the previous CAJ disapproval of a similar Law Revision Commission proposal on the grounds (1) that court-made exceptions to the rule against oral modification of contracts can be easily ascertained; (2) not all exceptions are included in the proposal, thereby running the risk of implication that those excluded were intended to be excluded; and (3) that new legislation will engender litigation over interpretation of the statute and probably further decisional expansion of the concept. It was noted that this proposal is designed to codify the present exceptions to the general rule but that some exceptions are not included and there, therefore, the status of these excluded exceptions is unclear. The Section reaffirmed its previous objections to the proposal and moved for disapproval of the LRC proposal for oral modification of contracts (no dissent).

AMENDED IN ASSEMBLY FEBRUARY 23, 1976

AMENDED IN ASSEMBLY FEBRUARY 10, 1976

CALIFORNIA LEGISLATURE—1975-76 REGULAR SESSION

**ASSEMBLY BILL**

**No. 2581**

**Introduced by Assemblyman McAlister**

January 5, 1976

REFERRED TO COMMITTEE ON JUDICIARY

An act to amend Section 1697 of, to amend the heading of Chapter 3 (commencing with Section 1697) of Title 5 of Part 2 of Division 3 of, to add Section 1698 to, and to repeal Section 1698 of, the Civil Code, relating to modification of contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 2581, as amended, McAlister (Jud.). Modification of contracts.

Existing statutory law applicable to contracts other than contracts for the sale of goods provides that a contract in writing may only be altered orally by an oral agreement executed by both parties, while court decisions have developed additional theories and rules governing the oral modification of written contracts.

This bill amends existing statutory law to reflect the additional rules and theories governing oral modification of written contracts developed by case law. Specifically, it recognizes modification of a contract where the rules of law concerning estoppel, oral novation and substitution of a new agreement, oral rescission, waiver of conditions of written contracts, or oral independent collateral contracts are applicable.

Existing case law permits modification of a written contract by an oral agreement supported by new consideration where the party seeking enforcement of the oral modification has executed his part of the agreement.

This bill extends the above case-law rule by deleting the requirement of performance by the party seeking enforcement of the oral modification; however, compliance with the statute of frauds is required if the contract as modified is within its provisions.

This bill specifies that its application is prospective only and that the existing provisions of law governing the modification of contracts shall apply to contracts made prior to the bill's effective date.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. The heading of Chapter 3  
2 (commencing with Section 1697) of Title 5 of Part 2 of  
3 Division 3 of the Civil Code is amended to read:

4

5 CHAPTER 3. MODIFICATION AND CANCELLATION

6

7 SEC. 2. Section 1697 of the Civil Code is amended to  
8 read:

9 1697. A contract not in writing may be modified in  
10 any respect by consent of the parties, in writing, without  
11 a new consideration, and is extinguished thereby to the  
12 extent of the modification.

13 SEC. 3. Section 1698 of the Civil Code is repealed.

14 SEC. 4. Section 1698 is added to the Civil Code, to  
15 read:

16 1698. (a) A contract in writing may be modified by a  
17 contract in writing.

18 (b) A contract in writing may be modified by an oral  
19 agreement to the extent that the oral agreement is  
20 executed by the parties.

21 (c) Unless the contract otherwise expressly provides, a  
22 contract in writing may be modified by an oral

1 agreement supported by new consideration. The statute  
2 of frauds (Section 1624) is required to be satisfied if the  
3 contract as modified is within its provisions.

4 (d) Nothing in this section precludes in an appropriate  
5 case the application of rules of law concerning estoppel,  
6 oral novation and substitution of a new agreement,  
7 rescission of a written contract by an oral agreement,  
8 waiver of a provision of a written contract, or oral  
9 independent collateral contracts.

10 SEC. 5. This act does not apply to any contract made  
11 prior to the effective date of this act. Notwithstanding the  
12 enactment of this act, Sections 1697 and 1698 of the Civil  
13 Code, as those sections existed prior to the effective date  
14 of this act, *and the applicable case law*, shall continue to  
15 apply to contracts made prior to the effective date of this  
16 act.

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