

Memorandum 74-11

Subject: Study 47 - Oral Modification of Written Contract

Attached to this memorandum is a tentative recommendation which incorporates the decisions of the Commission made at the last meeting. This staff member at least has some reservations whether the changes proposed are necessary or desirable. As an initial proposition, I would favor uniformity and would accordingly have supported the adoption of Commercial Code Section 2209 in the same form as it appears in the Uniform Commercial Code. However, California did not follow its sister states in this regard, and its failure to do so has not apparently caused any problems. At least they have not surfaced in any reported cases. (We have been able to find only one case in California which even refers to Section 2209, and that case is one which actually involves Civil Code Section 1698, and the court in passing notes the difference between Section 1698 and Section 2209(2).) Similarly, while it is apparent that Civil Code Section 1698 does not mean what it says, the exceptions to its apparent rule seem to be fairly well established--see Timbie, Modification of Written Contracts in California, 23 Hastings L.J. 1549 (1972); 1 B. Witkin, Summary of California Law Contracts §§ 715-719 at 600-604 (8th ed. 1973)--and I do not believe that Section 1698 generates litigation or produces poor results as the section is applied. In short, I do not believe that there is a demonstrable need for change.

As to the proposed changes, I would simply point out that they not only deal with the oral/written issue but also with whether the attempted modification must be supported by consideration or detrimental reliance. That is, Section 1697 now permits an oral contract to be altered in writing without

consideration but implicit in this rule is the corollary that an oral alteration must be supported by consideration or detrimental reliance (or be fully executed by both parties). Similarly, Section 1698 now permits a contract in writing to be altered only by a contract in writing or again by an oral agreement supported by consideration or detrimental reliance. Proposed Section 1697 would change both these rules; subdivision (a) provides that "an agreement modifying a contract needs no consideration to be binding." Most writers seem to agree that the latter rule insofar as it rejects the preexisting duty rule is a good thing. However, it would seem that some limitations are still desirable. Restatement of Contracts Section 89D (proposed) provides that a promise without consideration which modifies a contractual duty is binding only if the modification is fair and equitable in view of unanticipated circumstances or if there has been detrimental reliance. The Comment to this section makes clear that there must not be economic coercion and enforcement must be equitable. See also Com. Code § 1203 ("Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement."). Presumably the courts would create similar limitations if subdivision (a) of Section 1697 is enacted but the statute is silent in this regard.

The preceding comments are not intended to persuade the Commission to reverse its decision to send this recommendation out for comment. Rather, they are intended to suggest what I believe might be controversial aspects of this recommendation and to anticipate some criticism which might be received. Whether or not further revision of the recommendation is desirable I leave to the combined wisdom of the Commission.

Respectfully submitted,

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STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

ORAL MODIFICATION OF WRITTEN CONTRACTS

The parties to a contract frequently find it convenient or necessary to attempt to orally modify their original written contract to meet unforeseen conditions, to remedy defects in the original written contract, to resolve ambiguities, or for some other reason. Of course, in the majority of such situations, both parties perform in accordance with the written contract as modified. But in some cases there is a dispute concerning the terms of the oral modification, the nature of the performance, or whether there was a modification at all.

California law offers inadequate guidance to the parties involved in a dispute regarding oral modification. Since 1874, the rule provided in Civil Code Section 1698 has been that "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."¹ However, a great amount of litigation has resulted from the efforts of contracting parties to prove that the oral modification sought to be enforced falls within an exception to the bar of Section 1698.² There are several ways that the no-oral-modification rule of Section 1698 can be avoided:

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1. It has been suggested that this provision results from an inadequate attempt to state the common law rule that contracts required to be in writing can be modified only by a writing. See 2 Corbin, Contracts § 301 (1950); 15 Williston, Contracts § 1828 (3d ed. 1972).
 2. See cases cited in Timble, Modification of Written Contracts in California, 23 Hastings L.J. 1549 (1972), and 1 B. Witkin, Summary of California Law Contracts §§ 715-719 at 600-604 (8th ed. 1973).

1. Section 1698 itself provides that an "executed oral agreement" may alter a contract in writing; hence, it is clear that, if both parties have fully executed the oral modification, the no-oral-modification rule is inapplicable.³

2. By an oral novation, the parties may orally extinguish the written contract and substitute a new agreement.⁴

3. An oral cancellation may be viewed as an executed agreement to discharge the written contract, thereby satisfying the terms of Section 1698.⁵

4. More recently, the California Supreme Court in D.L. Godbey & Sons Construction Co. v. Deane⁶ held that an oral agreement modifying a written contract is "executed" under Section 1698 if consideration was given for the oral agreement and it has been performed by the party relying on the modification.

5. An oral modification may be upheld as a waiver of condition.⁷

6. A party who has changed his position in reliance on the oral agreement may be protected by the doctrine of equitable estoppel.⁸

7. Finally, an oral agreement may be viewed as an independent collateral contract, making Section 1698 inapplicable.⁹

3. See Julian v. Gold, 214 Cal. 74, 3 P.2d 1009 (1931). In several cases courts have ignored the fact that the modification had been performed on only one side and announced the result that the agreement was executed under Section 1698. See Timbie, Modification of Written Contracts in California, 23 Hastings L.J. 1549, 1560-1561 (1972).

4. See Pearsall v. Henry, 153 Cal. 314, 95 P. 154 (1908).

5. See Treadwell v. Nickel, 194 Cal. 243, 258-261, 228 P. 25, ____-____ (1924).

6. 39 Cal.2d 429, 246 P.2d 946 (1952).

7. See Bardeen v. Commander Oil Co., 40 Cal. App.2d 341, 104 P.2d 875 (1940).

8. See Wade v. Markwell & Co., 118 Cal. App.2d 410, 258 P.2d 497 (1953).

9. See Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App.2d 568, 577-578, 126 P.2d 644, ____-____ (1942).

The total effect of these exceptions has been to emasculate the no-oral-modification rule. There is little reason to retain such a deceptive statement of the law. Because of their vagueness and complexity, the rule and its exceptions have generated needless litigation. Once in court, the unwary litigant may select the wrong theory to satisfy the court that Section 1698 should not preclude enforcement of the oral modification.

When the Uniform Commercial Code was implemented in California, instead of adopting the provision concerning oral modification--Section 2-209--and conforming the Civil Code section to the Commercial Code, the opposite was done: that is, as enacted in California, Commercial Code Section 2209(2) was changed to conform to the apparent meaning of Civil Code Section 1698. Hence, Section 2209(2) currently provides that "a written contract within this division may only be modified by a written agreement or by an oral agreement fully executed by both parties."¹⁰ This approach is objectionable not only because of the deficiencies in Section 1698 but because it makes California the only state which has altered this section of the Uniform Commercial Code. Hence, it is an inconvenience in interstate sales transactions and prevents full use of contract forms prepared according to the Uniform Commercial Code.

The Law Revision Commission accordingly makes the following recommendations:

(1) Commercial Code Section 2209(2)(providing a rule against oral modification of written contracts except where both parties fully perform

10. This language expressly overrules the Godbey exception as concerns sales contracts. However, Section 2209(4) provides that an attempted modification or rescission may operate as a waiver. An estoppel exception also would be applicable under Commercial Code Section 1103. On the other hand, Commercial Code Section 2209(5) provides that an executory modification may be retracted upon reasonable notice unless the other party has materially changed his position in reliance on the waiver.

the modification) should be amended to conform to the language of the Uniform Commercial Code. This change will make California law on this matter the same as that of the other states which have enacted the Uniform Commercial Code.

(2) Civil Code Sections 1697 (providing that oral contracts may be altered in writing without new consideration) and 1698 (providing the rule against oral modifications of written contracts) should be replaced by the substance of Uniform Commercial Code Section 2-209.¹¹ This change will make uniform the rules concerning modification of contracts in the Civil Code and in the Commercial Code so that, in many cases, it will be unnecessary to determine whether or not a contract is governed by the Commercial Code. Under the Commission's recommendation, an oral agreement modifying an oral or written contract would be valid with or without consideration¹² if it satisfies the Statute of Frauds, where applicable, and if it is not required to be in writing by a provision in the contract. Moreover, even if required to be in writing, an attempted modification could operate as a waiver. The adoption of the provision of Uniform Commercial Code Section 2-209(1) that "an agreement modifying a contract . . . needs no consideration to be binding" would supersede the more limited rule provided in Civil Code Section 1697.

11. The Uniform Commercial Code requires that an agreement on a form supplied by the merchant excluding modification or rescission be separately signed except in transactions between merchants. The Commission believes that this provision is generally useless and is not therefore incorporated into the Civil Code. It is preserved in the Commercial Code only in the interest of uniformity.

12. This change makes the preexisting duty rule inapplicable to agreements modifying a contract.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to repeal Sections 1697 and 1698 of, to add Section 1697 to, the Civil Code, and to amend Section 2209 of the Commercial Code, relating to modification of contracts.

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

Civil Code § 1697 (repealed)

Section 1. Section 1697 of the Civil Code is repealed.

~~1697.--A contract not in writing may be altered in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the new alteration.~~

Comment. Former Section 1697 is superseded by subdivision (a) of Section 1697.

Civil Code § 1697 (added)

Sec. 2. Section 1697 is added to the Civil Code, to read:

1697. (a) An agreement modifying a contract needs no consideration to be binding.

(b) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded.

(c) The requirements of the Statute of Frauds must be satisfied if the contract as modified is within its provisions.

(d) Although an attempt at modification or rescission does not satisfy the requirements of subdivision (b) or (c) it can operate as a waiver.

(e) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Comment. Section 1697 is nearly identical to Commercial Code Section 2209. However, Section 1697 does not require that a clause excluding other than written modification be separately signed. Former Section 1698 purportedly allowed the modification of written contracts only by a contract in writing or by an executed oral agreement. However, the rule was subject to so many exceptions that its statement, if not totally emasculated, was deceptive at best. See Recommendation Relating to Oral Modification of Written Contracts, ____ Cal. L. Revision Comm'n Reports ____ (197_); Timbie, Modification of Written Contracts in California, 23 Hastings L.J. 1549 (1972).

Civil Code § 1698 (repealed)

Sec. 3. Section 1698 of the Civil Code is repealed.

~~1698.--A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.~~

Comment. Section 1698 is superseded by Section 1697.

Commercial Code § 2209 (amended)

Sec. 4. Section 2209 of the Commercial Code is amended to read:

2209. (1) An agreement modifying a contract within this division needs no consideration to be binding.

~~(2)--A-written-contract-within-this-division-may-only-be-modified-by a-written-agreement-or-by-an-oral-agreement-fully-executed-by-both-parties.~~

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but, except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this division (Section 2201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subdivision (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Comment. Subdivision (2) of Section 2209 is amended to conform to the language of the Uniform Commercial Code.