

#47

9/11/74

Memorandum 74-57

Subject: Study 47 - Oral Modification of Written Contracts

Attached to this memorandum is a staff draft of the Recommendation Relating to Oral Modification of Written Contracts implementing decisions made at the September meeting. We have combined the recommendations concerning Civil Code Section 1698 and Commercial Code Section 2209 into one recommendation containing two bills. We have the draft ready to send to the printer and will send it immediately after the October meeting.

We have researched the question of the effect of a contract provision requiring modifications to be in writing. The conclusion is that the doctrines of waiver, estoppel, oral independent collateral contract, and executed oral agreement have been applied to enforce attempted oral modifications despite such explicit contract provisions. The preliminary part (see footnote 9) and the Comment to Section 1698 state this principle and provide citations to authority.

Respectfully submitted,

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RECOMMENDATION

relating to

Oral Modification of Written Contracts

The parties to a written contract frequently find it convenient or necessary to modify the contract by oral agreement to meet unforeseen conditions, to remedy defects, or to resolve ambiguities in the contract as written, or for some other reason. In the majority of situations, both parties perform in accordance with the written contract as modified. In some situations, however, a dispute arises concerning the terms of the oral modification, the nature of the performance, or whether there was a modification at all. This recommendation deals with the rules governing oral modification of written contracts under general contract law (Civil Code Section 1698) and under the Commercial Code (Section 2209).

CIVIL CODE SECTION 1698

California statutes offer inadequate guidance to the parties who attempt to modify a written contract orally. 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 As a result of a great amount of litigation, the courts have established exceptions to the application of the rule against oral modification in order to achieve just results in particular cases.² These exceptions include the following:

(1) An oral agreement which has been executed by only one of the parties may be held to satisfy the rule.³

1. It has been suggested that this provision resulted 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, infra, reprinted from 23 Hastings L.J. 1549 (1972) (hereinafter referred to as "background study"), and 1 B. Witkin, Summary of California Law Contracts §§ 715-719 at 600-604 (8th ed. 1973).
3. See D.L. Godbey & Sons Construction Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952). See also background study, infra at [1560-1561].

(2) The parties may extinguish the written contract by an oral novation and substitute a new oral agreement.⁴

(3) The parties may rescind the written contract by an oral agreement, thereby satisfying the terms of Section 1698.⁵

(4) An oral modification may be upheld as a waiver of a condition of the written contract.⁶

(5) A party who has changed his position in reliance on the oral agreement may be protected by the doctrine of equitable estoppel.⁷

(6) An oral agreement may be held to be an independent collateral contract, making Section 1698 inapplicable.⁸

The effect of these exceptions has been largely to emasculate the rule against oral modification⁹ and make the statutory language deceptive at best. The vagueness and complexity of the rule and its exceptions have invited litigation.

The Commission accordingly recommends that Section 1698 be replaced by a new section that is consistent with the court-developed rules governing modification of written contracts. Specifically, the new section should provide that the parties may modify a written contract by a written contract, by an oral agreement executed by both parties, or by an oral agreement supported by consideration and executed by the party seeking enforcement. This would continue the substance of existing Section 1698 as interpreted by D.L. Godbey & Sons Construction Co. v.

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, 32-33 (1924).

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

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

8. See Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App.2d 563, 577-578, 126 P.2d 644, 649-650 (1942).

9. The doctrines of waiver, estoppel, oral independent collateral contract, and executed oral agreement have been applied to enforce oral modifications of written contracts despite a provision requiring modifications of the contract to be written and signed. See MacIsaac & Menke Co. v. Cardox Corp., 193 Cal. App.2d 661, 14 Cal. Rptr. 523 (1961); 1st Olympic Corp. v. Hawryluk, 185 Cal. App.2d 832, 8 Cal. Rptr. 728 (1960); Howard J. White, Inc. v. Varian Associates, 178 Cal. App.2d 348, 2 Cal. Rptr. 871 (1960); Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council, 128 Cal. App.2d 676, 276 P.2d 52 (1955). Compare Uniform Commercial Code § 2-209, discussed infra.

This section would merely describe cases where proof of an oral modification is permitted; the section would not, however, affect in any way the burden of the party claiming that there was an oral modification to produce evidence sufficient to persuade the trier of fact that the parties actually did make an oral modification of the contract. The section would not affect related principles of law; the rules concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a condition of a written contract, or oral independent collateral contracts would be applicable in appropriate cases.

COMMERCIAL CODE SECTION 2209

Subsection (2) of Section 2-209 of the Uniform Commercial Code permits the oral modification of a written contract for the sale of goods unless the contract expressly provides that it may not be rescinded or modified except by a signed writing.¹¹ This provision was changed when the Uniform Commercial Code was enacted in California. Subdivision (2) of Section 2209 of the California Commercial Code provides that "a

10. 39 Cal.2d 429, 246 P.2d 946 (1957). See also *Raedeke v. Gibraltar Sav. & Loan Ass'n*, 10 Cal.3d 665, 517 P.2d 1157, 111 Cal. Rptr. 693 (1974).

11. Section 2-209 of the Uniform Commercial Code provides as follows:

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

(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 Article (Section 2-201) 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 subsection (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.

written contract within this division may only be modified by a written agreement or by an oral agreement fully executed by both parties.¹²

The Law Revision Commission recommends that California adopt the official text of Uniform Commercial Code Section 2-209. California is the only state that departs from the official text of this provision.¹³ The great volume of interstate business calls for a single national rule in the area of sales transactions, particularly concerning the manner of drafting forms. The case law that develops in other states will be of assistance to California lawyers in understanding and applying Section 2209 if our section is revised to conform to the official text.

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12. The California Commercial Code provision was influenced by, but differs significantly from, the rule provided by Civil Code Section 1698. Section 1698 provides: "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." In D. L. Godbey & Sons Constr. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952), the California Supreme Court 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. The language of California Commercial Code Section 2209(2) overrules the Godbey exception for purposes of Division 2 of the Commercial Code by requiring execution of the agreement by both parties.
 13. See Permanent Editorial Board for the Uniform Commercial Code, Report No. 2, at 34-35 (1964). See also 1 Uniform Laws Annotated--Uniform Commercial Code 128 (master ed. 1968). Subdivision (3) of Uniform Commercial Code Section 2-209 was omitted from the code as originally enacted in California. It was added in 1967, thereby making the California provision the same as Section 2-209 of the Uniform Commercial Code with the exception of subdivision (2). Cal. Stats. 1967, Ch. 799, § 3.

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

BILL #1

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.

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

Technical amendment (heading for Chapter 3)

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

CHAPTER 3.

ALTERATION MODIFICATION AND CANCELLATION

Civil Code § 1697 (technical amendment)

Sec. 2. Section 1697 of the Civil Code is amended to read:

1697. A contract not in writing may be ~~altered~~ modified 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~~ modification .

Comment. The word "alteration" in Section 1697 is amended to read "modification" to conform with Section 1698. See Recommendation Relating to Oral Modification of Written Contracts, 13 Cal. L. Revision Comm'n Reports ____ (1974).

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. Former Section 1698 is superseded by new Section 1698.

Civil Code § 1698 (added)

Sec. 4. Section 1698 is added to the Civil Code, to read:

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

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

(c) A contract in writing may be modified by an oral agreement supported by new consideration to the extent that the oral agreement is executed by the party seeking enforcement of the modification.

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

Comment. Section 1698 states rules concerning modification of a written contract. See Recommendation Relating to Oral Modification of Written Contracts, 13 Cal. L. Revision Comm'n Reports ____ (1974). Subdivisions (a) and (b) continue the substance of former Section 1698. Subdivision (c) codifies the rule in D.L. Godbey & Sons Construction Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952). See also Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal.3d 665, 517 P.2d 1157, 111 Cal. Rptr. 693 (1974).

The rules provided by Section 1698 merely describe cases where proof of an oral modification is permitted; these rules do not, however, affect in any way the burden of the party claiming that there was an oral modification to produce sufficient evidence to persuade the trier of fact that the parties actually did make an oral modification of the contract. The rules stated in Section 1698 apply whether or not the contract expressly provides that modifications must be in writing, but nothing in the section excuses compliance with any other statutory requirements.

Subdivision (d) makes clear that Section 1698 does not affect related principles of law. See Wade v. Markwell & Co., 118 Cal. App.2d 410, 420-421, 258 P.2d 497, 502-503 (1953)(estoppel); Pearsall v. Henry, 153 Cal. 314, 95 P. 154 (1908)(oral novation and substitution of a new agreement); Treadwell v. Nickel, 194 Cal. 243, 258-261, 228 P. 25, 32-33 (1924)(rescission of a written contract by an oral agreement); Bardeen v. Commander Oil Co., 40 Cal. App.2d 341, 104 P.2d 875 (1940)(waiver of a condition of a written contract); and Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App.2d 568, 577-578, 126 P.2d 644, 649-650 (1942) (oral independent collateral contract). These principles may be applied as well to permit oral modification where the written contract expressly provides that modifications must be in writing. See MacIsaac & Menke Co. v. Cardox Corp., 193 Cal. App.2d 661, 14 Cal. Rptr. 523 (1961); 1st Olympic Corp. v. Hawryluk, 185 Cal. App.2d 832, 8 Cal. Rptr. 728 (1960); Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council, 128 Cal. App.2d 676, 276 P.2d 52 (1955). Compare Com. Code § 2209(2), (4), (5).

BILL #2

An act to amend Section 2209 of the Commercial Code, relating to modification of contracts.

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

Commercial Code § 2209 (amended)

Section 1. 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.