

#47.400

10/24/75

Memorandum 75-78

Subject: Study 47.400 - Oral Modification of Contracts (Civil Code Section 1698)

Attached to this memorandum are two copies of the staff draft of the "Recommendation Relating to Oral Modification of Contracts." This draft incorporates decisions made by the Commission at the October meeting. At the November meeting, we hope the Commission will approve the recommendation for printing subject to editorial suggestions. Mark your suggested editorial changes on one copy and give it to the staff at the meeting.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

October 22, 1975

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

relating to

Oral Modification Of Contracts

November 1975

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

CALIFORNIA LAW REVISION COMMISSION

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November 10, 1975

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 45 of the Statutes of 1974 to study whether the law relating to modification of contracts should be revised.

The Commission submitted a recommendation on this subject to the 1975 Legislature. Recommendation and Study Relating to Oral Modification of Written Contracts (January 1975), to be reprinted in 13 Cal. L. Revision Comm'n Reports 301 (1976). Two legislative measures were recommended: One proposed revisions of Civil Code Section 1698 and related sections; the other proposed an amendment of Commercial Code Section 2209. The Commercial Code amendment was enacted as Chapter 7 of the Statutes of 1975. The other legislative measure was not enacted.

The Commission has reviewed its earlier recommendation relating to Civil Code Section 1698 and related sections in light of the objections made to this recommendation and submits this new recommendation.

Respectfully submitted,
MARC SANDSTROM
Chairman

Staff Draft

RECOMMENDATION

relating to

ORAL MODIFICATION OF 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.¹

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."² As a result of a great amount of litigation, the courts have established exceptions to the application of the rule

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1. Civil Code § 1698. An earlier Commission recommendation dealing with oral modification of contracts under Commercial Code Section 2209 was enacted by the Legislature in 1975. Cal. Stats. 1975, Ch. 7. See Recommendation and Study Relating to Oral Modification of Written Contracts, 13 Cal. L. Revision Comm'n Reports 301, 309, 312-313 (1976).
 2. 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 A. Corbin, Contracts § 301 (1950); 15 S. Williston, Contracts § 1828 (3d ed. 1972).

against oral modification in order to achieve just results in particular cases.³ These exceptions include the following:

(1) An oral agreement which has been executed by only one of the parties may be enforced by that party, notwithstanding Section 1698.⁴

(2) The parties may extinguish the written contract by an oral novation and substitute a new oral agreement.⁵

(3) The parties may rescind the written contract by an oral agreement, thereby satisfying the terms of Section 1698.⁶

(4) An oral modification may be upheld as a waiver of a condition of the written contract.⁷

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

(6) An oral agreement may be held to be an independent collateral contract, making Section 1698 inapplicable.⁹

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

3. 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).

4. D.L. Godbey & Sons Constr. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952). See also Background Study, infra at 328-329.

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

6. Treadwell v. Nickel, 194 Cal. 243, 253-261, 228 P. 25, 32-33 (1924).

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

8. Wade v. Markwell & Co., 118 Cal. App.2d 410, 420-421, 258 P.2d 497, 502-503 (1953).

9. Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App.2d 568, 577-578, 126 P.2d 644, 649-650 (1942).

The Commission recommends that Section 1698 be replaced by a new section that would be consistent with the rule adopted by Commercial Code Section 2209¹⁰ that a written contract may be modified orally unless the contract includes a provision that requires any modification to be in writing, but the requirements of the Statute of Frauds must be satisfied if the contract as modified is within its provisions. Specifically, the new section should provide:

(1) A written contract may be modified by another written contract and, to the extent it is executed by the parties, by an oral agreement. This would codify existing law.

(2) Unless the parties provide in the contract that any modification must be in writing, a written contract may be modified by an oral agreement supported by new consideration so long as the Statute of

10. Commercial Code Section 2209 provides:

2209. (1) An agreement modifying a contract within this division 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 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.

Frauds¹¹ is satisfied if the contract as modified is within its provisions. This would adopt the substance of the Commercial Code rule.¹²

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 continue to be applicable in appropriate cases.¹³

11. Civil Code § 1624.

12. The provision for an anti-oral modification clause in the contract is derived from subdivision (2) of Commercial Code Section 2209. However, the proposed section would not require that the clause be separately signed by either party. In contrast to subdivision (1) of Commercial Code Section 2209, the proposed section would retain the requirement of current law that the oral modification must be supported by new consideration. See *D.L. Godbey & Sons Constr. Co. v. Deane*, 39 Cal.2d 429, 246 P.2d 846 (1952). However, the proposed section would not continue the requirement of the *Godbey* case that the oral modification must be executed by the party seeking enforcement.

13. These principles would also be applicable in appropriate cases to nullify an express provision in the contract 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*, 123 Cal. App.2d 676, 276 P.2d 52 (1955). The "waiver" provisions of subdivisions (4) and (5) of Commercial Code Section 2209 achieve a similar result regarding contracts governed by that section.

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

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:

Chapter heading (technical amendment)

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. Section 1697 is amended to substitute "modification" for "new alteration" to conform with the terminology used in new Section 1698.

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) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration, but the statute of frauds (Civil Code Section 1624) must be satisfied if the contract as modified is within its provisions.

(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. Subdivisions (a) and (b) continue the substance of former Section 1698. Subdivision (c) is derived from subdivisions (2) and (3) of Commercial Code Section 2209. The rules provided by subdivisions (b) and (c) 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.

Subdivision (c) retains the requirement of the rule in D.L. Godbey & Sons Construction Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946 (1952), that the oral modification be supported by new consideration. Compare Com. Code § 2209(1)(new consideration not required). However, the requirement in Godbey that the party seeking enforcement of the oral modification must have executed his part of the agreement is not continued.

Subdivision (c) makes clear that the Statute of Frauds, Section 1624, must be satisfied where the contract as modified is within its provisions. Hence, where the contract as modified does not fall into a category described in Section 1624 or where a doctrine such as part performance takes the contract as modified out of the statute, the statute is inapplicable. See e.g., Trout v. Ogilvie, 41 Cal. App. 167, 182 P. 333 (1919) (part performance doctrine applied to transfer of real property interest); Mac Morris Sales Corp. v. Kozak, 263 Cal. App.2d 430, 69 Cal. Rptr. 719 (1963) (part performance doctrine applied to contract not to be performed within one year).

The introductory clause of subdivision (c) recognizes that the parties may prevent enforcement of executory oral modifications by providing in the written contract that it may only be modified in writing. See Com. Code § 2209(2) for a comparable requirement. Such a provision would not apply to an oral modification valid under subdivision (b). Also, the principles described in subdivision (d) may be applied to permit oral modification although 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).

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).