Chapter 9. Contract Modification

9.1. Modification. Does the UCC parol evidence rule suppress oral statements or writings made ***after*** contract formation? In *Trad Industries v. Brogan*, 805 P.2d 54 (Mont. 1991), a written contract specified a certain delivery date for the sale of elk. In subsequent telephone conversations, the parties agreed to a later delivery date. The court stated: "The telephone conversations are not barred by the parol evidence rule. These occurred *after* the writings and pertain to Trad's assertion that the contracts were subsequently modified." *Id.* at 58.

UCC § 2-209 governs the ***modification***, ***rescission*** or ***waiver*** of contract terms after the contract has been formed.

There is no requirement of consideration to modify a contract. UCC § 2-209(1). This changes the common law "pre-existing duty" rule.

☑ **Purple Problem 9-1.** A bakery enters into an agreement to purchase a new commercial oven at a price of $10,000, to be delivered and installed in 14 days. A few days after signing the agreement, the seller calls the bakery and states that it may not be able to meet the 14-day delivery date. The seller promises to deliver the oven within 21 days. The purchaser orally agrees to the revised delivery date. Is this oral modification enforceable?

Under UCC § 2-209(2), the parties are free to provide that a written agreement can be modified only by a signed writing (usually called a ***"no oral modification***" or "***N.O.M.***" clause).

With regard to "no oral modification" clauses in any transactions which are ***not between merchants***, the "no oral modification" clause in a merchant's form must ***be separately signed by the non-merchant***. This requirement of a

separate signing is intended to alert non-merchants that they should not rely upon oral assurances. UCC § 2-209(2).

☑ **Purple Problem 9-2.** A gravel company agrees to provide 25,000 tons of gravel at the rate of 1,000 tons per week to a construction company that is building a road in a private development. The agreement contains a "no oral modification clause." Delivery is not made in accordance with the delivery schedule in the written contract. In the lawsuit that follows for breach of contract, can the gravel company present evidence that subsequent to the execution of the written agreement the delivery schedules had been modified orally to accommodate the actual start-up and discontinuance of construction schedules on the project?

9.2. Statute of Frauds. Does the statute of frauds apply to a modification? UCC § 2-209(3) provides that "the requirements of the statute of frauds ... must be satisfied if the contract as modified is within its provisions." According to White & Summers, Uniform Commercial Code § 2-7 (West 6th ed., 2010), there are at least five possible interpretations of this language:

> (1) that if the original contract was within 2-201, any modification thereof must also be in writing;
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> (2) that a modification must be in writing if the term it adds brings the entire deal within 2-201 for the first time, as where the price is modified from $400 to $500;
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> (3) that a modification must be in writing if it falls in 2-201 on its own;
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> (4) that the modification must be in writing if it changes the quantity term of an original agreement that fell within 2-201; and
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> (5) some combination of the foregoing. Given the purposes of the basic statute of frauds section 2-201, we believe interpretations (2), (3), and (4) are each justified, subject of course to the exceptions in 2-201 itself and to any general supplemental principles of estoppel.

Although White & Summers state their opinion that it is not "justified" to apply UCC § 2-209(3) to all modifications of a contract that originally falls within § 2-201, the majority of courts that have addressed the issue have applied the statute of frauds to oral modifications if both the original contract and the contract, as modified, are contracts involving goods with a purchase price in excess of $500. See, for example, *Green Construction Co. v. First Indemnity of America Insurance Co.*, 735 F. Supp. 1254, 1261 (D.N.J. 1990); *Trad Industries v. Brogan*, 805 P.2d 54, 59 (Mont. 1991).

☑ **Purple Problem 9-3.** A law firm purchases a printer from Office Emporium for $400. The written contract provides that the law firm may return the printer at any time within 30 days following the purchase, for any reason, in which event the full purchase price will be returned. The contract does not contain a "no oral modification" clause. After experiencing several problems in the first week, the law firm manager and Office Emporium manager orally modify the 30-day return period to a 60-day return period. The problems continue sporadically, and the law firm returns the printer on the 59th day after its purchase. Office Emporium refuses to accept it and issue a refund, pointing out the 30-day return period in the contract.

(1) Is the modification enforceable?

(2) Does your answer to the preceding question change if the purchase price of the printer under the original contract is $600?

9.3. Waiver. If a post-formation oral statement does not constitute an enforceable modification either because of a valid "no oral modification clause" or because of the statute of frauds, the oral statement may nonetheless *operate as a waiver* under UCC § 2-209(4). For example, a contract for the sale of a car is signed, requiring twelve payments of $1,000 on the first of each month. After three months of making payments on the first, the buyer calls the seller and asks for permission to make payments on the 15th. The seller orally agrees and accepts payments on the 15th for several months. Although this does not meet the statute of frauds requirement, and thus is not an effective *modification*, it does constitute a waiver, and the seller is estopped from alleging breach for payments it accepted that were not received on the first day of the month. *Margolin v. Franklin*, 270 N.E.2d 140 (Ill. Ct. App. 1971). Does this mean that every attempt at oral modification can be construed as a waiver? No.

Waiver is based upon the equitable doctrine of estoppel, and requires that the party attempting to enforce the oral agreement has relied upon the modification to her detriment. See *Trad Indus. v. Brogan*, 805 P.2d 54, 59 (Mont. 1991), the elk case noted at above, in which the court stated: "When a promisee reasonably and foreseeably relies on a promise to his detriment the promise is binding if injustice can be avoided only by enforcement of the promise."

The advantage of the waiver argument is that waivers do not need to satisfy the statute of frauds.

The disadvantage of the waiver argument is that under § 2-209(5) the seller can *unilaterally* retract the waiver by providing reasonable notice to 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. In contrast, valid modifications *cannot* be unilaterally retracted.

☑ **Purple Problem 9-4.** Let's go back to the law firm purchase of a printer whose original cost is $600, and the oral modification of a 30-day return period to a 60-day return period. The law firm returns the printer on the 59th day, and Office Emporium refuses to accept it and issue a refund. When Office Emporium raises the statute of frauds defense, will the law firm nonetheless prevail with a waiver argument under § 2-209(5).