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Parol Modification and the Statute of Frauds: Fitting the Pieces Together under the Uniform Commercial Code

Jeanette K. Brooks

COMMENT

PAROL MODIFICATION AND THE STATUTE OF FRAUDS: FITTING THE PIECES TOGETHER UNDER THE UNIFORM COMMERCIAL CODE

INTRODUCTION

The Uniform Commercial Code (hereinafter "the Code" or "UCC") was designed to provide uniformity and clarity to commercial transactions. It has not been entirely successful in this endeavor. Much has been criticized in the Code. Debate has swirled around the provisions regarding modification of contracts for the sale of goods. Section 2-209 of the Code addresses "Modification, Rescission and Waiver."[1] For years, section 2-209 has left judges, attorneys, and law students dumbfounded. Too often precedent has compelled both bench and bar to stretch equitable principles to encompass the practical necessities of common commercial practice.

The vast majority of courts that have addressed the issue of whether all oral modifications of contracts within the statute of

1. U.C.C. § 2-209 (1998) provides:

§ 2-209. Modification, Rescission and Waiver.

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signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.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

frauds must resatisfy the statute of frauds by a signed writing have resolved that issue in the affirmative.[2] If the original contract satisfied the statute of frauds and the contract, as modified, is within the statute, it is submitted that when read in light of section 2-201, section 2-209(3) demands only that modifications of the quantity term need to again satisfy the statute of frauds. Conversely, the language of the standard No Oral Modification clause,[3] as addressed in section 2-209(2), requires that all modifications of a contract containing such a provision be documented by a writing. This comment distinguishes the requirements of sections 2-209(2) and 2-209(3).

This comment explores, respectively, the history and purpose of the statute of frauds, the requirement of the Code's statute of frauds, the distinctions between sections 2-209(2) and 2-209(3), the faults in the majority application of section 2-209(3), the proposed application of section 2-209(3), and the benefits of the submitted application of section 2-209.

I. History and Purpose of the Statute of Frauds

The statute of frauds evolved in seventeenth century England and was later carried over to the United States.[4] Designed to avoid fraud and perjury, the statute required that specified kinds of contracts[5] be written and signed or otherwise memorialized by a note signed by the party to be charged or his authorized agent.[6]

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2. Van Den Broeke v. Bellanca Aircraft Corp., 576 F.2d 582, 584 (5th Cir. 1978); Cooley v. Big Horn Harvestore Systems, Inc., 767 P.2d 740, 744 (Colo. Ct. App. 1988), *aff'd in part, rev'd in part*, 813 P.2d 736 (Colo. 1991); Green Constr. Co. v. First Indemnity of Am. Ins. Co., 735 F. Supp. 1254, 1261 (D. N.J. 1990).

3. *See* 18 Am. Jur. 2d Legal Forms § 253:394 (1972).

4. *See* 6 William Holdsworth, A History of English Law, 387-93 (Metheun & Co. Ltd. and Sweet & Maxwell Ltd. 1971) (2d ed. 1937); E. Allan Farnsworth, Contracts § 6.1, at 391-96 (2d ed. 1990); Jason Scott Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 U. Pa. L. Rev. 1859, 1863-64 (1996); James J. O'Connell, Jr., *Boats Against the Current: The Courts and the Statute of Frauds,* 47 Emory L.J. 253, 257-58 (1998).

5. *See* Farnsworth, *supra* note 4, § 6.1, at 391; O'Connell, *supra* note 4, at 257-58. Such contracts were those to charge an executor or administrator to answer out of his own estate for any special promise, for the conveyance of an interest in real property, in consideration of marriage, unable to be performed within one year, for the promise to answer for the debt or miscarriage of another and for the sale of goods.

6. Holdsworth, *supra* note 4. *See also* Frank A. Rothermel, *Role of Course of Performance and Confirmatory Memoranda in Determining the Scope,*

Numerous courts and commentators have alluded to this purpose in applying equitable principles to remove a contract from within the statute.[7] The written contract or memorandum served an evidentiary function by supplying proof of the terms as well as a deterrent function by discouraging actions on false allegations.[8]

The passing centuries brought new commercial practices and dilemmas. The Code sought to redress some of these dilemmas by loosening the requirements of the statute of frauds.[9] Means of

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Operation, and Effect of 'No Oral Modification' Clauses, 48 U. PITT. L. REV. 1239 (1987).

7. Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1292 (7th Cir. 1986) (Easterbrooke J., dissenting) (referring to "manufactured assertions of alteration"); Dangerfield v. Markel, 252 N.W.2d 184, 190 (N.D. 1977). *See* Eisler, *Modification of Sales Contracts Under the Uniform Commercial Code: section 2-209 Reconsidered,* 57 TENN. L. REV. 401 (1990); Rothermel, *supra* note 6. For an interesting discussion of wayward applications of the statute of frauds, see O'Connell, *supra* note 4, at 268.

8. FARNSWORTH, *supra* note 4, § 6.1, at 392. Eisler, *supra* note 7, at 415. *See also* E. Rabel, *The Statute of Frauds and Comparative Legal History,* 63 LAW Q. REV. 174, 175-178 (1947).

9. U.C.C. § 2-201 (1998) provides:

§ 2-201. Formal Requirements; Statute of Frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $ 500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract which does not satisfy he requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

satisfying the signature requirement broadened to encompass commercial standards by, for example, allowing satisfaction of the signature requirement by a preprinted letterhead[10] or trademark.[11] The drafters went so far in accommodating business practices that the merchant exception binds a merchant for his inaction in failing to object within ten days to a memorandum that would have previously bound only the sender.[12]

None of the Code's divergences from the original statute can be said to be oversights. The Code is widely regarded as the most thorough and comprehensive body of legislation in the history of American jurisprudence.[13] In an attempt to provide uniformity, the drafters and legislatures fitted the law to those most directly affected by its provisions.[14] Catering to common commercial practices and seeking to standardize them, the drafters recognized the frequency of oral modifications of contracts within the statute.[15] Time constraints and the need for efficiency often overcome the desire to reduce modifications to writing. Surely, the most desirable situation allows time to prepare a document of modifications and send it to the other party. Business, however, cannot always be put on hold for technicalities. Parties, ignorant of the statute, often chose not to document their contracts or modifications, instead each relying upon the value of the other party's word.[16]

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606)

See Farnsworth, *supra* note 3, § 6.6 at 422-26, § 6.7 at 432-33.

10. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cole, 457 A.2d 656 (Conn. 1983).

11. Barber & Ross Co. v. Lifetime Doors, 810 F.2d 1276 (4th Cir. 1987).

12. U.C.C. § 2-201(2).

13. *Wisconsin Knife Works*, 781 F.2d at 1291; FARNSWORTH, *supra* note 4, § 1.9 at 29-30;

14. FARNSWORTH, *supra* note 4, § 1.10 at 34.

15. T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 2-209[A][6], at 2-84 (1978); JOSEPH LEVIE, THE INTERPRETATION OF CONTRACTS IN NEW YORK UNDER THE UNIFORM COMMERCIAL CODE, 10 N.Y.L.F. 350, 355 (1964); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1-5, at 44 (2d ed. 1980).

16. *See* Arthur Linton Corbin, *The Uniform Commercial Code – Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 829 (1950); Karl N. Llewellyn, *What Price Contract? —An Essay in Perspective*, 40 YALE L.J. 704, 712-14, note 45, at 722 (1931) (noting the frequency with which parties omit vital terms from a writing).

II. ANALYSIS

A. *Requirements of the Code's Statute of Frauds*

Contracts for the sale of goods priced above five hundred dollars must satisfy the statute of frauds.[17] The statute has three formalities.[18] First, a contract for the sale of goods must be evidenced by a writing.[19] A memorandum of nothing more than negotiations is not enough to bind a party. Some reasonable basis for believing that a real transaction was entered into must underlie any discussion of satisfaction of the statute.[20] Second, a written and signed contract or note must be made at some point.[21] Courts generally agree that the writing may be made any time prior to the bringing of the action.[22] The Code's sweeping definition of signature eases satisfaction of this requirement as a party may sign a memorandum without intending to or realizing that he or she is complying with the statute.[23] Finally, the contract or note must state a quantity. The Code provided that the note is valid though a term is omitted or misstated, but not beyond the quantity stated in the document.[24] Following the official commentary to the Code's statute of frauds, courts throughout this country have inferred from the language of section 2-201(1) that the quantity term must be stated in the writing.[25] Notably absent from the Code's statute of frauds is any reference to the traditional requirement that the memorandum set forth all the essential terms of the

17. U.C.C. § 2-201(1). A revision proposed by a study group sponsored by the Permanent Editorial Board of the U.C.C. would increase the price threshold to $ 10,000. National Conference of Commissioners on Uniform State Laws, *Revision of the Uniform Commercial Code: Article 2 - Sales 2-201(a)* (Discussion Draft, April 14, 1997).

18. U.C.C. § 2-201, comment 1.

19. U.C.C. § 2-201, comment 1.

20. U.C.C. § 2-201, comment 1.

21. U.C.C. § 2-201, comment 1.

22. Mid-South Packers v. Shoney's, 761 F.2d 1117 (5th Cir. 1985) (invoice made after contract formed was sufficient memorandum); Aragon v. Boyd, 450 P.2d 614 (N.M. 1969) (letters reciting contract sent after contract was formed were sufficient memoranda).

23. U.C.C. § 1-201(39). The "intent" required by the Code is an intent to authenticate the whole of the writing, rather than an intent to comply with the statute. U.C.C. § 1-201, comment 39.

24. U.C.C. § 2-201(1). *See also* Eisler, *supra* note 7, at 428.

25. U.C.C. § 2-201, comment 1; Dangerfield v. Markel, 252 N.W.2d 184, 189 (N.D. 1977); Costco Wholesale Corp. v. Worldwide Licensing Corp., 898 P.2d 347, 350-51 (Wash. App. 1995).

contract.[26] The Official Comment goes so far as to state that the language of section 2-201 was "intended to make it clear"[27] that the writing used to satisfy the statute "need not contain all the material terms of the contract and such material terms . . .need not be precisely stated."[28] The drafters clearly abandoned strict adherence to the original statute.

The Code provides alternative means of satisfying the statute which were not previously available. Specially manufactured goods[29] and part performance[30] exceptions allow a party to avoid defeat in court for noncompliance with the statute. Admissions in pleadings or testimony prevent the party so admitting from successfully asserting the statute as a defense.[31] Likewise, the merchants exception overcomes the statute where the recipient of a note which would be good as against the sender has reason to know of the note's contents and does not object within ten days.[32] These alternative means of satisfaction and the meager requirements discussed above indicate that the Code does not dictate strict adherence to the commercially blind statute as enacted in 1677.[33]

B. Distinctions Between Section 2-209(2) and Section 2-209(3)

Relying on the Official Comment to section 2-209(2) which allows the "parties in effect to make their own Statute of Frauds," courts often address sections 2-209(2) and 2-209(3) as though the only difference between the two provisions is the origin of the writing requirement, by contract or by statute.[34] This is perhaps the greatest flaw in interpretation of section 2-209. While the distinction is noteworthy, it pales in comparison to the substantive differences between the so-called private and public statutes of fraud. In blurring the substantive differences between these provisions, courts have essentially trampled on the freedom to contract. The inclusion of a no oral modification clause may be considered "boilerplate" language.[35] Boilerplate is by definition "standard" and

26. 4 *Williston on Contracts* § 567A, at 17 (3d ed. Jaeger 1961).
27. U.C.C. § 2-201, comment 1.
28. U.C.C. § 2-201, comment 1.
29. U.C.C. § 2-201(3)(a).
30. U.C.C. § 2-201(3)(c).
31. U.C.C. § 2-201(3)(b).
32. U.C.C. § 2-201(2).
33. O'Connell, *supra* note 4, at 257.
34. U.C.C. § 2-209, comment 3.
35. Rothermel, *supra* note 6, at 1241.

"almost universal" especially in the area of contracts.[36] Thus, its absence cannot be said to be a mere oversight. Rather, the absence of an express provision within the contract proscribing modifications except by a signed writing must be seen as part of the bargained for exchange. In omitting such terms, contracting parties are exercising their freedom to exclude contract terms which are not statutorily required. If such an omission is prohibited by the Code, then section 2-209(2) is meaningless because there would be no reason for the parties ever to include a no oral modification clause.

Section 2-209(2) has been labeled a "private statute of frauds."[37] This is a misnomer. The statute of frauds may be satisfied or otherwise avoided by promissory estoppel,[38] part performance,[39] judicial admission,[40] or confirmatory memoranda.[41] However, a no oral modification clause is not subject to all of these exceptions. Ongoing debate leaves doubt as to whether a confirmatory memorandum satisfies section 2-209(2),[42] though it is expressly provided for in the Code's statute of frauds.[43] A proposed revision of the Code would expand the use of a confirmatory memorandum to bind the recipient to include application in contracts between non-merchants or between merchant and non-merchant as well as between merchants.[44] As the Permanent Editorial Board of the U.C.C. considers this suggestion from a study group it sponsored, the importance of this distinction becomes even greater. Such revisions will make it easier to avoid the statute of frauds, further demonstrating the Code's excommunication of traditional adherence to the statute of frauds. Noteworthy, however, is the absence of any reference in these proposals to section 2-209(2).[45]

Subsection two of section 2-209 differs from subsection three in an even more significant manner. The former provision fulfills

36. Barron's Law Dictionary 54-55 (4th ed. 1996).
37. FARNSWORTH, *supra* note 4, § 7.6, at 494.
38. Northwest Potato Sales, Inc. v. Beck, 678 P.2d 1138 (Mont. 1984).
39. U.C.C. § 2-201(3)(c).
40. U.C.C. § 2-201(3)(b).
41. U.C.C. § 2-201(2).
42. For an interesting comment on this matter, *see* Rothermel, *supra* note 6.
43. U.C.C. § 2-201(2).
44. Richard E. Spiedel and Linda J. Rusch, *The Emerged and Emerging New Uniform Commercial Code, Article 2: Highlights of the Proposed Revisions*, SC36 ALI-ABA 15 (1997).
45. *Id.*

not only the evidentiary function of the so-called "public statute of frauds", but also provides a principal greater protection from the actions of his agent.[46] Although the statute of frauds was not intended to change the law of agency,[47] no oral modification clauses offer a principal greater protection than is normally afforded under a standard statute of frauds provision.[48] A typical no oral modification clause states: "This agreement cannot be modified in any way except in a writing signed by both parties."[49] Such provisions serve a cautionary function. The contract can only be modified by a writing. Actions of thoughtless or overzealous employees are less likely to bind their employers.[50] Employers may hide behind the provisions of the no oral modification clause. Debate continues over whether alternative means of satisfying the statute of frauds satisfy the writing requirement of a no oral modification clause.[51] The existence of the debate evidences the distinction between a no oral modification clause and the statute of frauds. Extending far beyond the mere evidentiary function of the statute of frauds, "private statutes of frauds" are not statute of frauds and thus should not be referred to as such.

Section 2-209(3) is by its own terms a true statute of frauds within the terms of the Code. The Code states: "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."[52] The requirements of the Code's statute of frauds are neither abbreviated nor expanded. Section 2-209(3) merely references the reader to the Code's statute.[53] Where the provision regarding no oral modifications states that a contract which "excludes modification or rescission except by a signed writing *cannot be otherwise modified or rescinded*,"[54] section 2-209(3) does not specifically address modes of satisfying the statute of frauds. Section 2-209(3) serves as a point of cross-reference to the Code's statute of frauds.[55] Expressly referring to section 2-201, section 2-209(3)

46. Eisler, *supra* note 7, at 419-20.
47. 4 *Williston on Contracts* § 587, at 177 (3d ed. Jaeger 1961).
48. Eisler, *supra* note 7, at 419-20.
49. 18 AM. JUR. 2D Legal Forms at 253:394.
50. Eisler, *supra* note 7, at 419-20.
51. *Id.*
52. U.C.C. § 2-209(3).
53. U.C.C. § 2-209(3).
54. U.C.C. § 2-209(2) (emphasis added).
55. U.C.C. § 2-201.

must be read in light of the language and case law of section 2-201.[56]

The requirements of a sufficient writing differ depending on whether the writing is compelled by subsection two or three. Subsection two presents a higher hurtle for the modifying parties to jump. A no oral modification clause requires that the modification be written, not merely memorialized by the writing. Where the parties have included a no oral modification clause, the Code requires modification "to be made 'by an instrument in writing.'"[57] Conversely, the statute of frauds is clear that a memorandum will satisfy its requirements.

C. *Faults in the Majority Application of Section 2-209(3)*

The majority application of section 2-209(3) restrains common commercial practices and inhibits beneficial modifications.[58] Most courts have required that every modification of a contract within the statute of frauds be memorialized by a writing though the original contract did not contain a no oral modification clause.[59] Buyers and sellers who modify their agreement find themselves trapped. A party seeking to modify or accommodate a modification faces, on one hand, the tedious and time consuming process of memorializing the modification, and on the other hand, the peril of perhaps unreasonably relying on a parol modification.

Although the satisfaction process may be expedited through the use of the merchants exception[60] and electronic media,[61] these alternatives still slow the transaction and bring additional dangers. Though a recipient may be bound by a note that would be good as against the sender, assuming both parties are merchants,[62] the sender must dedicate time to constructing the note and runs the risk of failing to send the written confirmation

56. U.C.C. § 2-209(3).

57. Marlowe v. Argentine Naval Comm., 808 F.2d 120, 123 (D.C. Cir. 1986).

58. Quinn, *supra* note 15, at 2-84 (discussing the frequency of modifications and the inclusion of no oral modification clauses).

59. Van Den Broeke v. Bellanca Aircraft Corp., 576 F.2d 582, 584 (5th Cir. 1978); Cooley v. Big Horn Harvestore Systems, Inc., 767 P.2d 740, 744 (Colo. Ct. App. 1988), *aff'd in part, rev'd in part*, 813 P.2d 736 (Colo. 1991); Green Constr. Co. v. First Indemnity of Am. Ins. Co., 735 F. Supp. 1254, 1261 (D. N.J. 1990).

60. U.C.C. § 2-201(2).

61. *See* Marc E. Szafran, *A Neo-Institutional Paradigm for Contracts Formed in Cyberspace: Judgment Day for the Statute of Frauds,* 14 CARDOZO ARTS & ENT. L.J. 491, 502-506 (1996) (discussing electronic media as a "writing").

62. U.C.C. § 2-201(2).

within a reasonable time. Furthermore, determining what is a reasonable time presents hazards which are beyond the scope of this comment. The sending merchant must also gamble that in the event of a dispute he will be able to establish that the recipient had reason to know the contents of the note.[63] As for the possible use of electronic media such as e-mail and tape recordings, the Code has not yet addressed the issue of whether such devices satisfy the writing requirement of the statute.[64] Courts that have broached the electronic memo and electronic signature issues have not uniformly held that electronic signatures on electronic memoranda satisfy the writing and signature requirements, especially in reference to audio tape recordings.[65] Parties seeking to use electronic media to memorialize a modification may find that such efforts were of no avail if the courts or future Code revisions conclude that these new media are insufficient.

The waiver alternative presented in section 2-209(4) and section 2-209(5) offers its own hazards. Section 2-209(4) provides that modifications which fail to satisfy sections 2-209(2) and (3) "*may* operate as a waiver."[66] The first obstacle a party attempting to show a waiver must face is under what circumstances a flawed modification operates as a waiver. Some courts have concluded that reasonable reliance is necessary for a waiver;[67] others have vaguely stated that course of performance, possibly a higher bar than reasonable reliance, is necessary.[68] One court has gone so far as to suggest that no more conduct than orally making the contract is necessary to affect a modification.[69] The second, and perhaps greater, obstacle is determining what exactly is waived.

63. U.C.C. § 2-201(2), comment 3.

64. Szafran, *supra* note 61, at 502-506.

65. Londono v. City of Gainesville, 768 F.2d 1223, 1227 (11th Cir. 1985) (tape recording "at the meeting satisfies the statute"); *But see* Swink & Co. v. Carroll McEntee & McGinley, 584 S.W.2d 393 (Ark. 1979) (assuming audio recording was a memorandum, it was not signed).

66. U.C.C. § 2-209(4).

67. *Wisconsin Knife Works*, 781 F.2d at 1287 (an attempted modification is effective as a waiver only if there is reasonable reliance that "adds something in the way of credibility to the mere say-so of one party"); Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 455, 337 S.E.2d 616, 619 (1987) (oral agreement without reliance is insufficient to establish a § 2-209(4) waiver).

68. Green Constr. Co. v. First Indem. of Am. Ins. Co., 735 F. Supp.1254 (D.N.J. 1990), *aff'd without op,* 935 F.2d 1281 (3d Cir. 1991) (waiver cannot be established without a course of performance based on the waiver).

69. Double—E Sportswear Corp. v. Girard Trust Bank, 488 F.2d 292, 296-97 (3d Cir. 1973).

Neither the Code nor the Official Comment indicate what the waiving party has waived.[70] Even if a party asserting the waiver manages to demonstrate the necessary requirements for waiver along with what the opposing party has waived, a greater challenge lies ahead. The waiving party may show that the waiver was retracted. Section 2-209(5) allows a waiving party to retract the waiver as to executory portions of the contract in the absence of reasonable reliance.[71] Thus the party asserting the modification ultimately faces the risk of unreasonable reliance on a waiver which has been retracted. As with any issue of reasonableness, much lies in the eyes of the beholder and the eagerness of the court in finding for a particular party.

Despite the conundrums of subsection four, courts regularly use waiver to avoid the harshness of the majority interpretation of subsection three. All too often, the bases for these waivers are at best strained and at worst absurd. Official comment on the waiver provision indicates that the drafters did not want parties to escape their "actual later conduct" by relying on the statute of frauds or a no oral modification clause.[72] Interpretation of actual later conduct by the court in determining whether a waiver has occurred leaves room for the court to find conduct amounting to a waiver that may be less than convincing.

D. Proposed Application of Section 2-209(3)

Most courts that have addressed the modification issue have required all modifications of contracts within the statute to be evidenced by a writing, without regard to whether section 2-209(2) or section 2-209(3) controlled the case.[73] As previously discussed, these two provisions differ significantly.[74] Section 2-209(3) requires that the modification satisfy the Code's statute of frauds. The only term, according to section 2-201, which must be included in the writing is the quantity term.[75] If the original contract satisfied the statute, whether or not it was originally within the statute, by evidence of a written memorandum or other means enumerated in section 2-201, then a modification of terms other than the quantity term do not alter the original satisfaction of the

70. U.C.C. § 2-209(4); U.C.C. §2-209, comment 4.
71. U.C.C. § 2-209(5).
72. U.C.C. § 2-209, comment 4.
73. *See supra* text accompanying note 59.
74. *See supra* text accompaning note 34-57.
75. U.C.C. § 2-201(1).

statute. That is to say, once a writing has been created giving a reasonable basis for believing that an agreement exists, containing the signature of the party to be charged and providing a quantity term, future modifications of other aspects of the contract will not undermine the original satisfaction of the statute. One commentator has referred to this proposition as "pass through" satisfaction.[76] The original satisfaction of the statute passes through to the contract as modified except as pertains to modifications of the quantity term.[77]

Why then do the courts require that *all* modifications be written? No logical answer withstands critical analysis. A party seeking to enforce a contract modified with regards to non-quantity terms, such as price and date of delivery, almost uniformly must provide a signed memorandum.[78] The plain language of section 2-209(3) refers expressly to section 2-201.[79] Section 2-201, making no mention of terms other than quantity,[80] has not been read to require non-quantity terms to be memorialized except as pertains to modifications.[81] Courts interpreting section 2-209(3) seldom mention the requisites of section 2-201.[82] It is submitted that when read in light of section 2-201, section 2-209(3) requires that only modifications of the quantity term must be evidenced by a signed writing provided that the original agreement satisfied the statute of frauds. Such an interpretation of section 2-209(3) leaves intact the requirements of section 2-209(2) which by its plain language allows modification only through a writing.[83] Thus, those parties seeking to control the hasty actions of agents[84] may do so by simply inserting in the original agreement a no oral modification clause.

Put in the simplest terms and the most convenient definitions, the following rule emerges from this submission: When the

76. Eisler, *supra* note 7, at 427-30.

77. *Id.* at 427-30.

78. *See supra* text accompanying note 59; *But see Costco*, 898 P.2d at 351.

79. U.C.C. § 2-209(3).

80. *See* U.C.C. § 2-201.

81. U.C.C. § 2-201; U.C.C. § 2-201, comment 1 ("The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.").

82. *See Wisconsin Knife Works*, 781 P.2d. 1280; *Dangerfield*, 252 N.W.2d 184.

83. U.C.C. § 2-209(2). *See supra* text accompanying notes 34-57.

84. *See supra* text accompanying notes 47-50.

original agreement satisfies the statute of frauds, then modifications of that agreement require a memorandum only if the quantity term is modified.[85]

The Washington State Court of Appeals appears to have followed this reasoning in *Costco Wholesale v. Worldwide Licensing*.[86] In a contract for the sale of jewelry, Costco alleged that Worldwide agreed to a rebate; Worldwide alleged that Costco agreed to buy a greater quantity.[87] Both parties contended that the other party's claim was barred by the statute of frauds.[88] Commenting in a footnote that it disagreed with those courts and commentators which require every modification to be in writing,[89] the *Costco* court followed the plain language of section 2-209(3) and looked to section 2-201 in determining the enforceability of the alleged price and quantity modifications.[90]

Noting that the original contract satisfied the statute and that satisfaction passed through to the modified agreement, the court in *Costco* barred Worldwide claim's on the quantity modification, but refused to bar Costco's claim on the rebate.[91] The court concluded that the defendant could not rely on the statute of frauds to bar plaintiff's claim for the rebate since the rebate was essentially a price modification.[92] In satisfying the statute, parties may omit the price term.[93] Analyzing section 2-201, the court properly reasoned that modifications of price need not be memorialized given that the statute of frauds does not require a memorandum of the price in the original contract.[94] However, quantity must be stated in the original contract or memorandum for the contract to be enforceable.[95] Logically, modifications to such a required term necessarily must be memorialized, and so the claim on a parol modification of the quantity term failed.

An argument could be made that the inclusion of a non-quantity term in the original memorandum somehow endows that term with a greater fortitude than the statute provides. Since the par-

85. Eisler, *supra* note 7, at 430.
86. *Costco*, 898 P.2d 347.
87. *Id.* at 350.
88. *Id.*
89. *Id.* at 351.
90. *Id.*
91. *Id.*
92. *Id.* at 351.
93. U.C.C. § 2-201(1).
94. *Costco*, 898 P.2d at 351.
95. U.C.C. § 2-201(1); *Costco*, 898 P.2d at 351.

ties thought the term was of enough significance to include in the original writing, subsequent modifications of such terms should be unenforceable without a memorandum, or so the argument goes. The inclusion of unnecessary terms does not alter the necessities of satisfaction. If it is assumed that the unnecessarily included term was of importance and it was because of this importance that the parties included it, then the likelihood is that no modification took place. The party asserting the modification most assuredly will then fail to carry his burden of proof and no modification will be found.[96] Furthermore, the parties frequently have either made the writing in total ignorance of the statute or included unnecessary terms in ignorance of section 2-201.[97] In the both types of situations, an argument cannot be made with a straight face that the parties included the unnecessary terms in the memorandum lest those terms be subject to the parol modification. Those with enough sophistication to be leery of the perversities of oral modifications would surely be sophisticated enough to include a no oral modification clause rendering this debate moot.

E. Benefits of the Submitted Application of section 2-209(3)

At common law, consideration was a prerequisite to enforceability of a modification.[98] The Code extinguished this requirement[99] and substituted in its place enforceability of no oral modification clauses.[100] Those wishing for the greatest protection from false assertions of oral modifications will surely include a no oral modification clause even at the expense of expediency. Common commercial practices and the speed with which they are executed are a greater impetus on contracting parties to omit a no oral modification clause from their agreement than is the marginal benefit to be had from inclusion of such a term.

The modern business world presents buyers and sellers with an extraordinary variety of conflicts. In the global economy, market conditions change more rapidly than ever. News of shortages and excess supply flash around the world via space satellites and the internet. Such news directly and virtually instantaneously varies the price at which goods are bought and sold. Distribution and manufacturing expenses are likewise effected by such vari-

96. Taran Distrib., Inc. v. Ami, Inc., 237 F.2d 488 (7th Cir. 1956).
97. See *supra* text accompanying note 16.
98. FARNSWORTH, *supra* note 4, § 7.6, at 492; Eisler, *supra* note 7, at 404.
99. U.C.C. § 2-209(1).
100. U.C.C. § 2-209(2).

ables. No longer can a retailer, distributor or manufacturer remain stifled by formalities of a Code long since outdated. Many conflicts and recessions have come and gone since the Code originated in the 1950's. The law must keep pace with the needs of common commercial practice. The flood of litigation surrounding section 2-209 evidences that common commercial practice cannot lay idle, stalled by antediluvian formalities. Parol modification is necessary and commonplace.

Those seeking to conform to common commercial practices will not go unprotected from false assertions. Even in the absence of a no oral modification clause, the Code does not throw open the doors to false allegations. The requirement of good faith remains.[101] The possibility of criminal sanctions looms over the heads of would-be perjurers. One deterrent to the bringing of false actions provides the greatest obstacle, the burden of proving the alleged modification.

The burden of proving a modification rests with the party asserting the modification.[102] Requiring a writing has not changed this common law. Instead, such requirements have encouraged the creation of documents to offer as proof of modifications and terms of such modifications. In the absence of a writing requirement, however, a party asserting a modification can still meet its burden through the production of testimony and other evidence. It is acknowledged that the burden may be more difficult to meet without a memorandum, but modern law provides a framework within which these difficulties may be overcome. The Code is part of this modern framework. As indicated in the Code's section preceding § 2-209, the parties' course of performance is relevant to determining the existence and terms of a modification.[103] Absent a no oral modification clause, testimony and other evidence establishing a course of performance may be used by a party asserting a modification of a non-quantity term to meet the burden of proof. Thus, a party omitting a no oral modification clause is afforded the protection of the original statute of frauds and the shelter of the rules of evidence, while enjoying the liberty of orally modifying a non-quantity term.

101. U.C.C. § 1-203.

102. Taran Distrib., Inc. v. Ami, Inc., 237 F.2d 488 (7th Cir. 1956).

103. U.C.C. § 2-208.

III. CONCLUSION

The Code allows modification of a contract in the absence of additional consideration and enforcement of a no oral modification clause. Without such a clause, the Code requires only that the contract, as modified, satisfy the statute of frauds. Where the original contract satisfied the statute of frauds, that satisfaction passes through to the modified agreement. Only agreements modifying the quantity term require a separate satisfaction. Keeping apace with modern commercial practices, the submitted interpretation of section 2-209(3) allows parties to a contract to modify as market conditions and other factors vary.

Jeanette K. Brooks