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WAIVER OF THE STATUTE OF FRAUDS UNDER UNIFORM COMMERCIAL CODE SECTION 2-209: DOUBLE-E SPORTSWEAR CORP. v. GIRARD TRUST BANK

Section 2-209 of the Uniform Commercial Code[1] reflects an attempt to adapt previous statutes and the common law to the sophisticated commercial practices of the modern marketplace while retaining safeguards against perjury and fraud. The provisions of this section, which govern modifications of contracts for the sale of goods, however, are subject to a number of interpretational difficulties.[2] One particularly significant question was brought into focus by the recent decision of the Court of Appeals for the Third Circuit in *Double-E Sportswear Corp. v. Girard Trust Bank*[3] that an attempted oral modification of a contract may operate as a waiver of the express statute of frauds provisions of the Code. Central to this ruling was an interpretation of the relationship between Code section 2-209(3), which requires that all contract modifications be in writing if the contract, as modified, is subject to the express statute of frauds requirements of the Code, and section 2-209(4), which states that an attempted modification which fails to satisfy the requirements of subsection (3) or a private statute of frauds between the parties under subsection (2) may nevertheless operate as a "waiver."[4] Specifically, the court was faced with the necessity of determining precisely what may be waived under the provisions of section 2-209(4).

1. UNIFORM COMMERCIAL CODE § 2-209 [hereinafter cited as UCC]. The text of section 2-209 is reproduced at note 33 *infra*.

2. *See, e.g.*, All-Year Golf, Inc. v. Products Investors Corp., 34 App. Div. 2d 246, 310 N.Y.S.2d 881 (Sup. Ct. 1970); Thomas Knutson Shipbuilding Corp. v. George Rogers Constr. Corp., 6 UCC REP. SERV. 323 (N.Y. Sup. Ct. 1969); Edelstein v. Carole House Apts., Inc., 220 Pa. Super. 298, 286 A.2d 658 (1971); Asco Mining Co. v. Gross Contracting Co., 3 UCC REP. SERV. 293 (Pa. Ct. C.P. 1965); Inwood Knitting Mills, Inc. v. Budge Mfg. Co., 1 UCC REP. SERV. 84 (Pa. Ct. C.P. 1962); *In re* Estate of Upchurch, 62 Tenn. App. 634, 466 S.W.2d 886 (1970). *See generally* Note, *The Scope and Meaning of Waiver in Section 2-209 of the Uniform Commercial Code*, 5 GA. L. REV. 783 (1971); Comment, *Oral Modification of Sales Contracts and the Statute of Frauds*, 21 DRAKE L. REV. 593 (1972); Comment, *The Mechanics of Parol Modification of Contracts Under the Uniform Commercial Code*, 29 U. PITT. L. REV. 665 (1968).

3. 488 F.2d 292 (3d Cir. 1973).

4. It is imperative at this point to distinguish between oral modification of a contract and the elimination of a condition for performance by a promisor's waiver. "A con-

Before examining the propriety of the decision in *Double-E* permitting waiver of the statute of frauds requirements of Code section 2-201,[5] it is necessary to survey the evolution of the statute of frauds and the concept of oral modification of contracts to their current status under Code sections 2-201 and 2-209, respectively. The interrelationship of these two sections must then be analyzed to ascertain the effect of the *Double-E* holding upon the balance of commercial flexibility and protection from fraud which it is necessary that the Code provide.

PRE-CODE ORAL MODIFICATION OF WRITTEN CONTRACTS

Oral promises became enforceable at English common law during the fourteenth century with the advent of actions in assumpsit,[6] but inequity soon resulted because of rigid procedural rules facilitating the perpetration of fraud by anyone willing to suborn perjury.[7] Lending vitality to this unfortunate consequence was the rule precluding testimony from parties to a lawsuit, as well as that prohibiting courts from overturning jury verdicts regardless of their reasonableness in light of the evidence presented.[8] With little to inhibit them, allegations of nonexistent oral contracts became increasingly common until 1677 when the House of Lords responded with "An Act for Prevention of Frauds and Perjuries." [9] The English Statute of Frauds predicated the enforceability of a contract for the sale of goods priced at ten or more pounds sterling upon

tractual modification . . . produces the usual effects of other valid contracts." 3A A. CORBIN, CONTRACTS § 752, at 482 (1960). A waiver, on the other hand, rather than constituting a binding agreement, is generally defined as the "intentional relinquishment of a known right." 3 S. WILLISTON, LAW OF CONTRACTS § 678, at 1959 (rev. ed. 1936).

There are several possible meanings of "waiver" (*id.* § 679, at 1960-63), and it has been said that the term "cannot be defined without reference to the kind of circumstances to which it is being related." 3A A. CORBIN, *supra*, § 752, at 478. It is clear, however, that in the context of variations from the terms of a binding contractual relationship, a waiver becomes enforceable only when another party relies thereon, the waiving party thereafter being estopped from enforcing the term. *Id.* at 480-81. A modification possesses all characteristics of a contract and is enforceable even absent detrimental reliance. The failure adequately to recognize this distinction has been a major source of difficulty in interpreting section 2-209.

5. The text of Code section 2-201 is reproduced at note 21 *infra*.

6. 2 A. CORBIN, *supra* note 4, § 275, at 2.

7. *Id.*

8. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 43 (1972).

9. 29 Car. II, c. 3 (1677).

the existence of a writing signed by the party against whom enforcement was sought or upon part performance.[10]

Although the Statute of Frauds undoubtedly provided for a more equitable result in many cases by preventing enforcement of nonexistent oral agreements,[11] it created a countervailing opportunity for those entering oral agreements to avoid enforcement with impunity.[12] Throughout the eighteenth and nineteenth centuries a steady undercurrent of criticism appeared, first in England and later in the United States, as the Statute's potential for encouraging fraud became manifest.[13] Consequently, there evolved a tendency by many courts to circumvent the writing requirement,[14] often upon what one commentator has termed "flimsy grounds." [15]

Despite the growing disenchantment with the Statute of Frauds, it was adopted, without substantial change, as section 4 of the Uniform Sales Act.[16] Thus, during the period immediately preceding the drafting of the Uniform Commercial Code, application of statute of frauds re-

10. Section 17 of the English Statute provided: "[N]o contract for the sale of any goods, wares, merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." *Id.* § 17.

11. The extent to which the Statute of Frauds actually deterred those who otherwise would have attempted to enforce nonexistent promises cannot be measured. Various courts, apparently relying on reason rather than empirical data, have nevertheless lavished praise upon the rule. *See, e.g.*, Dunphy v. Ryan, 116 U.S. 491, 498 (1886) ("The statute of frauds is founded in wisdom and has been justified by long experience.").

12. 2 A. CORBIN, *supra* note 4, § 275, at 3.

13. *Id.* at 8 & n.9.

14. *Id.* at 3 n.2; *see, e.g.*, Piper v. Fosher, 121 Ind. 407, 23 N.E. 269 (1890); Bader v. Hiscox, 188 Iowa 986, 174 N.W. 565 (1919); Hillhouse v. Jennings, 60 S.C. 373, 38 S.E. 599 (1901).

15. 2 A. CORBIN, *supra* note 4, § 275, at 3.

16. This uniform act was adopted in 36 jurisdictions but has since been superceded in each with the enactment of the Uniform Commercial Code. Section 4(1) provided: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

quirements in a majority of states was subject to vast judicial discretion, with little uniformity among the various jurisdictions.[17]

The Statute of Frauds applied to common law agreements modifying contracts in precisely the same manner it applied to original contracts; modifications which either brought a contract within the ambit of the Statute or failed to remove a contract from its reach were enforceable only if evidenced by a writing, or if partially performed.[18] Although there was never uniform judicial response in this country with respect to the effect of the Statute upon oral modifications, the majority of American courts followed the common law rule, applying the Statute anew to the contract in its modified state.[19] This practice continued until adoption of the Uniform Commercial Code, since the Uniform Sales Act did not regulate oral modifications of contracts.[20]

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17. Courts of equity refused to enforce the Statute of Frauds whenever they determined that strict adherence would promote, rather than prevent, fraud. *See, e.g.*, Montgomery v. Moreland, 205 F.2d 865 (9th Cir. 1953); Holton v. Reed, 193 F.2d 390 (10th Cir. 1951); Munzenmaier v. Quick, 134 Conn. 404, 58 A.2d 378 (1948); Harrington v. Harrington, 172 Kan. 549, 241 P.2d 513 (1952); Wussler v. Peterson, 270 S.W.2d 12 (Mo. Sup. Ct. 1954); Curcio v. Lounsbury, 64 N.Y.S.2d 128 (Sup. Ct. 1946); Cobble v. Langford, 190 Tenn. 385, 230 S.W.2d 194 (1950); Clark v. Atkins, 188 Va. 668, 51 S.E.2d 222 (1949).

Even courts of law exercised wide discretion in interpreting the Statute and determining what transactions were exempted from its writing requirement. *Compare* Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954), holding the Statute of Frauds a rule of substance, *with* Carmichael v. Stone, 243 Iowa 904, 54 N.W.2d 454 (1952), terming it a rule of evidence, *and* Grossman v. Levy's, 81 So. 2d 752 (Fla. 1955), holding that the Statute affects only the remedy. *Compare* Kavanaugh v. England, 232 Ind. 54, 110 N.E.2d 329 (1953), which held that a contract requirement that the parties perform some act in addition to the sale of goods did not remove the contract from the Statute, *with* Gronvold v. Whaley, 39 Wash. 2d 710, 237 P.2d 1026 (1951), where a contract for a transfer of securities, along with other obligations, was held not to be a sale of goods. *Compare* Rosen v. Garston, 319 Mass. 390, 66 N.E.2d 29 (1946), where specially manufactured goods not suitable for general sale were exempted from the Statute, *with* H.W. Myers & Son v. Felopulos, 116 Vt. 364, 76 A.2d 552 (1950), where specially manufactured goods were not excepted from the operation of the Statute. For a case demonstrating judicial extension of the Statute of Frauds, see Trefethen v. Amazeen, 96 N.H. 160, 71 A.2d 741 (1950), in which a contract to will personalty was found to be within the Statute of Frauds.

18. 2 A. CORBIN, *supra* note 4, § 301, at 88-90.

19. *See, e.g.*, Brown v. Aiken, 329 Pa. 566, 198 A. 441 (1938); Safe Deposit & Trust Co. v. Diamond Coal & Coke Co., 234 Pa. 100, 83 A. 54 (1912).

20. For cases in which modifications were held unenforceable absent a writing, see Tractor Supply & Overseas Exch. Corp. v. Ellard Contracting Co., 119 F. Supp. 814 (N.D. Ala. 1954); McClure v. Cerati, 86 Cal. App. 2d 74, 194 P.2d 46 (1948); Gulf Oil Corp. v. Willcoxon, 211 Ga. 462, 86 S.E.2d 507 (1955); Michael Chevrolet, Inc. v. Institution for Savings, 321 Mass. 215, 72 N.E.2d 514 (1947). *But see* Hotchner v. Neon

MODIFICATION OF WRITTEN CONTRACTS UNDER THE UCC

Statute of Frauds Under the Code

The statute of frauds codified in section 2-201[21] of the Uniform Commercial Code differs substantially from its English predecessor,[22] section 2-201(1) permitting enforcement of contracts substantiated by a writing

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Prods., Inc., 163 F.2d 672 (6th Cir. 1947); Mandel v. Atlas Assur. Co., 230 Minn. 347, 41 N.W.2d 590 (1950) (rule requiring written modification subject to exception); Manning v. Barnard, 277 S.W.2d 160 (Tex. Civ. App. 1955); Garcia v. Karam, 154 Tex. 240, 276 S.W.2d 255 (1955). *Compare* Brewood v. Cook, 207 F.2d 439 (D.C. Cir. 1953), in which reliance upon an oral modification effected a waiver of the Statute of Frauds, *with* Polka v. May, 383 Pa. 80, 118 A.2d 154 (1955), in which the court held the operation of the Statute to be unaffected by reliance and estoppel.

21. UCC § 2-201 provides:

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

22. J. WHITE & R. SUMMERS, *supra* note 8, at 43-44. Although the authors state that there is a significant difference between the Statute of Frauds of 1677 and UCC section 2-201, their discussion primarily illustrates similarities between the two statutes. Section 2-201(1) closely resembles its predecessor by retaining a minimum price requirement for determining which contracts are subject to the statute.

which omits or states incorrectly a material term[23] and sections 2-201(2) and (3) specifying four exceptions to the writing requirement. Section 2-201(2) compliments section 2-201(1) with even more liberal writing requirements as between merchants, providing for enforcement of certain writings not signed by the merchant against whom enforcement is sought.[24] This section serves to remedy the pre-Code inequity by which the recipient of a confirmatory memorandum, while escaping enforcement at will, could nevertheless bind the sender.[25] A second exception, contained in section 2-201(3)(a), permits a party to an oral contract to enforce the agreement whenever a substantial beginning has been made to produce "specially manufactured" goods for the other party.[26] This section was carefully worded to prevent the inequities to sellers of specially manufactured goods which often resulted at common law and under the Uniform Sales Act.[27]

Section 2-201(3)(b) permits enforcement of an oral contract when its existence is admitted during legal proceedings.[28] A comment to section 2-201 indicates that this exception, like the two previously dis-

23. UCC § 2-201(1). Although this provision technically is not an exception to the writing requirement, it is a significant liberalization since at common law every material term had to be stated precisely in the writing. *See, e.g.*, Soya Processing Co. v. Sirota, 104 F. Supp. 428 (S.D.N.Y. 1952). Under section 2-201 a contract is enforceable even when the price term is omitted. *See, e.g.*, Julian C. Cohen Salv. Corp. v. Eastern Elec. Sales Co., 205 Pa. Super. 26, 206 A.2d 331 (1965). In Port City Constr. Co. v. Henderson, 48 Ala. App. 639, 266 So. 2d 896 (1972), the court observed that section 2-201 was drafted to liberalize the former requirement that all terms be embodied in writing. Such an intent is found in a comment to section 2-201: "[A]ll that is required [under the Code] is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. . . . The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated." UCC § 2-201, Comment 1.

24. UCC § 2-201(2). When an oral contract is made between merchants and a written confirmation is sent from one to the other, the contract may be enforced against the recipient even without his signature on the instrument, provided he receives the confirmation within a reasonable time and has reason to know of its contents. *Id. See, e.g.*, Associated Hardware Supply Co. v. Big Wheel Distrib. Co., 355 F.2d 114 (3d Cir. 1965).

25. J. WHITE & R. SUMMERS, *supra* note 8, at 47-48.

26. UCC § 2-201 (3)(a). *See, e.g.*, Pittsburgh Metal Lithographing Co. v. Sovereign Corp., 220 Pa. Super. 219, 283 A.2d 714 (1971).

27. Proof that goods were being specially manufactured for the buyer did not necessarily bring the contract within the general part performance exception under the original Statute of Frauds. Cooke v. Millard, 65 N.Y. 352 (1875).

28. UCC § 2-201(3)(b). *See, e.g.*, Garrison v. Piatt, 113 Ga. App. 94, 147 S.E.2d 374 (1966).

cussed, liberalizes the pre-Code writing requirement, stating: "Under this section it is *no longer* possible to admit the contract in court and still treat the Statute as a defense." [29] The final express exception provides for enforcement of oral sales contracts when partial payment or partial delivery has been made.[30] A similar exception was recognized under the original Statute of Frauds; the Code version is, in fact, narrower than its common law predecessor. Formerly, oral contracts for the sale of goods were *wholly* enforceable if there had been substantial performance in accordance with the contract.[31] The official comments to the Code, however, clearly indicate that partial performance of a contract is enforceable thereunder as a substitute for a writing *only* to the extent of goods actually paid for or accepted.[32]

An examination of the four exceptions to the statute of frauds provisions under the Code demonstrates that no consistent effort was made either to liberalize or to restrict the pre-Code requirements for enforceability. Indeed, that section 2-201 contains provisions exhibiting each such tendency may suggest an intent to incorporate in one section all permissible exceptions to the section 2-201 writing requirement. An examination of the Code provisions regulating contract modifications is necessary to ascertain whether an additional, implicit exception arises from the interaction of such provisions with those of section 2-201.

Contract Modification Under the UCC

Unlike the Uniform Sales Act, the Uniform Commercial Code includes a provision explicitly regulating contract modification. Section

29. UCC § 2-201, Comment 7 (emphasis supplied).

30. *Id.* § 2-201(3)(c).

31. *See, e.g.*, Sharpensteen v. Pearce, 219 Ark. 916, 245 S.W.2d 385 (1952); Kurlan v. CBS, 40 Cal. 2d 799, 256 P.2d 962 (1953); Suverkrup v. Suhl, 108 Cal. App. 2d 284, 238 P.2d 674 (1951); Invincible Parlor Frame Co. v. Elegant Leather Goods, Inc., 187 Misc. 454, 62 N.Y.S.2d 398 (Sup. Ct. 1946). This common law exception to the writing requirement was created by the original Statute of Frauds for situations in which the "buyer shall accept part of the goods so sold . . . or give something in earnest to bind the bargain or in part payment." 29 Car. II, c. 3, § 17 (1677).

32. UCC § 2-201, Comment 2 states: "'Partial performance' as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted." *See, e.g.*, Bagby Land & Cattle Co. v. California Livestock Comm'n Co., 439 F.2d 315 (5th Cir. 1971); Artman v. International Harvester Co., 355 F. Supp. 476 (W.D. Pa. 1972); Huyler Paper Stock Co. v. Information Supplies Corp., 117 N.J. Super. 353, 284 A.2d 568 (Super. Ct. 1971); Starr v. Freeport Dodge, Inc., 54 Misc. 2d 271, 282 N.Y.S.2d 58 (Dist. Ct. 1967).

2-209[33] is designed to facilitate the modification of contracts by removing some of the technical barriers in existence prior to enactment of the Code[34] while retaining adequate protections against fraud and perjury.

Section 2-209(1) eliminates the common law requirement that modifying agreements be supported by separate consideration and premises their enforceability instead upon a finding that the parties acted in good faith.[35] The substitution of a "good faith" test for the former requirement of consideration has circumvented the technical problems engendered by the common law "pre-existing duty" rule[36] and cultivated a new flexibility more reflective of modern commercial reality. The basic freedom of modification established in section 2-209(1) is limited by the requirement in subsection (2) that the parties honor a "no oral modification" clause if included in the contract terms.[37] In addition, subsection (3) mandates compliance with the statute of frauds provisions of Code section 2-201.[38]

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33. UCC § 2-209 provides:

> (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.

34. Comment 1 to section 2-209 states that the section was promulgated to "protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."

35. UCC § 2-209, Comment 2.

36. At common law, a promise to do what one was already contractually obligated to do was unenforceable as being without consideration. *E.g.*, Foakes v. Beer, 5 Coke Rep. 117a (1602).

37. UCC § 2-209(2). A clause inserted in a contract requiring that modification of the contract be in writing operates much like the statute of frauds in section 2-201, except that it is a term of the contract and is private between those in privity.

38. *Id.* § 2-209(3).

It has been suggested that sections 2-209(4) and (5) provide a method by which the parties to a contract may partially emasculate the private statute of frauds procedure outlined in section 2-209(2).[39] Moreover, under the holding of the Court of Appeals for the Third Circuit in *Double-E*, these provisions may effectively limit the apparently absolute requirement in section 2-209(3) that certain modifications comply with the requirements of the section 2-201 statute of frauds. Section 2-209(4) acknowledges that an attempted modification which fails to satisfy either a private writing requirement or section 2-201 of the Code may nevertheless operate as a "waiver,"[40] while section 2-209(5) describes the procedure for retracting this "waiver."[41] A thorough analysis of the waiver and retraction subsections and of the interaction between sections 2-209 and 2-201 is essential to an evaluation of the result in *Double-E*.

SECTION 2-209: A CLOSER ANALYSIS

The defendant bank in *Double-E* had contracted to sell shirts and sweaters to the plaintiff company,[42] reserving an option to cancel the contract "for any reason" by giving adequate notice prior to the scheduled delivery date.[43] After receiving a higher offer from a third party, the bank inquired whether plaintiff would prefer to meet the new offer or have the bank exercise its option to cancel. Plaintiff indicated a willingness to match the third party's offer and entered into an oral agreement for the submission of sealed bids, the bank agreeing to relinquish its right to cancel if the plaintiff submitted the higher bid.[44] Although the plaintiff's representative offered to attend the bank's offices that day to reduce the oral modification to writing, the defendant suggested that the meeting take place the following day. Upon arrival

39. R. NORDSTROM, HANDBOOK OF THE LAW OF SALES 123 (1970).

40. UCC § 2-209(4).

41. *Id.* § 2-209(5).

42. The contract clearly was within the statute of frauds, the plaintiff being required to deposit $5,000 on account. 488 F.2d at 293.

43. Paragraph 10 of the agreement provided: "Seller is hereby granted an option to cancel and terminate this Agreement, for any reason whatever, provided such option is exercised by notice in writing to that effect forwarded to Buyer together with the sum of $5,000 deposited hereunder on or before April 1, 1971, whereupon all liability from either party to the other shall cease and terminate and this Agreement shall become null and void." *Id.*

44. If the bid of the third party was higher than that of the plaintiff, the bank's option to cancel was to become effective immediately. *Id.* at 294.

at the defendant's office at the appointed time, however, plaintiff's representative was informed that the bank had exercised its option to cancel under the prior written contract, thereby ignoring the oral modification. In response, the plaintiff instituted suit in federal district court.

On appeal from the trial court's grant of defendant bank's motion for summary judgment,[45] the Court of Appeals for the Third Circuit suggested that the defendant's argument proceeded from the false premise that section 2-201 of the Code precludes any recovery predicated on an alleged oral modification of a contract subject to its provisions. The court stated that although "an oral modification of a written agreement may theoretically be precluded, the code does explicitly provide for an oral waiver of the operation of the Statute of Frauds . . . [and] once the Statute of Frauds is waived, there is no barrier to an oral modification of the terms of a written contract under § 2-209(1)." [46] As a result of its interpretation of the relevant Code sections, the court remanded the case for resolution of three issues of material fact: whether the Code's statute of frauds had, in fact, been waived by the parties, whether there had been an effective modification of the original contract removing the bank's right to unilateral withdrawal, and whether any waiver made had been effectively retracted.[47] Concurring in result only, Judge Garth expressed fundamental disagreement with the majority's interpretation of section 2-209, stating that an attempted oral modification can operate as a waiver of a contract term only, not of the statute of frauds requirements which pervade Article 2 of the Code.[48]

45. The trial court, accepting the plaintiff's testimony, found that defendant's attempted oral modification constituted a waiver, under Code section 2-209(4), of its right to cancel. It also found, however, that, under section 2-209(5), the defendant had effectively retracted its waiver. The court rejected the plaintiff's claim that, in reliance upon the attempted oral modification, it had made a material change in position by refraining from proceeding immediately to the defendant's office to reduce the agreement to writing. A genuine issue of material fact was held to exist, nevertheless, whether the defendant had given timely notice of its cancellation as required by the original agreement. Therefore, defendant's motion for summary judgment was initially denied. Double-E Sportswear Corp. v. Girard Trust Bank, 10 UCC REP. SERV. 1041, 1046-47 (E.D. Pa. 1972). After additional proceedings, however, defendant's motion for summary judgment was renewed and granted. *See* 488 F.2d at 294.

46. 488 F.2d at 296.

47. *Id.* at 297.

48. *Id.* at 298. Judge Garth, whose concurrence in remanding the case was limited to having determined whether the defendant had made an effective retraction of the waiver of its right to cancel the contract, paraphrased section 2-209(4) as follows: "Although an attempt at modification or rescission does not satisfy the requirement

That the court of appeals could not reach a consensus with respect to the scope of the waiver provision in section 2-209(4) evidences the ambiguity of that provision. Nevertheless, uniformity is required if the courts are to resolve the frequent disputes which arise when parties to a contract attempt to alter the details of their agreement.

Support for the conclusion of the majority in *Double-E* that the statute of frauds requirements of section 2-201 may be waived is available through an analogy to the relationship between the waiver provisions of section 2-209(4) and the private writing requirement addressed in section 2-209(2). The courts which have considered this latter relationship generally have agreed that an attempted oral modification can operate as a waiver of a "no oral modification" clause.[49] If it is accepted that section 2-209(4) affects subsections (2) and (3) in the same manner, these holdings would provide considerable support for the conclusion that the statutory requirement of a writing, as well as a similar requirement imposed by the parties by contract, may be waived. Several persuasive arguments, however, militate against accepting the premise that a "no oral modification" clause and the section 2-201 writing requirement are indistinguishable with respect to the operation of section 2-209(4). These arguments tend, rather, to support the conclusion of the concurring opinion in *Double-E* that section 2-209(4) can operate only to permit relinquishment of a right to insist upon strict performance of a contractual term.

Initially, reference may be made to the use of the term "waiver" in section 2-209(5), which provides: "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 . . . ."[50] Clearly, the statute of frauds referred to in section 2-209(3) is not a "term" of the contract but a statutory standard which must be satisfied before certain contracts for the sale of goods may be enforced. As noted by the con-

of sub-section (2) or (3) it can operate as a waiver *of the particular condition, term or portion of the written contract sought to be waived.*" *Id.* at 298 n.1 (emphasis supplied).

49. *See* All-Year Golf, Inc. v. Products Investors Corp., 34 App. Div. 2d 246, 310 N.Y.S.2d 881 (Sup. Ct. 1970); Thomas Knutson Shipbuilding Corp. v. George W. Rogers Constr. Corp., 6 UCC REP. SERV. 323 (N.Y. Sup. Ct. 1969); Universal Builders, Inc. v. Moon Motor Lodge, Inc., 430 Pa. 550, 244 A.2d 10 (1968); Inwood Knitting Mills, Inc. v. Budge Mfg. Co., 1 UCC REP. SERV. 84 (Pa. Ct. C.P. 1962); *cf.* C.I.T. Corp. v. Jonnet, 3 UCC REP. SERV. 321 (Pa. Ct. C.P. 1965).

50. UCC § 2-209(5) (emphasis supplied).

curring judge in *Double-E*, an interpretation that section 2-209(4) permits waiver of the statutory writing requirement would "ascribe one meaning to the term 'waiver' as it is used in § 2-209(4) and another meaning to that term as it is used in § 2-209(5)."[51] In addition, under such an interpretation, section 2-209(5) would permit retraction of waivers affecting a contract term but not those pertaining to the statute of frauds.[52] This untoward result is unsupported by either case law or explicit language in the Code. It is submitted that a more reasonable interpretation would treat the reference in subsection (5) to a "term waived" as indicative of precisely that which the draftsmen intended may be waived as a result of an unsuccessful attempt to modify a contract.

The historical development of a writing requirement also weighs against an interpretation of section 2-209(4) permitting waiver of the Code's statute of frauds. Section 2-201 was developed 300 years after the initial attempt to preclude enforcement of nonexistent contracts. Although the procedural rules of early English courts may have created a greater need to protect against fraud in 1677 than exists today, it is clear that the draftsmen of section 2-201 were cognizant of a similar modern need,[53] derived partially from the evolution of more sophisticated commercial transactions[54] and partially from the erosion by judicially created exceptions of the original Statute's uniformity and effectiveness.[55] Thus, the draftsmen apparently had a dual purpose when creating section 2-201: to prevent perjury and fraud and to create a new uniformity and efficacy commensurate with the requirements of modern commercial reality. Towards the objective of uniformity in the application of the statute of frauds, it would seem desirable to provide in a single provision the general writing requirement and all sanctioned exceptions. That section 2-201 reflects such an attempt has already

51. 488 F.2d at 299.

52. The majority in *Double-E*, in a somewhat strained argument, discounted this inconsistency as a mere "drafting oversight." Conceding that there is no explicit provision in subsection (5) for retraction of a waiver of the statute of frauds, the court suggested that such a provision should be read into that section, stating: "Any other interpretation compels the conclusion that a party 'who has made a waiver' of the Statute of Frauds could never retract that waiver." 488 F.2d at 297 n.7. It is submitted that the very unreasonableness of that result supports the conclusion that the statute of frauds may not be "waived" under subsection (4).

53. UCC § 2-201, Comment 1.

54. *Id.* § 1-102(2)(a). *See also* Arcuri v. Weiss, 198 Pa. Super. 506, 184 A.2d 24 (1962).

55. *See* notes 14-15 & 17 *supra* & accompanying text.

been suggested, supported by an evaluation that the four exceptions codified in that section reveal a carefully drafted blend of liberalization and qualification of prior law.[56] It is submitted that this effort on the part of the framers of the Code indicates that sections 2-201(2) and (3) were intended to constitute a codification of all permissible exceptions to the general rule in subsection (1), rather than a mere enumeration of several exemplary exceptions.

This conclusion is supported by explicit language in the Code. Section 1-102(3) provides that the "effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act . . . ." [57] The terms of section 2-201(1) clearly provide otherwise, that section stating: "Except as otherwise provided *in this section* a contract for the sale of goods for the price of $500 or more is not enforceable . . . unless there is some writing . . . ." [58] Moreover, comment 2 to section 1-102 further indicates the intended operational effect of the statute of frauds, recognizing that although section 2-201 "does not explicitly preclude oral waiver of the requirement of a writing, . . . a fair reading denies enforcement to such a waiver as part of the 'contract' made unenforceable . . . ." [59]

Perhaps the strongest argument that the requirements of section 2-201 are not subject to waiver evolves from the belief that the draftsmen could not have intended one provision of the Code to render another nugatory. Section 2-209(3) expressly applies the section 2-201 writing requirement to contract modifications. Under the interpretation afforded section 2-209 in *Double-E*, however, an oral modification which is deficient under subsection (3) could operate as a waiver of the statute of frauds under subsection (4). As a result, enforcement would be permitted under subsection (4) of the very activity which the preceding subsection rendered unenforceable, and subsection (3) would be meaningless. Although the *Double-E* court attempted to avoid this result by "filling in the interstices" of subsection (5) to permit retraction of a waiver of the statute of frauds at any time prior to reliance,[60] it is

56. *See* notes 21-32 *supra* & accompanying text.

57. UCC § 1-102(3).

58. *Id.* § 2-201(1) (emphasis supplied).

59. *Id.* § 1-102, Comment 2.

60. 488 F.2d at 297 n.7. This interpretation of subsection (5) was also advocated in Comment, *The Mechanics of Parol Modification of Contracts Under the Uniform Commercial Code*, 29 U. PITT. L. REV. 665 (1968). It is submitted that the failure to provide in subsection (5) for the retraction of waivers of the statute of frauds should be

difficult to discern how retraction, with its concomitant reimposition of a writing requirement, could affect the enforceability of an oral modification entered into while the operation of the statute of frauds purportedly was suspended.[61]

Conclusion

Two seemingly inescapable problems are created if section 2-209(4) is interpreted to permit waiver of the statute of frauds requirements of section 2-201. First, such a construction reads into the Code an exception to the writing requirement of section 2-201 notwithstanding the apparently exhaustive enumeration of exceptions provided therein. Second, to permit waiver of the statute of frauds destroys the internal consistency of section 2-209 by removing any purpose for the writing requirement in subsection (3). It is submitted that restricting the operation of section 2-209(4) to permit the relinquishment only of a right to insist upon strict performance of a contractual term better reflects the intended operational effect of the section in providing a flexible means of effectuating contract modification while protecting the parties against perjury and fraud.

viewed not as an oversight on the part of the draftsmen but as an indication that subsection (4) was not intended to authorize such waivers. *See* note 52 *supra.*

61. If the statute of frauds were waived, there would be nothing to prevent the oral modification from becoming enforceable immediately; either party could sue for a breach of the agreement regardless of reliance. Since, by definition, the modification itself would be irretractable, there appears to be no available means of giving retroactive effect to a subsequent retraction of the waiver, although that is exactly what must occur if, under the interpretation in *Double-E,* subsection (3) is to have any meaning.