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ORAL MODIFICATION OF SALES CONTRACTS UNDER THE UNIFORM COMMERCIAL CODE: THE STATUTE OF FRAUDS PROBLEM

BETH A. EISLER*

I. INTRODUCTION

Section 2-209 of the Uniform Commercial Code¹ “seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which [at common law] hamper such adjustments.”² Subsection (1) permits all modifications, written or oral, to be binding without consideration. Subsection (2) allows the parties to exclude oral modification or rescission of their written agreement.³ Subsection (3) requires that the Code Statute of Frauds be satisfied if the contract as modified is within the provisions of the Statute. Subsection (4) provides that an attempt at modification

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signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.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

U.C.C. § 2-209. All citations to Code sections and comments, unless otherwise indicated, refer to the 1972 Official Edition of the Uniform Commercial Code and the Official Comments.

2. *Id.* Comment 1.

3. “No oral modification” clauses typically read: “This agreement is the entire understanding between the parties, and no modification, alteration or amendment shall be effective unless in a writing signed by both parties.” 3 BENDER’S U.C.C. SERVICE, SALES AND BULK TRANSFERS § 4.04(2). This article does not address oral modification of a written sales contract that contains a no oral modification clause.

or rescission, which does not satisfy the requirements of subsections (2) or (3), can operate as a waiver. Subsection (5) permits a party to retract a waiver made under subsection (4), unless the retraction would be unjust because of a material change of position by the other party in reliance on the waiver.

Although subsection (3) seems quite simple to comprehend, few courts or commentators agree on its meaning or effect.⁴ Assume, for example, that Buyer and Seller enter into a signed written contract for the sale of 100 items at \$10 per item. Assume further that before delivery Buyer and Seller orally agree to change the price to \$12 per item. Because the contract as modified is for the sale of goods for \$1,200, the writing requirement of subsection (3) is applicable. What, then, is the legal effect of the oral modification? Three issues immediately arise. First, does the original writing satisfy the requirements of subsection (3) or must the modification itself be written? Second, will compliance with the non-formal enforcement provisions of the Statute of Frauds satisfy subsection (3)? Finally, what effect do the waiver provisions of subsections (4) and (5) have on the enforceability of oral modifications if a party materially changes its position in reliance on the agreement as modified?

Because of the confusion concerning the legal effect of oral modification of sales contracts that come within the writing requirement of subsection (3), section 2-209 has failed to apprise buyers and sellers of the most efficient manner of conducting their business transactions.⁵ Moreover, the writing requirement in subsection (3) adds a technicality—albeit a necessary one—that hampers modification of sales contracts.⁶ A need still exists, therefore, for simplicity, clarity, and

4. See, e.g., *Double-E Sportswear Corp. v. Girard Trust Bank*, 488 F.2d 292 (3rd Cir. 1973); J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 1-5, at 45 (2d ed. 1980). See generally Note, *Oral Modification of Sales Contracts and the Statute of Frauds*, 21 *DRAKE L. REV.* 593 (1972); Note, *The Scope and Meaning of Waiver in Section 2-209 of the Uniform Commercial Code*, 5 *GA. L. REV.* 783 (1971); 15 *WM. & MARY L. REV.* 699 (1974).

5. The purpose of the Code is, *inter alia*, "to simplify, clarify and modernize the law governing commercial transactions" and "to make uniform the law among the various jurisdictions." U.C.C. §§ 1-102(2)(a), (c).

6. The drafters intended § 2-209 "to protect and make effective all necessary and desirable modifications of sales contracts without regard to the [pre-Code] technicalities which hamper such adjustments." U.C.C. § 2-209, Comment 1. Subsection (1) abrogates one common-law technicality—the pre-existing duty rule. 1 *N.Y. STATE LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE* 642 (1955) (analysis of E. Patterson) [hereinafter cited as *N.Y. STUDY*]. Briefly stated, the pre-existing duty rule requires that modifications of existing contracts be sup-

uniformity in the provisions of the Uniform Commercial Code permitting modification of sales contracts by oral agreement.

This article attempts to dispel some of the confusion concerning oral modification of written sales contracts when the contract as modified comes within the Statute of Frauds. The basic premise of the article is that the writing technicality of subsection (3) applies only to modifications unsupported by consideration. Development of this premise and comparisons of pre-Code common law with section 2-209 provide answers to the three major issues raised by subsection (3). First, the original writing does not satisfy the requirements of subsection (3); instead, all unsupported modifications⁷ of contracts within the Statute of Frauds must be evidenced by an authenticated memorandum. Second, contrary to present practice, compliance with the non-formal enforce-

ported by consideration. See RESTATEMENT (SECOND) OF CONTRACTS § 76A (Tent. Draft Nos. 1-7, 1973) [hereinafter cited as RESTATEMENT (SECOND)]; 1 RESTATEMENT OF CONTRACTS § 76 (1932) [hereinafter cited as RESTATEMENT].

Subsection (2), however, permits parties to a contract to add a "formality (or 'technicality?')" to the modification process. 1 N.Y. STUDY, *supra*, at 640 (analysis of E. Patterson). The writing requirement of subsection (3) also adds a technicality to the modification of contracts. Moreover, subsection (4), as currently interpreted, adds a technicality to what was quite clear and flexible at common law.

There seems to be a conflict between the text of subsection (1) and the official comment regarding the extent of the Code's abrogation of the pre-existing duty rule. Subsection (1) provides that an agreement modifying a contract for the sale of goods needs no consideration to be binding, but the official comment goes further by requiring that modifications meet the test of good faith imposed by the Code in § 1-203. U.C.C. § 2-209, Comment 2. See, e.g., Fratelli Gardino S.p.A. v. Caribbean Lumber Co., 587 F.2d 204 (5th Cir. 1979); United States for Use of Crane Co. v. Progressive Enterprises, Inc., 418 F. Supp. 662 (E.D. Va. 1976); Ralston Purina Co. v. McNabb, 381 F. Supp. 181 (D.C. Tenn. 1974); Ruble Forest Prods., Inc. v. Lancer Mobile Homes, Inc., 269 Or. 315, 524 P.2d 1204 (1974). Curiously, § 1-203 imposes an obligation of good faith on the performance or enforcement of a contract or duty, see 1 N.Y. STUDY, *supra*, at 310-15 (analysis of E. Patterson), but not on the formation of the contract. Because modification would come within the "formation" category more readily than within that of "performance" or "enforcement," comment 2's imposition of an obligation of good faith in the formation of a contract may be substantive rather than a mere restatement of what the Code already requires. If substantive, the good-faith requirement should have been enacted as part of subsection (1); otherwise, the comment does not have the force of law. See, e.g., Thompson v. United States, 408 F.2d 1075, 1084 n.15 (8th Cir. 1969); Burchett v. Allied Concord Financial Corp., 74 N.M. 575, 578, 396 P.2d 186, 188 (1964); R. SPEIDEL, R. SUMMERS & J. WHITE, TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW 41-43 (2d ed. 1974). Amendment of subsection (1) to include the good-faith obligation or amendment of § 1-203 to include modification would obviate any problem concerning the substantive nature of comment 2. Nevertheless, the modification must not be unconscionable. U.C.C. § 2-302; J. WHITE & R. SUMMERS, *supra* note 4, at 42-49.

7. Unsupported modifications are those agreements which modify existing contracts and lack consideration.

ment provisions of the Statute of Frauds should not satisfy the writing requirement of subsection (3); rather, subsection (3) requires written evidence of the modification, unless displaced by reliance. Third, the waiver terminology of subsections (4) and (5) is not only misleading and unnecessary, but should be replaced by the common-law doctrine of reliance.

Because not all commentators and courts interpret and apply section 2-209 according to these conclusions, however, this article also proposes a number of amendments to section 2-209.⁸ Some of the proposals amount to only technical refinements of the section, but the primary proposal is a substantive amendment that would make the writing requirement of subsection (3) inapplicable to merchants' promises unsupported by consideration.

II. THE BASIC PREMISE: THE WRITING REQUIREMENT OF SUBSECTION (3) APPLIES ONLY TO UNSUPPORTED MODIFICATIONS

A. *Consideration*

The justification for the basic premise of this article evolves primarily from the doctrine of consideration.⁹ The requirement that a prom-

8. I realize, of course, that even the most carefully drafted statute will not always result in identical decisions in like cases. I attempt merely to provide a unified framework for analysis. See 1 N.Y. STUDY, *supra* note 6, at 40 (introduction by E. Patterson & R. Schlesinger).

9. Consideration is "bargained-for exchange." J. MURRAY, JR., MURRAY ON CONTRACTS, A REVISION OF GRISMORE ON CONTRACTS 142 (2d ed. 1974). Consideration is also discussed in RESTATEMENT (SECOND), *supra* note 6, at § 75:

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of
 - (a) an act other than a promise, or
 - (b) a forbearance, or
 - (c) the creation, modification, or destruction of a legal relation.
- (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Although scholars have long debated the role of consideration in modern contract law, I proceed from the concept of consideration because of my agreement with Professor Patterson that "the doctrine of consideration seems likely to be with us for a long time to come, and we shall therefore need to make the best of it." Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 930 (1958). See also P. ATIYAH, CONSIDERATION IN CONTRACTS: A FUNDAMENTAL RESTATEMENT (1970); Llewellyn, *Common-Law Reform of Consideration: Are There Measures?*, 41 COLUM. L. REV. 863 (1941); Wright, *Ought the Doctrine of Consideration be Abolished from the Common Law?*, 49 HARV. L. REV. 1225 (1936).

ise be supported by consideration or other validation device is now found in the modern definition of a contract: "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."¹⁰ Consideration is the usual substantive basis for the legal enforcement of a promise; reliance on a promise affords another basis for relief. Some promises that lack a substantive basis for enforcement also may be legally enforceable if the form of the promise satisfies a statutory requirement. In these situations, compliance with the statute provides the formal basis for enforcement of the promise.¹¹

According to Professor Fuller, legal formalities perform three functions: the evidentiary function; the cautionary function; and the channeling function. More precisely, a legal formality provides evidence of the existence of a contract. It acts as a check against inconsiderate action by impressing upon the casual promisor the import of the promise, thus inducing deliberation. Thirdly, a legal formality "mark[s] or signalize[s] the enforceable promise."¹²

10. RESTATEMENT (SECOND), *supra* note 6, at § 1. Similarly, the UCC defines a contract as "the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." U.C.C. § 1-201(11). A "validation device" is that which makes a promise legally enforceable. J. MURRAY, JR., *supra* note 9, at 124.

11. I have relied extensively on the writings of Professors Patterson and Fuller for this basic discussion of consideration and other validation devices. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Patterson, *supra* note 9. Professor Fuller explored two bases for the enforcement of a promise—the substantive basis and the formal basis. The substantive basis includes "private autonomy" (which Professor Patterson spoke of as "bargain" and which I prefer to label "consideration"), reliance, and unjust enrichment. The formal basis usually consists of a seal or a signed written instrument.

12. Fuller, *supra* note 11, at 801. See also RESTATEMENT (SECOND), *supra* note 6, at § 76, Comment C.

Consideration, to some extent, performs two of the three functions. A promise supported by consideration cautions the casual promisor that he is required to do something more than just speak the words of a promise because the promise arose out of a bargain and contemplates a *quid pro quo*. Consideration also performs a channeling function in that it distinguishes preliminary negotiations from an enforceable promise; but unless contained in a signed writing, it cannot perform an evidentiary function.

This discussion of validation devices points out their shortcomings. Because a casual promisor may make unsupported promises with impunity, it may seem that courts protect insincere promisors. The rationale for requiring a validation device, however, is not that insincere promisors should be protected but that unsupported promises should not be given legal effect. Historically, not all promises can be given legal significance; the line must be drawn somewhere.

B. *Section 2-209*

Interpreting section 2-209 in light of this basic premise results in the following conclusions. Subsection (1) provides for the enforceability of unsupported modifications of contracts for the sale of goods for less than \$500.¹³ The legislation itself provides the legal basis for enforcement of the agreement. On the other hand, there must be either a formal or substantive basis to enforce unsupported oral modifications of contracts for the sale of goods for \$500 or more. The writing requirement of subsection (3) provides a formal basis for enforcement of the agreement. If, however, the formal basis for enforcement is lacking, *i.e.*, if the writing requirement of subsection (3) is not satisfied, a material change in position in reliance on the modification agreement provides a substantive basis for enforcement of the agreement under subsections (4) and (5).

What follows is an attempt to resolve the three issues raised by the hypothetical fact situation in which the parties to a sales contract attempt to modify the original contract through an unsupported oral agreement. Discussion of these issues requires substantial comparisons of the Code and pre-Code common law because the drafters adopted section 2-209 to change existing law.¹⁴ Resolution of these issues provides the foundation for proof of this article's basic premise—subsection (3) does not apply to supported oral modification agreements.

13. *See* note 6 *supra*. An unsupported modification agreement of a contract for the sale of goods under \$500 does not easily fit into either the substantive or the formal category. The modification promise, although given in exchange for a pre-existing legal duty, arose in a bargaining context. The modification, therefore, at best has a "semi-substantive" basis for enforcement. The enforceability of this kind of agreement rests primarily on a policy decision of the Code's drafters that necessary and desirable modifications of existing sales contracts should be legally enforceable. Even though not supported by consideration, the modification should be enforceable if the sales contract is unimportant.

In some respects, the *Restatement (Second) of Contracts* goes further than § 2-209. Section 89D(a) provides for the enforcement of all unsupported oral modifications that are fair and equitable in view of unanticipated circumstances. The Statute of Frauds is applicable to these modification agreements through § 223, but § 223 does not require that all unsupported modifications of contracts within the Statute be written. *See* RESTATEMENT (SECOND), *supra* note 6, at §§ 89D, 223.

14. *See* text accompanying note 2 *supra*.

III. PRE-CODE AND NON-CODE COMMON LAW—ORAL MODIFICATION OF CONTRACTS UNDER THE STATUTE OF FRAUDS

A. *In General*

After the enactment of the English Statute of Frauds,¹⁵ certain classes of contracts were unenforceable unless the agreement was evidenced by a written memorandum signed by the party against whom enforcement of the contract was sought.¹⁶ In the United States, some form of the Statute of Frauds has been enacted in virtually every state.¹⁷

The Statute requires that the memorandum state with reasonable certainty and accuracy (1) each party to the contract, (2) the subject matter to which the contract relates, and (3) the terms and conditions of all promises constituting the contract and by whom and to whom the promises are made.¹⁸ Only material terms, however, need be in-

15. "An Act for Prevention of Frauds and Perjuries," 29 Charles II, c.3 (1677). See 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 450 (3d ed. 1960).

16. See generally 2 A. CORBIN, A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW § 275 (1950); 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 448-450 (3d ed. 1960). "The principle design of the statute of frauds was," as Lord Ellenborough remarks, in *Cuff v. Penn*, 1 Mau. & Sel. 26, "that parties should not have imposed on them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase." *Cummings v. Arnold*, 44 Mass. (3 Met.) 486, 490-91 (1842).

17. Thirty-six jurisdictions adopted the Uniform Sales Act. Section 4 of the Act provided:

(1) 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.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

UNIFORM SALES ACT § 4 (superceded by U.C.C. § 2-201).

18. 1 RESTATEMENT, *supra* note 6, at § 207.

cluded.¹⁹ Several writings may constitute a sufficient memorandum.²⁰

Contracts for the sale of goods over a certain dollar amount may satisfy the Statute by methods other than by written memorandum, including (1) acceptance and receipt, (2) part payment, or (3) earnest payment.²¹

Generally, a written contract within the Statute may be effectively rescinded by an oral rescission agreement when the agreement is supported by consideration.²² Any written contract may be effectively modified by an oral modification agreement if the new contract is not within the Statute.²³ If, however, the new contract falls within the Stat-

19. Although the Uniform Sales Act did not specify what the writing must contain, § 4(1) had been judicially construed to require all material terms to be in writing. *See, e.g.*, *Ginsberg Mach. Co. v. J & H Label Processing Corp.*, 341 F.2d 825 (2d Cir. 1965); *Lauter v. W & J Sloane, Inc.*, 417 F. Supp. 252 (S.D.N.Y. 1976); 1 N.Y. STUDY, *supra* note 6, at 368 & n.29 (analysis of J. Honnold). *See also* 1 N.Y. STATE LAW REVISION COMMISSION, STENOGRAPHIC REPORT OF HEARING ON ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE 163-64 (1954) (testimony of K. Llewellyn).

20. 1 RESTATEMENT, *supra* note 6, at § 208.

21. Section 17 of the original Statute provided:

And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no contract for the sale of any goods, wares and merchandises, for the price of £10 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.

29 Charles II, c.3 (1677). Acceptance is an act of assent by the buyer, either by words or conduct, to become the owner of those goods which are the subject matter of the contract. Assent to the contract may be acceptance under the Statute. Receipt, on the other hand, usually denotes a change in possession of the goods from the seller to the buyer. *See* 2 A. CORBIN, *supra* note 16, at §§ 482-493; 1 RESTATEMENT, *supra* note 6, at §§ 201-202.

Many courts and the *Restatement* treat part payment and earnest payment as identical concepts. Professor Corbin, however, persuasively argues that § 17 of the original Statute treated them as separate and distinct concepts. *See* 2 A. CORBIN, *supra* note 16, at § 494; 1 RESTATEMENT, *supra* note 6, at §§ 199(b), 205. Payment may be in money, negotiable instrument, property, services, or cancellation of an existing claim or debt. *Id.* § 205.

22. The reason for the general rule that rescission agreements need not be written is that the Statute applies only to the making of contracts, not to their rescission. It is important to note, however, that if the rescission includes a transfer or retransfer of property that falls within the Statute, the rescission agreement must satisfy the requirements of the Statute. *See* 2 A. CORBIN, *supra* note 16, at § 302; 4 S. WILLISTON, *supra* note 16, at § 592; 1 RESTATEMENT, *supra* note 6, at § 222.

23. 2 A. CORBIN, *supra* note 16, at § 304; 4 S. WILLISTON, *supra* note 16, at § 591. It is helpful at this point to clarify terminology. When the parties to a contract modify an existing contract, their modification agreement rescinds the original contract and creates a new contract consisting of the terms of the original contract, which the parties have not changed, plus the new terms contained in the modification agreement. 1 RESTATEMENT, *supra* note 6, at § 223(1). Conceptually, there are two contracts, the original and the new contract, but only one is legally enforceable. The new contract is considered a substitute for the original one and, consequently, is

ute, the general rule is that the modification agreement must be written or otherwise satisfy the requirements of the Statute to modify effectively the original contract.²⁴ This rule warrants further analysis, because not all modifications of contracts within the Statute must be written; only those agreements which modify essential terms must be written.

At the outset, the extent of the modification does not change the general rule that a modification agreement must satisfy the Statute if the new contract is within the Statute.²⁵ A modification of a contract within the Statute, which changes the time of delivery from noon to

enforceable if it satisfies the requirements of the Statute of Frauds. If, however, the new contract does not satisfy the Statute and there has been no change of position in reliance on the new contract, the original contract is neither modified nor rescinded and is enforceable if it was otherwise enforceable. *Id.* § 223(2). The justification for this result is that the parties' manifestation of an intent to contract, absent a contrary intent to rescind their original agreement, should leave the parties with an enforceable contract.

Professor Patterson discussed the concept of "modification" in his analysis of § 2-209 for the New York Law Revision Commission:

Strictly speaking, no one, not even the parties to a contract, can "modify" the terms of a contract already made, any more than one can "modify" the day on which George Washington was actually born. Any so-called "modification" of a contract involves analytically two steps: (a) The termination by agreement of all obligations under the (first) contract; (b) the making of a (second) contract containing some of the terms of the first contract and some different terms.

1 N.Y. STUDY, *supra* note 6, at 643 (analysis of E. Patterson). As used in this article, a "modification" occurs through a two-step process of rescission of the original contract and formation of a new contract.

24. See 2 A. CORBIN, *supra* note 16, at § 305; 4 S. WILLISTON, *supra* note 16, at § 593. Abell v. Munson, 18 Mich. 306, 100 Am. Dec. 165 (1869), enunciates the early common-law rule: "The [Statute of Frauds] prohibits any enforcement of parol contracts; and while written contracts, which would have been lawful if unwritten, may be modified by parol, subsequently, in many cases, yet this cannot be done where the law requires the agreement to be in writing." *Id.* at 312, 100 Am. Dec. at 167.

Justice Cardozo, while on the Court of Appeals of New York, succinctly stated these general principles in his concurring opinion in *Imperator Realty Co. v. Tull*, 228 N.Y. 447, 127 N.E. 263 (1920):

I think it is the law that where contracts are subject to the statute, changes are governed by the same requirements of form as original provisions. Abrogated by word of mouth such a contract may be, but its obligations may not be varied by spoken words of promise while it continues undissolved. . . . Oral promises are ineffective to make the contract, or any part of it, in the beginning. Oral promises must also be ineffective to vary it thereafter.

Id. at 454, 127 N.E. at 265 (citations omitted) (Cardozo, J., concurring). In *Imperator Realty* the parties orally agreed to a change in performance of a written contract to exchange property. Defendant refused to convey because of plaintiff's failure to perform according to the original contract. The court reinstated the trial court judgment for plaintiff on the theory of waiver and estoppel.

25. 4 S. WILLISTON, *supra* note 16, at § 594. Justice Cardozo, in *Imperator Realty*, stated: "I think it is inadequate to say that oral changes are effective if they are slight, and ineffective if they are important. Every part of the contract, in regard to which the parties are stipulating,

1:00 p.m., for example, must satisfy the Statute just as would a modification from June 1 to July 1.²⁶ Both changes must satisfy the Statute not because all modifications must be written or because the modifications are material, but because the delivery term is an essential term of the contract and the memorandum must contain all essential terms of the contract to satisfy the Statute. It follows, then, that a change in the delivery term, no matter how slight, is effective only when it is evidenced by a writing or it otherwise satisfies the Statute.²⁷

Likewise, if the modification agreement changes a nonessential term in the original contract, it need not satisfy the Statute because the original written contract satisfies the Statute. In this case, the new contract consists of the original written contract plus the oral modification agreement, both of which, viewed as a whole, satisfy the Statute. This case is rare, though, because courts considered very few terms in a pre-Code or non-Code contract to be nonessential.²⁸

Thus, the requirement that modifications be written is grounded in the requirement that the memorandum accurately contain all essential terms of the contract, rather than in a per se rule that all modifications be written.

B. *Contracts for the Sale of Goods*

A matter that frequently arose in pre-Code cases was the effect, if any, of an oral agreement modifying an essential term of a written sales

must be taken to be material'" 228 N.Y. at 455, 127 N.E. at 265 (Cardozo, J., concurring) (quoting *Marshall v. Lynn*, 6 M & W 109, 117, 151 Eng. Rep. 342, 345 (1840)).

26. An illustration from the *Restatement* provides another example: *S* promises to sell and *B* promises to buy a specific automobile for \$1,000. The written contract provides that delivery shall be in 30 days and payment in 60 days. Before the expiration of 30 days, *S* and *B* orally agree that the automobile shall be delivered in 45 days and that payment shall be made in 90 days from the time of the original bargain. According to the *Restatement*, the new contract as modified is unenforceable and does not affect the duties of *S* and *B* under the original contract. The new contract is unenforceable because the modification agreement is not in writing. 1 *RESTATEMENT*, *supra* note 6, at § 223, Illustration 2. See also *Van Iderstine Co. v. Barnet Leather Co.*, 242 N.Y. 425, 152 N.E. 250 (1926).

27. See 2 A. CORBIN, *supra* note 16, at § 304. This analysis comports with Justice Cardozo's statement in *Imperator Realty* that "changes are governed by the same requirements of form as original provisions." 228 N.Y. at 454, 127 N.E. at 265 (Cardozo, J., concurring).

28. Professor Corbin cited *Kohoot v. Gurbisz*, 101 N.J. Eq. 757, 139 A. 223 (1927), for the proposition that an oral agreement to change the consideration is effective when the Statute expressly provides that the consideration need not be contained in the memorandum. 2 A. CORBIN, *supra* note 16, at § 304.

contract when the new contract came within the Statute.²⁹ It is clear that if the modification was oral, it would not satisfy the memorandum requirement of the Statute. The agreement, however, might satisfy one of the Statute's alternative requirements.³⁰ If there had been part or earnest payment³¹ or acceptance and receipt of part or all of the goods³² under the new contract as modified, the oral agreement would be enforceable.³³

It is possible that the oral agreement would have had some effect even had the requirements of the Statute not been satisfied. If one of the parties to the original agreement could have and would have performed but the other party through the oral agreement prevented that performance, the original contract was not modified; however, neither would the other party have breached the original contract.³⁴

For purposes of illustration, assume that Buyer and Seller negotiated a written contract for the sale of 100 grade B items at \$10 per item to be delivered on June 1. Assume also that Buyer and Seller orally agreed to change the items to be delivered to 100 grade A items at \$12 per item. The new contract, which is still within the Statute because it is for the sale of goods for \$1,200, does not satisfy the Statute because the

29. *See, e.g.*, *Willis v. Fields*, 132 Ga. 242, 63 S.E. 828 (1908); *Grand Forks Lumber Co. v. McClure Logging Co.*, 103 Minn. 471, 115 N.W. 406 (1908); *Warren v. A. B. Mayer Mfg. Co.*, 161 Mo. 112, 61 S.W. 644 (1901).

30. *See* text accompanying notes 20-21 *supra*.

31. *See H.W. Paine & Co. v. Manistee Tanning Co.*, 279 F. 340 (6th Cir. 1922); *Ryan v. Gilbert*, 320 Mass. 682, 71 N.E.2d 219 (1947); *Packard v. Steward*, 34 Vt. 126 (1861).

32. *See Kribs v. Jones*, 44 Md. 396 (1875); *McDonald v. Union Hay Co.*, 143 Minn. 40, 172 N.W. 891 (1919); *Adams v. Thayer*, 85 N.H. 177, 155 A. 687 (1931); *Producers Coke Co. v. Hoover*, 268 Pa. 104, 110 A. 733 (1920); *Sedro Venner Co. v. Kwapil*, 62 Wash. 385, 113 P. 1100 (1911).

33. 2 A. CORBIN, *supra* note 16, at § 305; 4 S. WILLISTON, *supra* note 16, at § 598. Professor Williston points out that the alternative means by which the Statute is satisfied must occur after the oral modification agreement has been made.

34. 2 A. CORBIN, *supra* note 16, at §§ 310-311; 4 S. WILLISTON, *supra* note 16, at § 595; *see Lampasona v. Capriotti*, 296 Mass. 34, 4 N.E.2d 621 (1936); *Bank of United States v. Manheim*, 264 N.Y. 45, 189 N.E. 776 (1934).

"He who prevents a thing from being done may not avail himself of the non-performance which he has, himself, occasioned, for the law says to him, in effect; 'This is your own act, and, therefore, you are not damnified' ". . . . Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. . . . The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. . . . The Statute of Frauds was not intended to offer an asylum of escape from that fundamental principle of justice.

Imperator Realty Co. v. Tull, 228 N.Y. at 457, 127 N.E. at 266 (Cardozo, J., concurring) (quoting *Dolan v. Rodgers*, 149 N.Y. 489, 491, 44 N.E. 167, 167 (1896)) (citations omitted).

original writing did not accurately reflect the new terms of the agreement. If Seller could have delivered 100 grade B items on June 1, but instead delivered 100 grade A items because of the oral agreement, Seller's failure to perform under the original contract is not a breach.³⁵ Thus, Buyer could not refuse to pay for the items delivered under the contract on the ground that delivery of 100 grade B items was a condition precedent to his duty to pay. Buyer also would have no right to damages because of Seller's failure to deliver the grade B items under the original contract.

The result would be the same had the oral agreement not been supported by consideration.³⁶ Assume that instead of exchanging the quality for the price the parties orally agreed to change the delivery date from June 1 to July 1. The oral agreement would be unenforceable on two grounds: first, the oral agreement violates the accuracy requirement of the Statute; and second, the agreement violates the pre-existing duty rule in that Buyer's promise to accept the goods one month later than agreed upon in the original contract is not supported by consideration. As in the previous hypothetical, Seller would be excused from performing as required under the original contract if he could have performed but did not in reliance on the oral agreement. Thus, if Seller delivered on July 1, Seller would be excused for the delay if he could have delivered on June 1, but did not do so because of the oral agreement.

Because the oral agreement does not satisfy the Statute, either party could have repudiated the modification upon notice before the other party substantially changed his position in reliance on the agreement.³⁷ In terms of the previous hypothetical, Buyer could have insisted before

35. Buyer's failure to perform may have been only temporary or may have been permanent. In either case, the failure to deliver the grade B items is not actionable because the oral agreement prevented Buyer's performance. Buyer's reliance on the oral agreement, however, merely excused its failure to perform; its reliance did not create a new contract.

36. See 4 S. WILLISTON, *supra* note 16, at § 595 (citing *Scheerschmidt v. Smith*, 74 Minn. 224, 77 N.W. 34 (1898)). See also *Reinky v. Findley Elec.*, 147 Minn. 161, 180 N.W. 236 (1920); *Nelson v. Glasoe*, 231 N.W.2d 766 (N.D. 1975); *Neppach v. Oregon & C. R.R.*, 46 Or. 374, 80 P. 482 (1905).

37. 2 A. CORBIN, *supra* note 16, at § 310; 4 S. WILLISTON, *supra* note 16, at § 595. See also 1 RESTATEMENT, *supra* note 6, at § 224.

"The contract, therefore, stood unchanged. The defendant might have retracted his oral promise an hour after making it, [or within a reasonable time thereafter] and the plaintiff would have been helpless." *Imperator Realty Co. v. Tull*, 228 N.Y. at 456, 127 N.E. at 266 (Cardozo, J., concurring).

June 1 on delivery of the grade B items if Seller had not substantially changed his position so that he no longer would have been able to deliver the grade B items.³⁸ In the latter hypothetical, Buyer also could have insisted on the original June 1 delivery date before Seller substantially changed his position. Thus, only a material change of position in reliance on an oral modification gave legal effect to an otherwise unenforceable modification.³⁹

IV. SECTION 2-201: THE STATUTE OF FRAUDS UNDER THE UNIFORM COMMERCIAL CODE⁴⁰

Section 2-201 follows the general outline of section 17 of the original

38. The issue of which party could repudiate the oral agreement seems not to have been the subject of dispute in any reported case. Professor Williston determined that it was the party "who requested delay or prevented performance when due" who could withdraw the request or cease prevention. 4 S. WILLISTON, *supra* note 16, at § 595. Professor Corbin spoke of the party who caused and requested the delay as the one who repudiates the oral agreement. 2 A. CORBIN, *supra* note 16, at § 311. Professor Corbin did not expressly deny the other party the right to repudiate. Illustration 2 of the *Restatement* describes the party assenting to a request for delay as withdrawing his oral assent. 1 RESTATEMENT, *supra* note 6, at § 224, Illustration 2. In addition, Justice Cardozo, in *Imperator Realty*, described the English principle as permitting either party to change his mind before oral consent is acted on. 228 N.Y. at 458, 127 N.E. at 266 (Cardozo, J., concurring).

39. The principle that the party prevented from performing is not in breach of contract because of reliance on the oral agreement applies even if that party is the same party who requested the modification. 2 A. CORBIN, *supra* note 16, at §§ 310-311. Thus in the hypothetical, Seller would not be in breach even if Seller requested the modification.

40. Section 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,

English Statute of Frauds.⁴¹ Like the original Statute, section 2-201 denies enforcement to contracts for the sale of goods above a certain dollar amount unless the parties satisfy the requirements of the section.⁴² Similarly, the purpose of section 2-201 is primarily evidentiary—"to indicate that a contract for sale has been made."⁴³

Under the Code the Statute of Frauds is satisfied either by a writing signed by the party against whom enforcement is sought⁴⁴ or, as between merchants, by receipt of a confirmation to which the receiving party does not object.⁴⁵ In addition, otherwise valid contracts that do not satisfy either requirement may be enforceable in three situations: (1) special manufacture;⁴⁶ (2) admission;⁴⁷ and (3) payment and acceptance of the price or receipt and acceptance of the goods.⁴⁸

Conformity with the writing requirement mandates that the writing merely indicate that a sales contract has been made between the parties and that the contract be signed by the party against whom enforcement is sought.⁴⁹ Contrary to pre-Code common law, the writing "need not contain all the [essential] terms of the contract. . . . All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction."⁵⁰ In addition, the contract is

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).

U.C.C. § 2-201. A contract valid in other respects must be proved; the writing is merely evidence of that contract.

41. Section 17 is reproduced in note 21 *supra*.

42. The Code's Statute of Frauds applies to "a contract for the sale of goods for the price of \$500 or more." U.C.C. § 2-201(1).

43. *Port City Constr. Co. v. Henderson*, 48 Ala. App. 639, 266 So. 2d 896 (1972); *see J. WHITE & R. SUMMERS, supra* note 4, at 61.

44. U.C.C. § 2-201(1).

45. *Id.* § 2-201(2).

46. *Id.* § 2-201(3)(a).

47. *Id.* § 2-201(3)(b).

48. *Id.* § 2-201(3)(c).

49. The words "has been made" may mean that a written offer or a preliminary writing would not satisfy the Statute regarding a subsequent contract. *Alice v. Robett Mfg.*, 328 F. Supp. 1377 (D. Ga. 1970), *aff'd*, 445 F.2d 316 (5th Cir. 1971); *Nations Enterprises v. Process Equip.*, 579 P.2d 655 (Colo. 1978); 1 N.Y. STUDY, *supra* note 6, at 369 (analysis of J. Honnold). *Contra*, *Southwest Eng'r v. Martin Tractor Co.*, 205 Kan. 684, 475 P.2d 18 (1970); *Veik v. Tilden Bank*, 200 Neb. 705, 265 N.W.2d 214 (1978); *GTP Leisure Prods. v. B-W Footwear*, 55 A.D.2d 1009, 391 N.Y.S.2d 489 (1977); *Nelson v. Union Equity Coop. Exch.*, 536 S.W.2d 635 (Tex. 1976). *See R. NORDSTROM, HANDBOOK OF THE LAW OF SALES* § 24 n.13 (1970).

50. U.C.C. § 2-201, Comment 1. In its entirety, this comment provides:

enforceable even if the writing incorrectly states the terms.⁵¹ The only term that must be specified is quantity,⁵² and even it need not be stated accurately.⁵³ As at common law, the writing may consist of several pieces of paper.⁵⁴

If the contract is between merchants, the Statute also may be satisfied without a writing signed by the party against whom enforcement is sought. In this situation, the potential plaintiff sends a signed, written confirmation, which satisfies the requirements of the Statute against the plaintiff. If the potential defendant receives the confirmation and has reason to know of its contents and does not give written notice of objection to its contents within ten days after its receipt, the confirmation

The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. 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.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term even where the parties have contracted on the basis of a published price list. In many valid contracts for sale the parties do not mention the price in express terms, the buyer being bound to pay and the seller to accept a reasonable price which the trier of the fact may well be trusted to determine. Again, frequently the price is not mentioned since the parties have based their agreement on a price list or catalogue known to both of them and this list serves as an efficient safeguard against perjury. Finally, "market" prices and valuations that are current in the vicinity constitute a similar check. Thus if the price is not stated in the memorandum it can normally be supplied without danger of fraud. Of course if the "price" consists of goods rather than money the quantity of goods must be stated.

Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be "signed", a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

Id.

51. *Id.* § 2-201(1) & Comment 1.

52. Comment 1 specifies that the "only term which must appear is the quantity term." This statement, however, may not be a correct interpretation of the Statute. Section 2-201(1) provides that a writing is not insufficient because it omits or incorrectly states a term, but that the contract is not enforceable beyond the quantity of goods shown in the writing. This provision may mean that if, and only if, a quantity term is stated in the writing, then that term controls; contrary to the rule for other terms, the stated quantity term controls the maximum quantity even if the stated quantity is not the term agreed upon by the parties. If, on the other hand, the writing does not contain a quantity term, oral evidence may prove the quantity agreed upon by the parties. *See* J. WHITE & R. SUMMERS, *supra* note 4, at § 2-4 & n.52.

53. U.C.C. § 2-201(1) & Comment 1.

54. *See, e.g.,* Alaska Independent Fishermen's Marketing Ass'n v. New England Fish Co., 15 Wash. App. 154, 548 P.2d 348 (1976).

satisfies the requirements of the Statute against the potential defendant.⁵⁵

Additionally, although a contract does not satisfy the writing requirement of the Statute, it is enforceable in three situations.⁵⁶ First, if the contract is for the sale of goods to be specially manufactured by a seller and the goods are not suitable for sale to others in the ordinary course of the seller's business, the contract is enforceable if the seller has either substantially begun the manufacture of or made commitments for procurement of the goods.⁵⁷ Second, the contract is enforceable if the party against whom enforcement is sought admits that a contract for sale was made.⁵⁸ Third, the contract is enforceable to the extent of the parties' conduct, either when the buyer pays and the seller accepts payment for the goods or when the buyer receives and accepts the goods.⁵⁹

If the contract is unenforceable under the Statute, reliance may constitute an alternative means of enforcement.⁶⁰ In *Warder & Lee Eleva-*

55. U.C.C. § 2-201(2). This means of satisfying the Statute may create a "Catch-22" situation for the defendant if written notice of objection and its confirmation satisfy the requirements of subsection (1). If Buyer, for example, sends a confirmation to Seller and Seller sends back a signed objection, which admits the making of a contract but objects to the terms in the confirmation, an enforceable contract may be found under subsection (1).

56. The distinction between satisfaction of the Statute and enforcement of the contract is critical in light of the terminology of § 2-209(3). See text accompanying notes 63-85 *infra*.

57. U.C.C. § 2-201(3)(a). See, e.g., *Perlmutter Printing Co. v. Strome*, 436 F. Supp. 409 (D. Ohio 1976); *LTV Aerospace Corp. v. Bateman*, 492 S.W.2d 703 (Tex. Civ. App. 1973). Enforcement in this situation is for the benefit of the seller because the seller relied on the oral agreement. This provision, however, specifically does not preclude enforcement of the contract against the seller, although the reliance basis for enforcement of the contract is absent when enforcement is sought against the seller.

58. U.C.C. § 2-201(3)(b). See, e.g., *Chrysler Corp. v. Majestic Marine*, 35 Mich. App. 403, 192 N.W.2d 507 (1971). According to Comment 7 of § 2-201, it is no longer possible for defendant to admit the contract, plead the statute as a defense, and receive judgment because the Statute was not satisfied. See, e.g., *Dangerfield v. Markel*, 252 N.W.2d 184 (N.D. 1977).

59. U.C.C. § 2-201(3)(c). See, e.g., *Clifton Cattle Co. v. Thompson*, 43 Cal. App. 3d 11, 117 Cal. Rptr. 500 (1974) (receipt and acceptance); *Lockwood v. Smigel*, 18 Cal. App. 3d 800, 96 Cal. Rptr. 289 (1971) (partial payment). This provision is contrary to pre-Code common law in that the entire contract at common law was enforceable because of the parties' conduct. Under the Code, the contract is enforceable only to the extent of that conduct. See, e.g., *In re Augustin Bros. Co.*, 460 F.2d 376 (8th Cir. 1972).

60. See *Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976); *Sacred Heart Farmers Coop. Elevator v. Johnson*, 305 Minn. 324, 232 N.W.2d 921 (1975); *Jamestown Terminal Elevator v. Hieb*, 246 N.W.2d 736 (N.D. 1976). But see *Farmland Serv. Coop. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976).

tor, Inc. v. Britten,⁶¹ the Iowa Supreme Court held the doctrine of promissory estoppel applicable to section 2-201 through section 1-103.⁶² In that case, the buyer resold grain that the seller had orally promised to sell to the buyer. The buyer's detrimental reliance on the seller's oral promise persuaded the court to affirm the trial court's judgment enforcing the oral sales agreement in spite of the specific requirements of section 2-201.

V. MODIFICATION OF WRITTEN CONTRACTS UNDER SECTION 2-209(3)—AGREEMENTS NOT SUPPORTED BY CONSIDERATION

A. *The Writing Requirement*

Under section 2-209(3), the Statute of Frauds for Article 2 (section 2-201) must be satisfied if the contract as modified comes within the provisions of section 2-201.⁶³ The drafters intended subsection (3) "to protect against false allegations of oral modifications."⁶⁴ To this end, the official comment to section 2-209(3) states that the Statute of Frauds provisions of Article 2 apply expressly to modification agreements. Because of subsection (3), "[m]odification' for the future cannot be conjured up by oral testimony if the price involved is \$500.00 or more since such modification must be shown at least by an authenticated memo."⁶⁵ Consistent with the policy of the Statute of Frauds, subsection (3) affords no protection to parties modifying contracts of less than \$500.⁶⁶

A literal reading of subsection (3) produces a result different from that enunciated in the official comment. The words of the provision demand only that the modified contract satisfy the Statute. The comment, however, requires that the modification itself be written.

61. 274 N.W.2d 339 (Iowa 1979).

62. Section 1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." U.C.C. § 1-103.

63. Section 2-209(3) provides: "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." *Id.* § 2-209(3). The text of § 2-201 is reproduced in note 40 *supra*.

64. U.C.C. § 2-209, Comment 3.

65. *Id.* As at common law, the \$500 price refers to the new contract, not to the price in the modification agreement. See text accompanying note 24 *supra*.

66. See note 13 *supra* and accompanying text.

A hypothetical illustrates the difference between a literal interpretation of subsection (3) and that of the official comment. Assume that Buyer and Seller enter into a written contract, signed by both parties, in which Buyer agrees to buy 100 items at \$10 per item and Seller agrees to deliver the 100 items on June 1. The original contract comes within and satisfies section 2-201(1). Assume also that before June 1 Buyer and Seller orally agree to a good faith price change to \$12 per item.⁶⁷ The oral agreement is not supported by consideration, but is enforceable under subsection (1). The modified contract, however, comes within the Statute and thus triggers subsection (3).

A literal interpretation of subsection (3) results in enforcement of the modification. If only the contract as modified must satisfy the Statute, then the original written contract satisfies the writing requirements of section 2-201(1) for both the original contract and the contract as modified. It matters not that the price term in the writing is incorrect or does not reflect the modification agreement.⁶⁸ The Statute is satisfied and the modification and the contract as modified are enforceable.⁶⁹ Anal-

67. For a discussion of the requirement that the modification be made in good faith, see note 6 *supra*.

68. See text accompanying note 51 *supra*.

69. Professors White and Summers have acknowledged a similar analysis, but only one of them concurs. See J. WHITE & R. SUMMERS, *supra* note 4, at 45.

It might be argued that even under a literal interpretation of subsection (3), the original writing does not satisfy the writing requirement of the Statute for the contract as modified. The new contract consists of the original written contract plus the modification agreement. Section 2-201(1) requires that there be "some writing sufficient to indicate that a contract for sale has been made between the parties." The original writing, although evidencing the existence of the original contract, does not indicate that a new contract "has been made." The original writing, therefore, does not satisfy the Statute's writing requirement for the new contract, *i.e.*, the contract as modified. See note 49 *supra*.

A simple hypothetical, however, refutes this argument. Assume that Buyer sends Seller a signed written offer to buy 100 items at \$10 per item. Assume that Seller, in turn, sends Buyer a signed acceptance of the offer, but expressly conditions acceptance on Buyer's assent to a price of \$10.50. Buyer then telephones his assent. A contract for 100 items at \$10.50 per item results, and the two writings satisfy the Statute. See U.C.C. § 2-207; notes 49, 54 *supra*. In a breach of contract action based on this hypothetical, the party alleging the contract would have the burden of proving Buyer's oral assent. From Buyer's perspective of the contract, the result would be the same if instead of sending a written acceptance, Seller telephones Buyer that he will accept Buyer's offer only if Buyer agrees to a \$10.50 price. Thus, in this hypothetical (wholly oral acceptance or counter-offer), the party alleging the contract would have the burden of proving both Seller's oral communication and Buyer's assent. In the hypothetical in the text (wholly oral modification), however, the party alleging the modification, most likely Seller, would have the burden of proving the oral modification agreement.

There is no reason why all three situations should not be treated in the same manner, because the writings in each situation were made before the formation of the contract. The problem arises

ysis under the official comment, however, yields a contrary result. The modification is not enforceable because the modification itself is not shown by "an authenticated memo."⁷⁰ This analysis accords with judicial interpretation of subsection (3).⁷¹

The legislative history of subsection (3) sheds little light on the intended meaning of the provision.⁷² Professor Patterson, in his analysis of section 2-209 for the New York Law Revision Commission, found that subsection (3) merely codified the pre-Code common law's construction of the Statute of Frauds "to apply to agreements modifying any written agreement which is within the Statute."⁷³ An analysis of the cases cited by Professor Patterson leads to the conclusion that at common law the modification agreement was required to satisfy the Statute to the same extent as the original contract.⁷⁴ If a term had to be written in the original, a modification of that term must also be evidenced by a writing.⁷⁵ In most situations, therefore, the modification agreement needed to be written to be enforceable.⁷⁶ As previously stated, however, the common-law writing requirement was grounded in the accuracy requirements of the Statute, not in a per se rule that all modifications must be written.⁷⁷

not with the literal interpretation of subsection (3) of § 2-209, but with an interpretation of the words "has been made" in § 2-201(1).

70. Authentication in this regard requires that the memorandum be signed by the party against whom enforcement is sought.

71. *See, e.g.*, Van Den Broeke v. Bellanca Aircraft Co., 576 F.2d 582 (5th Cir. 1978) (change in warranty); Double-E Sportswear Co. v. Girard Trust Bank, 488 F.2d 292 (3rd Cir. 1973) (elimination of option to cancel); Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc., — Minn. —, 265 N.W.2d 655 (1978); Farmers' Elevator Co. v. Anderson, 170 Mont. 175, 552 P.2d 63 (1976) (change in date of delivery); Dangerfield v. Markel, 252 N.W.2d 184 (N.D. 1977) (change in payment provision).

72. An attempt to find a legislative "intent" may prove to be fruitless or beyond the "intent" of the drafters. *See* Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-84 (1930). *But see* Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 601-02 (1966).

73. 1 N.Y. STUDY, *supra* note 6, at 643.

74. *See, e.g.*, Hill v. Blake, 97 N.Y. 216 (1884); Davison Coal Co. v. Weston, Dodson & Co., 209 A.D. 514, 205 N.Y.S. 49 (1924), *aff'd*, 240 N.Y. 705, 148 N.E. 767 (1925).

75. *See* text accompanying notes 24-28 *supra*. The requirements of a memorandum under § 207 of the *Restatement (Second)* are less rigorous than those under the *Restatement*. The *Restatement (Second)* requires that the essential terms of only the unperformed promises be stated with reasonable certainty, but the *Restatement* mandates that the terms and conditions of all promises be stated with reasonable certainty and accuracy.

76. Acceptance and receipt, earnest payment, or part payment subsequent to the modification agreement also would have satisfied the Statute. *See* notes 31-32 *supra*.

77. *See* text accompanying notes 15-28 *supra*.

If the common law approach to modification agreements were used to interpret section 2-209(3), the entire contract as modified would have to satisfy the Statute. The original writing, therefore, would satisfy the Statute, and the price change need not be evidenced by a writing, because section 2-201 requires only a writing sufficient to indicate that a contract for sale has been made. This approach conforms to the wording of subsection (3), but not to the official comment.

The analysis thus comes full circle. Read literally, the language of subsection (3) requires that the contract as modified satisfy the Statute. Accordingly, the original writing would satisfy the Statute.⁷⁸ Comment 3, however, mandates that the modification agreement itself satisfy the Statute. Consequently, the modification would have to be written. Furthermore, common-law analysis leads to anomalous results. Under the common law, modifications of essential terms must be written accurately. Thus, if subsection (3) follows the common law, as Professor Patterson stated, then modifications under section 2-209(3) would have to be written because almost all terms are essential. Common-law analysis of the Statute of Frauds of section 2-201, however, would grant legal effect to oral modifications because the only term that must be written under section 2-201 is the quantity term. Thus, comment 3, which requires modification agreements to be written, yields the same result as at common law, but a literal interpretation of subsection (3) uses a common-law analysis to grant enforcement of oral modifications.

This analysis leads to the following conclusion: subsection (3) requires modification agreements to be written. In accordance with comment 3, this interpretation best effects the purpose of section 2-209(3): "to protect against false allegations of oral modifications." An authenticated memo, that is, a memo signed by the party against whom enforcement is sought, is evidence of the modification agreement and affords the best protection against false allegations of oral modifications. This interpretation also renders section 2-209(3) available as an

78. If the original contract were oral, of course, there would be no original writing to satisfy the Statute. In that case the parties would have to satisfy the Statute in their new contract. If, for example, the original oral contract were for the sale of goods for \$400, a good faith price change to \$500 would bring the new contract within the Statute. The parties, therefore, would have to make a signed writing containing a quantity term to satisfy the Statute. Moreover, if the original oral contract had been within the Statute (assume a price of \$500), special manufacture under § 2-201(3)(a) would make the original contract enforceable. Special manufacture before the modification would not make the new contract enforceable. See note 33 *supra*.

alternative basis for enforcement of modification agreements. In cases in which a substantive basis for the enforcement of a modification agreement is lacking, such as in agreements unsupported by consideration, there must be a formal basis for enforcement of the agreement. An authenticated memo provides that basis.⁷⁹

The writing requirement also performs the three functions of a legal formality. A memorandum clearly satisfies the evidentiary function of the formality⁸⁰ and protects against false allegations of modification. To a lesser extent, the memo also satisfies the cautionary function of the formality because the promisor is put on notice that the promise contained in the memo is not simply a casual promise but is legally enforceable. If a promisor must take the time to reduce his promise to a signed writing, then it is unlikely that the written promise will be made casually or taken lightly. In most situations the writing also fulfills the channeling function of the formality by manifesting the promisor's intent that the promise be legally enforceable.⁸¹

In addition to effecting the purpose of section 2-209(3) and performing the three functions of a legal formality, this conclusion is consistent with judicial analyses of the problem. Those courts which have considered the issue have interpreted subsection (3) to require written modification agreements.⁸² In *Asco Mining Co. Inc. v. Gross Contracting*

79. A material change of position in reliance on a modification agreement also would create a legally enforceable modification, but the drafters of the Code made a policy decision that a writing is a better substitute for consideration because of its evidentiary and cautionary functions, which would better warn the casual promisor than would reliance. Reliance makes the agreement legally enforceable when the agreement is unsupported by consideration and is not evidenced by an authenticated memorandum. U.C.C. §§ 2-209(4), (5).

80. See text accompanying note 12 *supra*.

81. *Id.* It might be argued that under this analysis a writing could be used as a substitute for consideration in all situations, including an original gratuitous promise. See, e.g., Patterson, *supra* note 9, at 958-60. The Code, however, reflects a policy decision that only in very few situations can a writing make enforceable a promise unsupported by consideration. See, e.g., U.C.C. §§ 1-107, 2-205. This article is not an apology for the Code's preliminary policy decisions; yet, the decision to abolish the pre-existing duty rule for modifications of existing contracts is sound because the parties are already in a bargaining situation at the time of the modification. See, e.g., Fuller, *supra* note 11, at 818-19.

Additionally, it might be argued that if the writing fulfills the cautionary function of a legal formality, then the Code also should require a memorandum of an unsupported modification agreement that is part of a contract of sale for a price under \$500. Once again, the policy decision was that of the drafters, but the decision is correct. "Forms must be reserved for relatively important transactions." *Id.* at 805.

82. See, e.g., cases cited note 71 *supra*.

Co.,⁸³ for example, the court found that an oral modification agreement changing the time for payment from that set in a written contract governed by section 2-201 violated section 2-209(3).⁸⁴ Had the court interpreted subsection (3) to require merely that the contract as modified satisfy the Statute of Frauds, the original written contract would have been sufficient because section 2-201(1) does not require the payment term to be accurately stated. The court's requirement that the modification agreement be written performs the functions of a legal formality: the writing is evidence of the modification and protects against false allegation of modification. More importantly, the writing cautions the potential casual promisor that the unsupported promise contained in the written modification agreement is legally enforceable.

B. *Reliance—Subsections (4) and (5)*

There are situations in which a party to an oral modification agreement has reasonably relied on the agreement even in the absence of consideration or an authenticated memorandum. Reliance, a material change of position because of an oral modification agreement, provides a compelling justification for legal enforcement of oral modification agreements. Reliance, therefore, offers an alternative substantive basis for enforcement of oral agreements.⁸⁵

Unlike consideration, reliance affords some evidence of an oral agreement because the material change in position more likely than not occurred as a result of the promise to modify.⁸⁶ Unlike consideration or a writing, however, reliance performs neither a channeling nor a cautionary function. In the absence of a writing, the casual promisor is not cautioned that the oral agreement has legal effect. Nevertheless, courts dispense with caution when justice dictates. Justice requires enforcement of an oral modification agreement when one party has justifiably, materially, and detrimentally changed his position in reliance on the agreement.⁸⁷

Subsections (4) and (5) recognize reliance as an alternative yet subordinate validation device to consideration and a signed written memorandum. Because these subsections couch reliance in terms of

83. 3 U.C.C. Rep. 293 (Pa. C.P. 1965).

84. *Id.* at 296.

85. See text accompanying notes 9-14 *supra*.

86. See generally Comment, *The Mechanics of Parol Modification of Contracts Under the Uniform Commercial Code*, 29 U. PITT. L. REV. 665, 668-76 (1968).

87. See note 11 *supra*.

waiver,⁸⁸ several courts and commentators have wrestled with their meaning in relation to the writing requirement of subsection (3). Questions consistently arise concerning what is waived; when it is waived; who makes the waiver; what the effect of the waiver is; who may retract the waiver; and what the effect of retraction of the waiver is.⁸⁹

The case of *Double-E Sportswear Corp. v. Girard Trust Bank*⁹⁰ best points out these issues. In that case, Buyer and Seller entered into a written contract for the sale of shirts and sweaters. One provision of the contract granted Seller an option to terminate the agreement on or before April 1 by sending written notice to Buyer. On March 21, Seller opened up the sale to other bidders using a sealed bid arrangement. On March 31, Seller and Buyer orally agreed that Seller would not exercise its option to terminate the agreement if, on April 1 when the bids were opened, Buyer was the highest bidder or no other sealed bids were received. When Buyer attempted to deliver its bid to Seller on April 1, Seller refused to accept it. Instead, Seller exercised its option to terminate the agreement, because it had contracted on the evening of March 31 to sell the goods to a third party, whose bid was substantially lower than that of Buyer. Buyer sued.

The trial court granted Seller's motion for summary judgment on the ground that it had timely terminated the written contract. Apparently, the court reasoned that the oral modification agreement of March 31 between Buyer and Seller was not legally enforceable because it did not satisfy the writing requirement of section 2-209(3).⁹¹

On appeal, the Third Circuit held erroneous the district court's grant

88. Although waiver is a "troublesome term in the law," it usually is defined as "the voluntary and intentional relinquishment of a known right." See 5 S. WILLISTON, *supra* note 16, at § 678.

89. For cases dealing with the waiver of a term, see *Van Den Broeke v. Bellanca Aircraft Co.*, 576 F.2d 582 (5th Cir. 1978); *Double-E Sportswear Corp. v. Girard Trust Bank*, 488 F.2d 292 (3rd Cir. 1973) (concurring opinion); *Double-E Sportswear Corp. v. Girard Trust Bank*, 55 F.R.D. 297 (E.D. Pa. 1972); *Blue Rock Indus. v. Raymond Int'l*, 325 A.2d 66 (Me. 1974).

For cases dealing with waiver of the Statute of Frauds, see *Double-E Sportswear Corp. v. Girard Trust Bank*, 488 F.2d 292 (3rd Cir. 1973); *Farmers Elevator Co. v. Anderson*, 170 Mont. 175, 552 P.2d 63 (1976); *Dangerfield v. Markel*, 252 N.W.2d 184 (N.D. 1977); *Durbano Metals, Inc. v. A & K R.R. Materials, Inc.*, 574 P.2d 1159 (Utah 1978). See also Note, *The Scope and Meaning of Waiver in Section 2-209 of the Uniform Commercial Code*, 5 GA. L. REV. 783 (1971).
90. 488 F.2d 292 (3rd Cir. 1973).

91. The district court denied defendant's motion for summary judgment. 55 F.R.D. 297 (E.D. Pa. 1972). After additional proceedings, however, defendant's motion was renewed and granted by the court without opinion. From this order plaintiff appealed. See 13 U.C.C. Rep. 577, 578 (3rd Cir. 1973).

of summary judgment for Seller because the case presented genuine issues of material fact. The majority found that the district court should have determined whether there was a waiver of the Statute of Frauds and, if so, whether there was an oral modification of the original contract or a retraction of the waiver. The majority based its decision on the finding that a waiver under subsection (4) is a waiver of the Statute of Frauds.⁹² The concurring judge read the majority holding to mean that a waiver of subsection (4) is a complete waiver of the Statute; thus, all other subsequent modifications need not be written.⁹³ The concurring judge, however, confined the scope of a waiver to waiver of a substantive term.⁹⁴ Thus, the majority looked for an oral waiver of the Statute, but the concurring judge found a waiver of the option term in the parties' oral agreement to modify.

The choice of the word waiver in subsections (4) and (5) is unfortunate.⁹⁵ Courts and commentators have expended too much discussion on the vagaries of waiver when the real issue in section 2-209 cases is whether an oral modification agreement unsupported by consideration is legally enforceable. By looking to the underlying purpose and policy of section 2-209 proposed in this article,⁹⁶ analysis of the issue is quite simple. At the outset, an oral agreement unsupported by consideration is unenforceable. If, however, one of the parties materially changes position in reliance on the agreement, the agreement is legally enforceable if it would be unjust to deny its enforcement.⁹⁷ Inherent in this phrase-

92. 488 F.2d at 296 n.4.

93. *Id.* at 298 (Garth, C.J., concurring).

94. *Id.*

95. I agree wholeheartedly with Professor J. Ewart's thesis that "there is not in law any such concept as 'waiver,' apart from [election, estoppel, contract and release]." Ewart, *Waiver or Election*, 29 HARV. L. REV. 724, 729 (1916). See also J. EWART, *WAIVER DISTRIBUTED AMONG THE DEPARTMENTS, ELECTION, ESTOPPEL, CONTRACT, RELEASE* (1917). Nevertheless, the commentary to the *Restatement (Second) of Contracts* retains the waiver terminology. See, e.g., *RESTATEMENT (SECOND)*, *supra* note 6, at §§ 88, 89D. In addition, the Code speaks of waiver in at least one other section in Article 2. See U.C.C. § 2-208(3).

96. The Code is to be "liberally construed and applied to promote its underlying purposes and policies." U.C.C. § 1-102(1).

97. This interpretation is similar to the common-law treatment of oral modification agreements, except that at common law the agreement was not enforceable; rather, reliance on the agreement merely provided an excuse for nonperformance of the contract according to the original terms. See text accompanying notes 24-39 *supra*. On the other hand, this interpretation tracks the manner in which § 90 of both the *Restatement* and *Restatement (Second)* treat reliance on a gratuitous promise—reliance on the promise makes the promise legally enforceable. 1 *RESTATEMENT*, *supra* note 6, at § 90. Section 90(1) provides: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does

ology is the notion that either party has the right to notify the other that strict performance of the original contract will be required, and that notification, if given within a reasonable time of performance, precludes the other party from relying on the oral modification agreement.⁹⁸ Analyzing subsections (4) and (5) without using the waiver terminology also dispenses with the problem presented by comment 2 to section 1-102, which on its face prohibits waiver of the Statute of Frauds.⁹⁹

Application of this analysis to *Double-E Sportswear* points out the relative ease with which subsections (4) and (5) may be applied to seemingly difficult cases. The oral modification agreement in *Double-E Sportswear* should not be enforceable because the modification was not supported by consideration and the new contract was for the sale of goods over \$500. If, however, Buyer would have delivered its bid to Seller on March 31 but did not do so in reliance on their oral agreement modifying the option to terminate, then Buyer's forbearance would provide the substantive basis for enforcement of an otherwise unenforceable promise.¹⁰⁰ On the other hand, if Buyer did not materially change its position in reliance on the oral agreement, Seller could have notified Buyer, within a reasonable time before Seller accepted the third party's bid, that it was reinstating the original option to terminate according to the original agreement. On remand, the trial court would need to determine whether, in fact, the parties entered into a modification agreement and, if so, whether Buyer materially changed its position in reliance on the agreement before Seller notified Buyer of

induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND), *supra* note 6, at § 90(1). See also *id.* § 89D(c).

98. Permitting either party to give notice of strict performance flies in the face of the wording of subsection (5) added to the 1957 Official Edition of the Code that "[a] party who has made a waiver . . . may retract the waiver." U.C.C. § 2-209(5) (1957 ed.). Nevertheless, because neither party has made an express waiver and because each party has orally agreed to the modification, it is only just that either party be permitted to thwart reliance.

99. This principle of freedom of contract is subject to specific exceptions found elsewhere in the Act and to the general exception stated here. The specific exceptions vary in explicitness: the statute of frauds found in Section 2-201, for example, does not explicitly preclude oral waiver of the requirement of a writing, but a fair reading denies enforcement to such a waiver as part of the "contract" made unenforceable

Id. § 1-102, Comment 2.

100. Both subsection (5) and RESTATEMENT (SECOND), *supra* note 6, at § 90, make the enforcement of the promise dependent on the requirements of justice. See notes 1, 97 *supra*. In this situation, justice would require enforcement of the unsupported oral promise.

the original term's reinstatement. If so, then the agreement is legally enforceable and Seller wrongfully terminated the contract.

C. *Enforceability Under Section 2-201(3)*

Application of subsections (4) and (5) without reference to waiver not only more closely follows pre-Code common law¹⁰¹ and simplifies the evidentiary issues surrounding oral modification agreements, but also closes the "big back door" that commentators feared subsection (4) had opened on the protection provided by subsections (2) and (3).¹⁰² Under the waiver analysis, because an attempt at modification that does not satisfy subsection (3) can operate as a waiver, the waiver automatically creates a legally enforceable modification. The writing protection of subsection (3), thus, is pushed out the "big back door" whenever the parties make an oral modification agreement. By substituting reliance for the waiver analysis, an oral modification agreement is unenforceable unless relied upon. The writing requirement of subsection (3) controls all situations except those in which there has been a material change of position in reliance on the oral agreement and closes the "big back door" on automatic modification. Subsection (4) opens no bigger back door on subsection (3) than the entire doctrine of promissory estoppel opens on the law of contracts.¹⁰³

Many courts, however, have opened the "big back door" by confusing satisfaction of the Statute of Frauds with enforceability of a contract that does not satisfy the Statute.¹⁰⁴ As previously discussed, only a writing satisfies section 2-201.¹⁰⁵ Nevertheless, section 2-201(3) permits enforcement of an agreement that does not satisfy the writing requirement of the Statute in cases of special manufacture, admission, payment and acceptance, or receipt and acceptance.¹⁰⁶ Section 2-209(3) requires that the agreement satisfy the Statute, not that the

101. See text accompanying notes 29-39, 97 *supra*.

102. 1 N.Y. STUDY, *supra* note 6, at 644 (analysis of E. Patterson); see also Note, *supra* note 89.

103. Section 1-103 supplements the Code provisions with the law of estoppel. See note 62 *supra*.

104. See, e.g., *Ampex Corp. v. Appel Media, Inc.*, 374 F. Supp. 1114 (W.D. Pa. 1974) (§ 2-201(3)(c)); *Thomas Knutson Shipbuilding Corp. v. George W. Rogers Constr. Corp.*, 6 U.C.C. Rep. 323 (N.Y. Sup. Ct. 1969) (§ 2-201(3)(a), (c)). See also *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963) (issue of applicability of § 2-201(3)(c) not reached).

105. See text accompanying notes 44-45, 49-55 *supra*.

106. See text accompanying notes 46-48, 56-62 *supra*. Section 2-201(3) is reproduced in note 40 *supra*.

agreement be enforceable. Moreover, the enforceability provisions of section 2-201(3) do not require proof of a legal basis for enforcement of the oral agreement. Thus, consistent with the basic premise of this article that the writing requirement of subsection (3) is an alternative basis for enforcement of the unsupported agreement, these other circumstances should not be used as a mechanism for enforcement of the modification agreement.¹⁰⁷

In *Dangerfield v. Markel*,¹⁰⁸ for example, the court decided whether Buyer's admission in court that the parties had orally agreed to modify the payment term satisfied section 2-209(3).¹⁰⁹ Both parties admitted the oral modification, but their testimony on the terms of the agreement differed. The court held that because the admission satisfied the requirements of enforcement of section 2-201(3)(b) the admission barred Buyer from alleging that the modification did not satisfy the Statute of Frauds. The terms of the agreement merely presented a factual issue.

This holding would be correct if the case were to be decided solely to protect the Buyer from false allegations of modification, because the admission is proof that the parties agreed to a modification. As noted above, however, there is another purpose for subsection (3).¹¹⁰ Because the modification was not supported by consideration, a formal basis for enforcement of the modification agreement was necessary. The admission clearly performed the evidentiary function of a legal formality, but failed to fulfill the cautionary function, because at the time of the agreement there was nothing to apprise Buyer that his promise would be legally enforceable. In addition, Buyer's courtroom admission in no manner indicated that Buyer, at the time of the agreement, manifested an intent that the modification agreement be legally enforceable.¹¹¹

107. A written confirmation that complies with § 2-201(2) would satisfy the writing requirement of § 2-209(3) even though the writing was not signed by the party against whom enforcement is sought. In this circumstance, the confirmation is a statement by the sender of an intent to rely on the oral modification agreement. This notification of reliance should be sufficient to warn the casual promisor that the agreement is legally enforceable. See Fuller, *supra* note 11, at 811. See also *A & G Constr. Co. v. Reid Bros. Logging Co.*, 547 P.2d 1207 (Alaska 1976).

108. 252 N.W.2d 184 (N.D. 1977).

109. *Id.* at 190.

110. See note 79 *supra* and accompanying text.

111. As a matter of fact, it seems that Buyer in this case agreed to a modification of the payment term only to continue the contractual relationship of the parties on a friendly basis. Seller presented no evidence that Buyer had reason to know that the oral agreement might have legal significance.

The court, therefore, was incorrect in holding that the Buyer's admission satisfied the writing requirements of subsection (3).

If, on the other hand, Buyer relied on the oral modification agreement, the court was correct in holding the oral modification legally enforceable because fulfillment of the cautionary function of a legal formality is subordinate to a party's material change of position in reliance on the oral agreement.¹¹²

Assume, for example, that Buyer and Seller enter into a signed written contract for the sale on credit of 100 items at \$10 per item. Assume that Seller encounters financial difficulties and orally requests Buyer to pay cash on delivery of the items and that Buyer orally agrees to the modification. Because of Buyer's promise to pay C.O.D., Seller does not seek outside financial assistance. When Seller attempts to deliver the goods, Buyer refuses to pay and, as a result, Seller refuses to leave the shipment with Buyer. Buyer sues Seller for breach of contract for failure to deliver the goods and Seller counterclaims for Buyer's breach of contract. Assume further that both parties admit the existence of the oral modification agreement in their pleadings. The issue of whether Buyer breached the contract depends, therefore, on the enforceability of the oral modification agreement. Because the agreement was not in writing, it does not satisfy subsection (3). Moreover, even though the admission provides evidence of the oral agreement, it provides no substantive or formal basis for enforcement of the unsupported modification. If before delivery, however, Seller can obtain a loan but does not apply for one in reliance on the oral agreement, Seller's forbearance constitutes a material change of position in reliance on the oral agreement. According to subsections (4) and (5), therefore, Seller's reliance dispenses with the requirement that Buyer be cautioned about the legal significance of the unsupported oral promise. Seller's reliance, not Seller's admission, provides the substantive basis for enforcement of the modification.¹¹³

The same analysis applies to situations of special manufacture. Assume Buyer and Seller enter into a signed written contract for the sale of 100 pairs of brown leather gloves at \$15 per pair and that Seller later orally agrees to Buyer's request to deliver orange gloves, which require special manufacture and are not suitable for sale to others in the ordi-

112. See text accompanying notes 85-103 *supra*.

113. Moreover, in this situation it would be unjust to deny enforcement of the promise. See note 100 *supra*.

nary course of Seller's business. Seller's substantial beginning of the manufacture of the orange gloves conforms with the requirements of enforcement of section 2-201(3)(a), but the modification agreement does not satisfy the writing requirement of section 2-209(3). Arguably, the special manufacture provision of section 2-201(3)(a) protects Buyer against Seller's false allegation of modification because it is evidence of the modification, but the special manufacture does not caution Buyer, possibly a casual promisor, that the modification agreement would be legally enforceable. Nevertheless, the oral modification in this situation would be enforceable in that Seller materially changed position in reliance on the oral agreement, and it would be unjust to deny its enforcement.¹¹⁴ According to subsections (4) and (5), Seller's reliance creates the alternative substantive basis for enforcement of the agreement. Seller's proof that he would not have begun manufacture of the orange leather gloves but for the oral agreement is sufficient evidence of Seller's reliance. The suitability of the gloves for sale to others need not be proved under subsections (4) and (5); it merely would be some evidence of Seller's reliance on the agreement because a reasonable manufacturer does not manufacture items, unless specially ordered, that are not suitable for sale.¹¹⁵

The same result would follow if the original contract were for orange gloves and Seller orally agreed to a change to brown gloves, which were suitable for sale to others. Seller's substantial beginning of manufacture of the brown gloves would be the reliance required under subsections (4) and (5), and in this situation it would be unjust to deny enforcement of the promise.¹¹⁶ Thus, in situations in which specially manufactured goods are suitable for sale to others, it would be more difficult to make a case for enforcement under section 2-201(3)(a) than it would be to prove reliance under subsections (4) and (5).

Furthermore, in certain situations it would be possible to satisfy section 2-201(3)(a), but impossible to prove reliance. Assume, for example, that the contract is for the sale of brown gloves in Buyer's unique design. Seller, unable to procure brown leather, instead manufactures orange leather gloves, which are not suitable for sale to anyone in the ordinary course of Seller's business. Seller then telephones Buyer and

114. *See id.*

115. *See* note 86 *supra* and accompanying text.

116. *See* note 100 *supra*. At the very least, Seller should be compensated for any incidental damages incurred in resale of the gloves. U.C.C. § 2-710.

asks Buyer to agree to a change in color from brown to orange. Buyer agrees, but before delivery Buyer telephones Seller and insists on delivery of the original brown gloves. In this instance, the lack of consideration in support of the oral agreement does not make the agreement unenforceable,¹¹⁷ but under subsection (3) the agreement must be written. Moreover, there is no evidence of a material change of position by Seller in reliance on the agreement. The oral modification is thus unenforceable.

Application of the *Dangerfield*¹¹⁸ analysis to this fact pattern, however, yields a contrary result. Seller completed special manufacture of the goods, which were not suitable for sale to others, before Buyer notified Seller of the reinstatement of terms under circumstances reasonably indicating that the goods were for Buyer because of their manufacture in Buyer's unique design. In short, the facts satisfy section 2-201(3)(a), but not section 2-209(3). Mere satisfaction of section 2-201(3)(a), therefore, affords no legal basis for enforcement of the agreement unless the facts indicate a material change of position in reliance on the agreement.

The final circumstances for enforcement under section 2-201(3), payment and acceptance of the price or receipt and acceptance of the goods, presents a similar problem. Assume that Buyer and Seller enter into a signed written contract for the sale of 100 pairs of brown leather gloves at \$15 per pair to be delivered on June 1, but before June 1 Buyer and Seller agree in good faith to a price change to \$16 per pair. On June 1, Buyer receives and accepts the gloves. Buyer's receipt and acceptance, which is not specifically referable to the modification agreement, is neither evidence of the modification nor a cautionary device indicating to Buyer that the oral modification agreement might be legally enforceable. This agreement might be enforceable, however, if Seller can prove a material change of position in reliance on the agreement. If, after Buyer and Seller orally agree to the price change, Seller orders the gloves from his supplier at a price higher than he had anticipated when he entered into the original contract, then under subsections (4) and (5) Seller's reliance on the agreement would provide a substantive basis for enforcement of the agreement, notwithstanding

117. See U.C.C. § 2-209(1).

118. 252 N.W.2d 184 (N.D. 1977). See text accompanying notes 107-09 *supra*.

the lack of warning to Buyer that the modification is enforceable.¹¹⁹

If, however, the modification was from brown leather to brown vinyl, Buyer's receipt and acceptance of the brown vinyl gloves arguably would not be specifically referable to the modification agreement, but might indicate Buyer's decision to accept the nonconforming goods and sue for damages.¹²⁰ Once again, receipt and acceptance fulfills neither the evidentiary nor cautionary functions of the formality. Even if the modification were a change in delivery date from June 1 to July 1, receipt and acceptance on July 1, although more probative of the oral agreement than the other hypothetical changes, would not be specifically referable to the modification because Buyer merely may have been exercising his option to accept a nonconforming delivery.¹²¹

As the previous situations indicate, the agreement is legally enforceable under subsections (4) and (5) if either party to the contract can prove that the parties orally modified the contract and that the party alleging enforcement of the oral agreement materially changed his position in reliance on the agreement. The agreement, however, is not enforceable merely because it satisfies section 2-201(3)(c). That section does not require evidence to support a finding of either a substantive or formal basis for enforcement of the agreement.¹²²

This analysis of section 2-201(3) shows that neither admission of the agreement by the party against whom enforcement is sought, nor evidence of special manufacture, nor evidence of receipt and acceptance, cautions parties to an unsupported oral modification that their agreement is legally enforceable. Pursuant to subsections (4) and (5), the writing requirement should be dispensed with only when a party to the agreement has materially changed his position in reliance on the agree-

119. Moreover, in this situation, as in the others in this section of the article, it would be unjust to deny enforcement of the promise. See note 100 *supra*.

120. See U.C.C. §§ 2-601(b), 714(1).

121. See *id.*

122. It can be argued that the agreement should be legally enforceable if either party can prove the modification agreement by a preponderance of the evidence. This argument, however, fails to take into account the importance of cautioning the casual promisor that his promise, which is unsupported by consideration, is legally enforceable when the promise is part of an agreement modifying an existing contract. Of course, a compelling argument could be made in rebuttal that if Buyer orally agreed to the modification, then acceptance of the goods would caution a reasonable person in Buyer's position that the modification agreement was legally enforceable. This supposition of caution, however, does not take into account the realities of modern business. Buyer's acceptance, for example, may be made by an agent unaware of Buyer's oral agreement, or Buyer may not remember the oral agreement at the time of acceptance.

ment and justice requires enforcement of the agreement. Because section 2-201(3) does not require proof of reliance, the occurrence of any of the circumstances in section 2-201(3), without more, does not satisfy the writing requirement of subsection (3).¹²³

VI. MODIFICATION OF WRITTEN CONTRACTS UNDER SECTION 2-209(3)—AGREEMENTS SUPPORTED BY CONSIDERATION

As previously stated, the basic premise of this article is that the writing requirement of subsection (3) does not apply to oral modification agreements that are supported by consideration.¹²⁴ Assume that Buyer and Seller enter into a signed written contract in which Buyer agrees to buy 100 items on credit at \$10 per item and Seller agrees to deliver the 100 items on June 1. The original contract thus comes within and satisfies section 2-201(1). On May 1 Buyer and Seller orally agree to a modification by which Seller promises to deliver the goods on May 15 in exchange for Buyer's promise to pay cash on delivery for the goods.

At first blush, the agreement seems to fall within the requirements of subsection (3) because the new contract is within the Statute of Frauds. The modification agreement, however, need not be shown by an authenticated memorandum because application of subsection (3) to this situation is unnecessary and, more importantly, contrary to the underlying purpose and policy of section 2-209.¹²⁵ The agreement is supported by consideration, which provides a substantive basis for enforcement of the agreement, and thus requires no further legal basis for enforcement. Moreover, the original writing satisfies the writing requirement of the Statute of Frauds because the memorandum need not be accurate.¹²⁶

Although the drafters intended subsection (3) to protect against false allegations of oral modifications,¹²⁷ this protection is unnecessary when the modification is supported by consideration. Very rarely would a party to a contract "conjure up"¹²⁸ a modification that imposes an additional duty on himself as well as on the other party to the contract. If

123. If subsection (3) were amended as proposed in this article, see text accompanying notes 148-51 *infra*, unsupported oral promises made by a merchant would be legally enforceable without proof of a writing or reliance.

124. See text accompanying notes 9-14 *supra*.

125. See text accompanying note 2 *supra*; note 96 *supra*.

126. See text accompanying notes 49-53 *supra*.

127. See text accompanying note 64 *supra*.

128. U.C.C. § 2-209, Comment 3. See text accompanying note 65 *supra*.

such conjuring does occur, the party alleging the modification would need to prove the modification by a preponderance of the evidence. Proving the modification would be difficult if the original writing contained the original term. Even if the modification is proved, the other party can raise a defense that the agreement does not meet the test of good faith¹²⁹ or that it is unconscionable.¹³⁰ Thus, consideration provides most of the necessary protection against false allegations of modifications. If subsection (3) is interpreted to require that every modification agreement supported by consideration satisfy the Statute of Frauds, section 2-209 clearly adds an unnecessary technicality to modification of sales contracts that did not exist at common law.¹³¹

The only modification that always must be written to satisfy the requirements of the Statute is a change in quantity. In the hypothetical, assume that instead of changing the date and payment terms, Buyer and Seller orally agree to an increase in quantity from 100 to 200 items. This modification must satisfy section 2-201 because the new contract is not enforceable beyond the quantity of goods shown in the original writing.¹³²

In conclusion, section 2-209(3) does not apply to modification agreements that are supported by consideration because consideration supplies the substantive basis for their enforcement. The formality of a writing provides no further protection. Unless the agreement modifies the quantity, it need not be written because the original writing satisfies the Statute of Frauds.

VII. A PROPOSAL FOR AMENDMENT OF SUBSECTION (3)— MERCHANTS AND NONMERCHANTS

To this point, the article has made no distinction between situations

129. See note 6 *supra*. See also *Ruble Forest Prods., Inc. v. Lancer Mobile Homes, Inc.*, 269 Or. 315, 524 P.2d 1204 (1974).

130. See note 6 *supra*.

131. See text accompanying notes 15-28 *supra*. In *S.C. Gray, Inc. v. Ford Motor Co.*, — Mich. App. —, 286 N.W.2d 34 (1979), the court did not apply section 2-209 to a modification supported by consideration. Contrary to the argument in this article, however, the court seemed to have determined that section 2-201 applies to all modification—not just quantity modification—of contracts within the Statute. *Id.* at —, 286 N.W.2d at 39 n.1.

132. See text accompanying notes 49-53 *supra*. In this situation, satisfaction of any provision of § 2-201 would allow for enforcement of the new contract because the writing requirement stems from § 2-201(1) (the Statute of Frauds), not from § 2-209(3).

in which the promisor is a merchant and a nonmerchant.¹³³ No such distinction is made in subsections (3), (4), and (5),¹³⁴ and any attempt to distinguish between different classes of promisors within the present framework of section 2-209 would be artificial.

The policy and purpose of section 2-209¹³⁵ and the fast pace of commercial transactions, however, justify a substantive amendment that would eliminate the writing requirement of subsection (3) for merchant promisors. Section 2-209 differs from contract law in that a promise modifying an existing contract needs no consideration to be binding. Nevertheless, section 2-209 follows contract law to the extent that a promise modifying an important contract needs some legal basis for enforcement; subsection (3) requires a formal basis for enforcement in place of consideration, and subsections (4) and (5) permit reliance as an alternative substantive basis for enforcement.¹³⁶ These bases, however, are unnecessary when the promisor is a merchant.

For purposes of illustration, assume that Buyer and Seller enter into a signed written contract for the sale of 100 pairs of leather gloves at \$10 per pair. Before Seller takes steps to obtain the gloves, Seller and Buyer orally agree to a price change to \$12 per pair. Pursuant to subsection (3), this oral modification agreement is not enforceable. One ramification of this result is that Buyer can change his mind about the price change and insist on the gloves at \$10 per pair. Consequently, if damages were assessed for a breach one minute after the parties made the oral agreement, Buyer would receive a windfall. If Seller breaches the contract, he would pay damages based upon the lower contract price, which would enhance the amount Buyer would receive.¹³⁷ If

133. Section 2-104(1) defines "merchant."

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-104(1). For a thorough discussion of merchants under Article 2, see Dolan, *The Merchant Class of Article 2: Farmers, Doctors, and Others*, 1977 WASH. U.L.Q. 1.

134. Subsection (2) of § 2-209, which is reproduced in note 1 *supra*, distinguishes the protections afforded merchants from those available to nonmerchants under Article 2.

135. See text accompanying note 2 *supra*; note 96 *supra*.

136. See text following note 13 *supra*.

137. In this situation, Buyer's damages equal the difference between the market price at the time of breach and the contract price. U.C.C. § 2-713(1). If the market price is greater than \$10, Buyer will receive a larger award if the contract price is \$10 rather than \$12. Under either contract price, Buyer will be awarded no damages if the market price is less than \$10.

Buyer breaches, Seller's damages would be lower because of the \$10 contract price.¹³⁸ The question of who should receive the windfall in these situations is relatively unimportant; likewise, the attribution of the windfall to the party wishing to change his mind is arbitrary. The rule just as easily could have presented the windfall to the party wishing to enforce the oral agreement.

A. *Of Merchants*

Although attribution of the windfall is relatively unimportant, there are two reasons for giving effect to oral modification promises made by merchants. First, this kind of promise frequently is made in commercial transactions.¹³⁹ More importantly, to deny legal enforcement of the promise is economically wasteful.

In the hypothetical, Seller was in no better position after than before Buyer orally agreed to the price change because Buyer did not sign a written promise. Seller, in fact, put himself in a worse position because the only evidence of a legal basis for enforcement of the agreement that Seller possibly could adduce is evidence of Seller's material change of position in reliance on the oral agreement. Assume that Seller ordered the leather to make the gloves or that Seller already manufactured the gloves. Seller could have cancelled the order or sold the gloves to another buyer and sued Buyer for damages. But what is the contract price? At what point does the oral promise become legally enforceable? Because of his dependence on proof of reliance, Seller never can be certain of the terms of the sales contract. Moreover, producing evidence of reliance is much more costly to the parties than merely producing evidence of the oral agreement.¹⁴⁰ In addition, requiring a judicial determination of whether reliance is present and whether justice requires enforcement of the promise is judicially and administra-

138. In this situation, Seller's damages equal the difference between the market price at the time for tender and the contract price. *Id.* § 2-708(1). If the market price is less than \$10, Seller will receive less in damages under the \$10 contract price than under the \$12 price.

139. *See, e.g.,* Van Den Broeke v. Bellanca Aircraft Co., 576 F.2d 582 (5th Cir. 1978); Double-E Sportswear Corp. v. Girard Trust Bank, 488 F.2d 292 (3rd Cir. 1973); Farmers Elevator Co. v. Anderson, 170 Mont. 175, 552 P.2d 63 (1976); Thomas Knutson Shipbuilding Corp. v. George W. Rogers Constr. Corp., 6 U.C.C. Rep. 323 (N.Y. Sup. Ct. 1969); Ruble Forest Prods., Inc. v. Lancer Mobile Homes, Inc., 269 Or. 315, 524 P.2d 1204 (1974); Asco Mining Co. v. Gross Contracting Co., 3 U.C.C. Rep. 293 (Pa. C.P. 1965).

140. Instances of reliance also may be evidence of the agreement's existence, but presentation of this evidence to prove the agreement is within the discretion of the parties. *See* text accompanying note 115 *supra*.

tively more expensive than merely requiring a determination of whether an oral agreement exists.

This proposal, which gives legal effect to oral modification agreements not supported by consideration or reliance, creates a new legal basis for the enforcement of a promise. This basis, merely statutory, fits into none of Professor Fuller's categories.¹⁴¹ As with unsupported oral modifications of contracts for the sale of goods for less than \$500,¹⁴² the mere making of the promise provides the legal basis for its enforcement. This basis, however, comports with present fast moving commercial transactions.

Of course, if subsection (3) were amended, the casual promisor would not be cautioned of the legal significance of his promise. This problem can be solved with education of merchants, who gradually will become aware that all promises made as part of an existing bargain are enforceable. Casual merchant promisors, moreover, will not be left without recourse. Section 2-209(1) grants enforcement only to those modification agreements which are made in good faith,¹⁴³ unconscionable agreements, in addition, remain subject to the provisions of section 2-302.¹⁴⁴

B. *Of Nonmerchants*

Because nonmerchants are the very people who need the writing protection of subsection (3), this article does not propose that unsupported oral promises made by nonmerchants be given legal effect. Assume that Buyer and Seller in the hypothetical are nonmerchants. Seller inherits 100 pairs of gloves and contracts to sell them to Buyer at \$10 per pair. Because Seller later anticipates greater delivery costs, Seller and Buyer orally agree to a price change to \$12 per pair.

What is the price of the gloves? Under subsection (3) the answer is \$10 because the reasonable expectation of a nonmerchant is that an unsupported promise is not legally enforceable.¹⁴⁵ The nonmerchant is

141. See note 11 *supra*.

142. See note 13 *supra* and accompanying text.

143. See note 6 *supra*. "Good faith" in the case of a merchant means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103(1)(b).

144. See note 6 *supra*.

145. Although I have no empirical evidence to support this proposition, one need only look to the kinds of promises that courts usually enforce to determine what the reasonable expectation of a nonmerchant would be. Of course, nonmerchants usually do not speak or think in terms of

not cautioned that his promise may have legal significance; only the act of signing the promise provides this caution.¹⁴⁶

C. *Between Merchants and Nonmerchants*

The proposed amendment creates some problems in situations in which only one party to the contract is a merchant. Assume that Buyer, a nonmerchant, orally agrees to a price change proposed by Seller, a merchant. Although Buyer agrees to the price change, Seller is in the same position he would be if subsection (3) were not amended. Seller must show reliance to create a legally enforceable promise from an unenforceable one. Because Buyer can change his mind any time before reliance, it will be difficult for Seller to plan for further performance of the contract. Although the unenforceability of Buyer's promise creates some commercial problems for Seller, resolution of these problems should favor the nonmerchant promisor who expects that his unsupported promise will not be legally enforceable. In addition, Seller always can protect his expectation by having Buyer sign a written agreement.

A more serious inequity may arise when a merchant makes an unsupported oral promise to a nonmerchant. Assume that Buyer is a merchant and Seller is a nonmerchant. According to the proposal, the merchant Buyer's unsupported oral promise will be legally enforceable and Buyer will not be permitted to change his mind concerning the price change unless Seller agrees. Buyer, in this situation, will argue that because Seller does not expect the unsupported oral agreement to be legally enforceable, Buyer should have the same right to change his mind as a nonmerchant. Buyer's argument is palpable, but the merchant Buyer should expect his promise to be enforceable. This proposal cautions him that his promise to the nonmerchant Seller will be enforceable. Moreover, making the Buyer's promise legally enforceable is consistent with the section 2-209 policy of protecting nonmerchants.¹⁴⁷

"consideration" or "unsupported" promises, but it is reasonable to assume that almost all lay persons know that gift promises and social promises are not enforceable. Baby, for example, cannot sue Grandma for not giving him a new bicycle on his sixth birthday; John cannot recover damages from Mary for breaking a date with him.

146. See note 11 *supra*. It is also reasonable to assume that a writing would impress a nonmerchant more than consideration because nonmerchants forever are trying to "get it in writing."

147. Subsection (2) makes it difficult for a merchant to foist a "no oral modification clause" on a nonmerchant. If the merchant supplies the original written contract, the nonmerchant must

D. Conclusion

By giving legal effect to unsupported oral promises made by merchants, the proposed amendment to subsection (3) would free present fast moving commercial transactions from the technical constraints of the common law of contracts and section 2-209(3) as it presently exists. In addition, merely requiring the party asserting the oral agreement to prove its existence would streamline and make less costly controversies surrounding unsupported oral modification agreements.

VII. THE FUTURE OF SUBSECTION (3)

The purpose of section 2-209 is to "make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which [prior to enactment of the Code] hamper[ed] such adjustments."¹⁴⁸ Subsection (1) accomplishes much of this goal by abolishing the pre-existing duty rule. Subsection (3), on the other hand, adds to the modification process a writing technicality that did not exist at common law.¹⁴⁹ By requiring an authenticated memorandum to enforce every unsupported modification creating a new contract that comes within the Statute of Frauds, subsection (3) impedes the effectiveness of many necessary and desirable oral modification agreements.

At this time, the writing requirement may be necessary to caution a casual promisor that an unsupported modification agreement is legally enforceable. This caution, however, should not be afforded to a merchant promisor,¹⁵⁰ and subsection (3) should be modified accordingly. Total repeal of subsection (3) should occur when the caution of the written formality is not needed by nonmerchants. At that time, nonmerchants will have become sufficiently aware that unsupported oral promises made in a bargaining context will be legally enforced. When subsection (3) finally is repealed, modifications of contracts governed by the Statute of Frauds need satisfy only section 2-201.¹⁵¹

separately sign the clause for it to be enforceable. *See* U.C.C. § 2-209(2). *Contra*, *Trust Co. of Georgia v. Montgomery*, 136 Ga. App. 742, 222 S.E.2d 196 (1975); Note, *Oral Modification of Sales Contracts and the Statute of Frauds*, 21 *DRAKE L. REV.* 593, 601 (1972).

148. U.C.C. § 2-209, Comment 1.

149. There was, however, a common-law requirement that modifications of essential terms be written. *See* text accompanying notes 15-28 *supra*.

150. *See* text accompanying notes 139-44; text following note 146 *supra*.

151. At least one court already has ignored subsection (3) by looking only to the requirements of the Code's Statute of Frauds; but that court misinterpreted § 2-201 to prohibit all oral modifications of contracts within the Statute. *See* *Edelstein v. Carole House Apts., Inc.*, 220 Pa. Super.

APPENDIX

PROPOSED AMENDMENT TO SECTION 2-209

§ 2-209. Modification Not Supported by Consideration¹⁵²

(1) A good faith 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.¹⁵³

(3) A modification agreement:

(a) which is not supported by consideration; and

(b) which creates a new contract for the sale of goods for the price of \$500 or more; and

[(c) in which the promisor is a nonmerchant]¹⁵⁴

is not enforceable by way of action or defense unless there is a writing sufficient to indicate that the agreement has been made by the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

(4) Although an attempt at modification does not satisfy the requirements of subsection (2) or (3), it is enforceable by way of action or defense if either party to the agreement has made a justifiable material change of position in reliance on the oral agreement and it would be unjust to deny its enforcement.

298, 286 A.2d 658 (1971). The *Restatement (Second)* also can be interpreted to follow this approach. RESTATEMENT (SECOND), *supra* note 6, at §§ 89D, 223; *see* note 13 *supra*.

152. The title is changed to reflect my agreement with Professor Ewart that waiver does not exist in contract law. *See* note 95 *supra*. In addition, rescission is an unnecessary term because it need not be supported by consideration or satisfy the Statute of Frauds. *See* text accompanying note 22 *supra*.

153. Amendment of subsection (2) is left for another day.

154. Inclusion of this clause would amend the substance of § 2-209 as it now exists. *See* text accompanying notes 133-47 *supra*. When the caution of a written formality is no longer needed by nonmerchants, this subsection shall be repealed. *See* text accompanying notes 148-51 *supra*.

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