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A STUDY OF UNIFORM COMMERCIAL CODE METHODOLOGY: CONTRACT MODIFICATION UNDER ARTICLE TWO

ROBERT A. HILLMAN†

A goal of the Uniform Commercial Code is to provide rules that respond to commercial reality so that the intentions of contracting parties will be effectuated. To meet this challenge the U.C.C. was written to allow both certainty and flexibility. In this Article, Professor Hillman examines the Code provisions governing contract modifications. Through a series of hypothetical problems he explores the methodology used by the U.C.C. in attempting to achieve a proper balance between stability and flexibility in contract modification law. He concludes that the Code has not been successful in achieving its goals in this area. The various sections relating to contract modification are often ambiguous, confusing, and even conflicting. Professor Hillman attempts to counter these Code inadequacies by suggesting solutions consistent with the Code policy of enforcing freely made modification agreements.

Balancing the need for flexibility and stability in the rules governing our commercial world was a major challenge in drafting the Uniform Commercial Code.¹ In response to criticism of prior commercial statutes concerning their rigidity, complexity, and obsolescence,² much of the Code is couched in broad language³ to enable courts to develop the law in light of new circumstances and practices.⁴ Critics of prior commercial legislation also noted, however, that the absence of sufficient specificity in the legislation would render the Code ambiguous and ineffectual.⁵ Specific rules in the Code reflect the need for certainty to enable commercial parties to plan their transactions.⁶ The

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1. Hereinafter referred to as U.C.C. or Code.

2. See, e.g., Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 305; Llewellyn, *Why a Commercial Code?* 22 TENN. L. REV. 779, 779 (1953). For a discussion of the arguments surrounding the codification issue, see NEW YORK LAW REVISION COMMISSION, 1 STUDY OF THE UNIFORM COMMERCIAL CODE, DOC. NO. 65(A), 41 (1955) [hereinafter cited as STUDY].

3. See, e.g., U.C.C. §§ 1-203, 2-302; *Azevedo v. Minister*, 86 Nev. 576, 579, 471 P.2d 661, 663 (1970).

4. One of the underlying "purposes and policies" of the Code is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." U.C.C. § 1-102(2)(b). The need for flexibility in drafting is discussed in Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 759-61 (1969); Hillman, *Construction of the Uniform Commercial Code: U.C.C. Section 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COM. L. REV. 655, 656-57 (1977); Jackson & Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907, 907-08 (1978).

5. See STUDY, *supra* note 2, at 58, 63-64.

6. See, e.g., U.C.C. §§ 2-201, 2-207, 2-209(2), 2-209(3).

Code drafters directed in section 1-102(1) that courts "liberally construe and apply" the Code "to promote its underlying purposes and policies."⁷ This section enables courts to construe Code language either broadly or narrowly to conform with Code purposes and policies.⁸

The tension between drafting legislation that is both sufficiently broad to provide flexibility and at the same time sufficiently specific to provide certainty and stability⁹ is reflected in the approach to contract modification taken by Article 2 of the U.C.C.¹⁰ Contracting parties often attempt to adjust their agreements to respond to changes in economic conditions, changes in the law, or changes of mind.¹¹ Accordingly, Code modification law should facilitate the freedom of contracting parties to adjust to change. At the same time, however, contracting parties also desire stability in their contracts¹² so that they can enter into other agreements in reliance upon their contracts. The Code approach to contract modification should ensure that the parties' expectations are protected.¹³

The U.C.C. contract modification provisions clearly display the tension between drafting for flexibility and certainty. For example, to enable contracting parties to alter their agreements freely, section 2-209(1) rejects the common-law preexisting duty doctrine that bars the enforcement of contract modifications in the absence of additional consideration supplied by the party seeking to enforce the modification.¹⁴ Whereas the preexisting duty rule provided some protection to a contracting party from attempts by the other party to coerce modification by threats of nonperformance, the Code attempts to police against such overreaching in the negotiation of modifications through the obligation of good faith performance found in section 1-203.¹⁵ Section 2-209(4), to cite another example of broad drafting, enables parties asserting the

7. Section 1-102(1) has been interpreted to mean that the Code displaces all other commercial law and that all answers to commercial problems, whether or not explicitly addressed by the Code, are found within its provisions by referring to appropriate purposes and policies. See Hawkland, *supra* note 2, at 292; Hillman, *supra* note 4, at 656-58. This methodology has been called "true Code methodology." *Id.*

8. U.C.C. § 1-102, Comment 1.

9. "The learning from all of the great commercial lawyers . . . has always been that the legal system must draw on the commercial sense of the transaction and the parties, in a process that must have boundaries while retaining elasticity as well." Jackson & Peters, *supra* note 4, at 985.

10. See generally Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. L. REV. 854 (1978).

11. See, e.g., J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 43 (2d ed. 1980); 2 WILLISTON ON SALES § 12-4, at 8 (4th ed. A. Squillante & J. Fonseca 1974) [hereinafter cited as WILLISTON]; Levie, *The Interpretation of Contracts in New York Under the Uniform Commercial Code*, 10 N.Y. L.F. 350, 355 (1964).

12. See, e.g., Macneil, *supra* note 10, at 859-61.

13. By encouraging the formation of contracts, society is benefited through the specialization and efficiencies that are the product of the contract arrangement. See Fuller & Perdue, *The Reliance Interest in Contract Damages: Part 1*, 46 YALE L.J. 52, 61 (1936). See also Hartzler, *The Business and Economic Functions of the Law of Contract Damages*, 6 AM. BUS. L.J. 387, 392 (1968).

14. U.C.C. § 2-209(1) provides: "An agreement modifying a contract within this Article needs no consideration to be binding."

15. Fraud and duress rules supplement the Code through § 1-103. See note 183 *infra*. These

enforceability of a modification that does not meet the formal requirements of section 2-209(2) or (3) to prevail on waiver grounds.¹⁶ In contrast to these flexible rules, section 2-209(2) contains the specific mandate that signed writings which exclude oral modification cannot be modified or rescinded except in writing,¹⁷ and section 2-209(3) contains an additional statute of frauds requirement applicable in modification cases.¹⁸

Unfortunately, the Code is not very successful in achieving a proper balance between flexibility and stability in contract modification law. In response to some issues of contract modification the Code has opted for an overly broad approach;¹⁹ in response to other issues the Code is too inflexible.²⁰ Some of the Code's broad language is too ambiguous to be helpful,²¹ and some of the specific rules are poorly drafted and confusing.²² Furthermore, some sections of the Code seem to conflict with others.²³ As a result, the overall effect of the Code on modification law is not to foster, but to impede the enforcement of freely made modification agreements.²⁴ The weaknesses of the Code in this area highlight the importance of the section 1-102(1) reference to purposes and policies in interpreting the Code. Only by freely applying the purposes and policies of Code modification law to the Code provisions can a proper balance be achieved between flexibility and certainty in this important area of com-

doctrines also may be employed to police against overreaching in the modification context. See generally Hillman, *supra* note 4.

In an earlier article on contract modification under the Code, this author concluded that the absence of explicit language prohibiting the enforcement of unfairly procured modifications and the lack of sufficient guidance on which modifications should be enforced have resulted in an inadequate approach to the problem of overreaching in contract modification. See Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 901-02 (1979).

16. U.C.C. § 2-209(4) provides: "Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver." See text accompanying notes 170-203 *infra*.

The purpose of § 2-209 is "to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments." U.C.C. § 2-209, Comment 1.

17. U.C.C. § 2-209(2) provides: "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." See text accompanying notes 127-139 *infra*.

The New York Law Revision Commission commented that § 2-209(2) "permit(s) the parties to add another formality" and hinted that the subsection was counter to the basic policy of § 2-209 to reduce the technicalities of modification formation and enforceability. 1 STUDY, *supra* note 2, at 640.

18. U.C.C. § 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." See text accompanying notes 140-153 *infra*.

19. See generally text accompanying notes 111-126 *infra*.

20. See generally text accompanying notes 140-153 *infra*.

21. See generally text accompanying notes 170-193 *infra*.

22. See generally text accompanying notes 127-153 *infra*.

23. See generally text accompanying notes 166-167 *infra*.

24. "Because modification and waiver provide a large portion of the disputes litigated in commercial cases, this section is of enormous practical importance. Unfortunately, it will present difficulties which will lead to extensive litigation, perhaps unavoidably because of its subject matter." Levie, *supra* note 11, at 355.

mercial law.²⁵

This Article will analyze contract modification law under Article 2 of the Code. It will highlight the drafting weaknesses of the contract modification sections of the Code and will suggest solutions to the problems of interpretation consistent with the methodology of section 1-102(1). The frame of reference for this discussion is a series of hypothetical problems involving a simple sales contract between two merchants.²⁶ Part I of the Article investigates modification formation, and Part II examines the enforceability of a modification.

I. MODIFICATION FORMATION

The first task in examining contract modification under the Code is to determine when the special rules of contract modification apply to a particular dispute. Only when the parties have intended to enter into an agreement that alters their original contract should the special rules of contract modification apply.

A. *Modification Formation v. Contract Interpretation*

A contracting party's attempt to enforce an existing agreement may be confused with an attempt to modify the agreement, or, conversely, a modification agreement may be incorrectly treated as part of the original contract. The confusion is exacerbated by the Code's failure to define adequately the term "modification."²⁷ Proper framing of the issue may influence the tenor of the litigation and its outcome.

PROBLEM ONE

Selco Manufacturing Company and Buyco Ice Cream Company enter into a written agreement for the sale by Selco to Buyco of five slush freezers, used to crush ice, for the total price of \$10,000. The price provision, though vaguely worded, appears to include a price escalation clause that would permit price increases to reflect the market price on the date of delivery. On the date of delivery Selco seeks an increase in the purchase price based upon the market price of the slush freezers on that date. Buyco refuses to pay, and Selco bring an action for breach of contract.

Contracting parties are mindful that circumstances may change during the performance of their contracts. Accordingly, they often make their agreements flexible so that they can adjust to change.²⁸ One method of achieving flexibility is to provide that a contract term will be completed at a later time by

25. Efforts to modify an agreement often occur, see 2 WILLISTON, *supra* note 11, § 12-4, at 8, and are of "immense practical significance." J. WHITE & R. SUMMERS, *supra* note 11, at 43; see also Levie, *supra* note 11, at 355.

26. The parties are merchants under U.C.C. § 2-104(1) in all problems except Problem Ten in which the buyer is a consumer. See notes 127-39 and accompanying text *infra*.

27. See generally text accompanying notes 33-41 *infra*.

28. See Macneil, *supra* note 10, at 865-73.

referring at that later time to an objective standard such as the market price at the date of delivery.²⁹ Another method of ensuring flexibility is to agree that a contract term will be completed at a later time after further negotiations of the parties.³⁰ When contracting parties have made their agreement flexible by reference to objective standards or by leaving gaps for further negotiation,³¹ and one party then refuses to abide by the standard or to agree to fill the gap, the controversy involves examination and interpretation of the original agreement, not determination of whether an agreement to modify a contract has been made and is enforceable.³²

The Code does not define the terms "modification" or "modify." Section 2-209(1) merely refers to "an agreement modifying a contract."³³ Agreement is defined as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance"³⁴ An agreement is the culmination of the parties' negotiations and evidences their intent to contract,³⁵ but the parties' agreement is not a contract under the Code. A contract is "the total legal obligation which results from the parties' agreement"³⁶ Once the parties have entered into an agreement, the Code determines whether and to what extent that agreement is enforceable as a contract. The dictionary definition of the term "modify" is "to change."³⁷ Official Comment 1 to section 2-209, which refers to modifications as "adjustments,"³⁸ suggests that the Code incorporates the dictionary definition of "modify."³⁹ Under the definitions of agreement and contract in the Code and the dictionary definition of "modify," an "agreement that modifies a contract" is the bargain of the parties in fact to change a legal obligation that results from the parties' original agreement.⁴⁰ A

29. See, e.g., *Feyh v. Brandtjen & Kluge, Inc.*, 3 N.Y.2d 971, 146 N.E.2d 794, 169 N.Y.S.2d 38 (1957) (mem.). See also *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 9 (4th Cir. 1971) (price subject to escalation dependent on production costs).

30. See I. MACNEIL, *CONTRACTS—EXCHANGE TRANSACTIONS AND RELATIONS* 890 (2d ed. 1978) (flexibility needs to be ensured as a means of effecting mutually agreeable changes).

31. For example, the parties may appoint a neutral party to complete gaps in their agreement. Macneil, *supra* note 10, at 866.

32. An offer of proof concerning the filling of a gap left inadvertently by contractual silence also is not an attempt to modify a contract. For example, if a contract does not indicate the quality of seed sold to a buyer, oral testimony may be offered to show the quality intended. See *Flamm v. Scherer*, 40 Mich. App. 1, 198 N.W.2d 702 (1972). When the contract is silent on the point, a buyer should not be precluded from demonstrating that the seller agreed to deliver "grade A" seed on the ground that agreement to deliver "grade A" seed would be a contract modification.

33. See note 14 *supra* for the text of U.C.C. § 2-209(1).

34. U.C.C. § 1-201(3).

35. See, e.g., *Kleinschmidt Div. of SCM Corp. v. Futuronics Corp.*, 41 N.Y.2d 972, 973, 363 N.E.2d 701, 702, 395 N.Y.S.2d 151, 152 (1977).

36. U.C.C. § 1-201(11).

37. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1452 (unabridged 3d ed. 1976).

38. U.C.C. § 2-209, Comment 1.

39. See also *In re Estate of Upchurch*, 62 Tenn. App. 634, 644, 466 S.W.2d 886, 890 (1970).

40. See, e.g., *Van Den Broeke v. Bellanca Aircraft Corp.*, 576 F.2d 582 (5th Cir. 1978).

The New York Revision Commission concluded that the language of section 2-209(1) was apparently tautological because an agreement, defined as a "bargain in fact" under the Code, suggests that consideration was given while the rest of the subsection states that the agreement to modify "needs no consideration to be binding." 1 STUDY, *supra* note 2, at 642. The assumption is

modification contract is the legal obligation that results from the modification agreement. In Problem One Selco must attempt to persuade the court *not* that a bargain of the parties was made to change the price term of the original agreement, but instead that the original agreement, though vaguely worded, contains the price escalation clause. Whether Selco is entitled to the price increase is, therefore, an issue of contract interpretation, not of contract modification.⁴¹

What is the legal significance for Selco and Buyco of a finding that Selco is merely attempting to enforce the original agreement, *not* a modification of the original agreement? Selco, in support of its action, must prove the existence and effect of the price escalation clause in the original agreement rather than the existence and enforceability of a modification of the \$10,000 price term in the original agreement. Selco can avoid the strictures of section 2-209, but instead must contend with the rules of contract interpretation under the Code.⁴²

PROBLEM TWO

Selco and Buyco enter into a written agreement for the sale by Selco to Buyco of five slush freezers. The written agreement contains a price provision of \$10,000 for the five freezers and no price escalation clause. On the date of delivery Selco seeks an increase in the purchase price based upon its theory that, in their trade, price provisions are projections only and are subject to market price fluctuations. Buyco refuses to negotiate a price alteration. Selco refuses to deliver and brings an action against Buyco. At trial Selco seeks to introduce evidence of a trade practice to support its assertion that the price term was subject to further agreement.

The basic approach of the Code to contract interpretation is to admit extrinsic evidence liberally to determine the meaning of the words used by the parties in reaching an agreement.⁴³ As discussed in Problem One, "agreement" is defined in U.C.C. section 1-201(3) as "the bargain of the parties in fact as found in their language or by implication from other circumstances

made in this Article that the language eliminating the need for consideration should prevail over any implication that consideration is required arising from the use of the terms "bargain" and "agreement."

41. *But see* Silver v. Sloop Silver Cloud, 259 F. Supp. 187, 192 (S.D.N.Y. 1966) (agreement for sale of sloop included price provision of \$27,750 "plus extras," held that subsequent agreement on extras was a modification of the contract).

42. If Selco were attempting to modify the price term the issues for litigation under U.C.C. § 2-209 would include whether an agreement to modify had been made, the good faith of Selco in achieving the modification, whether the modification required a writing, whether Buyco had waived the price provision or the writing requirement, and whether Buyco had retracted the waiver. The difficulties in interpreting § 2-209 that can be avoided by a finding that Selco was attempting only to enforce the original agreement are discussed in Part II of this Article. The rules of contract interpretation are governed by U.C.C. §§ 1-205, 2-201, 2-202, and 2-208. *See also* discussion of Problem Two *infra*.

43. *See* MURRAY ON CONTRACTS 745 (2d rev. ed. 1974) [hereinafter cited as MURRAY]; R. NORDSTROM, LAW OF SALES 144-45 (1970).

...⁴⁴ The "other circumstances" include course of dealing and usage of trade.⁴⁵ In determining whether Selco was seeking to modify the written agreement or simply to execute it, evidence of trade usage should be admissible to aid in interpretation of the terms of the original agreement. If Selco can demonstrate that, in the trade, price terms in contracts for the sale of slush freezers are projections only, the original agreement between the parties should include that interpretation. The trade practice evidence would demonstrate that Selco was attempting to enforce the original agreement, not attempting to modify it.⁴⁶

In response to a claim by Selco that it was attempting to enforce the original agreement only, Buyco could assert that under Code section 1-205(4) Selco's evidence of trade usage should be inadmissible. Under that section, express terms of an agreement "control" inconsistent course of dealing and usage of trade.⁴⁷ Buyco could argue that, since the price term was \$10,000 and the agreement did not indicate that the term was a projection only, the express price provision should "control" Selco's evidence of trade usage.⁴⁸ If Buyco prevailed on this argument, Selco would be in breach unless it could show that a modification agreement to renegotiate the price had been formed.

44. See text accompanying note 34 *supra*.

45. U.C.C. § 1-201(3).

46. See, e.g., *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971) (trade usage evidence that price and quantity terms are projections to be adjusted according to market forces admissible). But see *Southern Concrete Serv., Inc. v. Mableton Contractors, Inc.*, 407 F. Supp. 581 (N.D. Ga. 1975), *aff'd per curiam*, 569 F.2d 1154 (5th Cir. 1978).

Similarly, if Selco and Buyco had dealt with each other in the past, and Buyco frequently had accepted alterations of the price term of those agreements, then, in the absence of an agreement to the contrary, the slush freezer agreement would contain the implication that Buyco would agree to alterations of the price term. The course of dealing evidence would be presented to demonstrate that Selco was seeking to enforce the original agreement, not to modify it.

The Code parol evidence rule, § 2-202, is consistent with the approach suggested in the text. The section states that course of dealing and usage of trade may "explain or supplement" the final written agreement. U.C.C. § 2-202(a).

47. U.C.C. 1-205(4) provides:

The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

See, e.g., *Beautis Products Co., Inc. v. Chromatic Corp.*, 24 U.C.C. REP. 35, 38 (N.Y. Sup. Ct. 1978). See generally *Kirst, Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. ILL. L.F. 811.

48. Section 1-205(4) also states that, when reasonable, express terms and trade usage or course of dealing are to be construed as consistent with each other. Perhaps in Problem Two the existence of the \$10,000 price term is consistent with the interpretation that it is a projection only. See, e.g., *Modine Mfg. Co. v. North East Independent Sch. Dist.*, 503 S.W.2d 830 (Tex. Civ. App. 1973). This approach to § 1-205(4) suffers from the inherent difficulties in attempting to resolve whether extrinsic evidence is consistent or contradicts the writing. In *Peoples Bank & Trust v. Reiff*, 256 N.W.2d 336 (N.D. 1977), for example, the court held that extrinsic evidence of an agreement granting a secured creditor superiority as to "any claims in excess of \$15,000" was inconsistent with the writing that stated that the amount of superiority would be determined under Article 9 of the Code. *Id.* at 342. But in *Modine Mfg. Co. v. North East Independent Sch. Dist.*, 503 S.W.2d 833 (Tex. Civ. App. 1973), the court held that evidence of trade usage allowing variations in cooling capacity was consistent with a writing that specified a definite figure. *Id.* at 843. See also *Southern Concrete Serv., Inc. v. Mableton Contractors, Inc.*, 407 F. Supp. 581 (N.D. Ga. 1975).

The U.C.C. de-emphasizes the importance of written agreements so that the actual bargain of the parties, determined after an examination of all surrounding circumstances, can be enforced.⁴⁹ If section 1-205(4) is interpreted to bar any evidence of course of dealing and usage of trade that appears inconsistent with the express terms of an agreement, this general goal of the Code will be impeded.⁵⁰ The section should be read narrowly to avoid such a result. Course of dealing and trade usage evidence should be admissible except when clear evidence beyond the dictionary meaning of the express language of the agreement demonstrates that the parties intended to exclude it. In situations like Problem Two, in which the trade usage appears inconsistent with the dictionary meaning of the language of the agreement, the trade usage evidence still should be submitted to the trier of fact to determine whether the evidence is inconsistent with the parties' intent.⁵¹

The admonition in section 1-205(4) that express provisions "control" inconsistent course of dealing or usage of trade evidence should *never* bar the admissibility of that evidence, even when it clearly is inconsistent with the writing, if the parties have agreed *after* the original contract formation that the course of dealing or usage of trade should supplement their agreement. In this situation the parties have formed a modification agreement or have waived the inconsistent written term.⁵² For example, in Problem Two if, at the time of contracting, the parties did not intend that the price provision would be subject to further agreement, but they subsequently agreed to follow the trade practice of renegotiating the price provision, the evidence of the trade practice would be offered to support the modified agreement or waiver

49. See Murray, *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342, 1349 (1975). See also text accompanying note 43 *supra*.

50. For example, in *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 136 (5th Cir.), *cert. denied*, 100 S. Ct. 288 (1979), the court stated that although "past conduct" may have created a "reasonable expectation" that Amana would not terminate a distributorship agreement arbitrarily, the contract gave Amana the right to terminate arbitrarily. By upholding the express terms, the court subverted the express policy of the Code to construe evidence of course of dealing and usage of trade "as an element of the meaning of the words used." U.C.C. § 2-202, Comment 2. See generally Kirst, *supra* note 47, at 844.

51. The trier of fact could determine the terms of the contract in exactly the same way that it would if faced with a contract that contained express conflicting terms—by examining the language of the agreement and the overall circumstances to determine the intent of the parties. For example, if trade usage evidence was contrary to the dictionary meaning of the language, but was consistent with the basic nature of the transaction, the trade usage should supplement the written language of the deal in the absence of additional evidence tending to show that the trade usage meaning was not intended to be employed by the parties. If the trade usage evidence contradicted the basic nature of the transaction, it could be excluded from the agreement by the trier of fact on the ground that the parties did not intend to include it. See 1 STUDY, *supra* note 2, at 324-25. Thus, in Problem Two if the writing and overall circumstances demonstrated that the parties intended that the price provision was firm, and that they intended to gamble on market fluctuations, the trade usage would be inconsistent with the parties' transaction. Similarly, if the writing contained a provision barring supplementation by evidence of course of dealing or usage of trade, that provision would demonstrate the intent of the parties to exclude the inconsistent course of dealing or trade usage from the agreement. See *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 10 (4th Cir. 1971). In the absence of such evidence of an intent to exclude course of dealing and usage of trade evidence, § 1-205(4) should not be interpreted to bar such evidence simply because it appears inconsistent with the writing.

52. See generally text accompanying notes 110-228 *infra*.

and should not be barred by section 1-205(4). Of course, the evidence must meet the admissibility standards applicable to modifications or waivers.⁵³

PROBLEM THREE

On February 1, Selco and Buyco enter into negotiations for the sale to Buyco of five slush freezers. An oral agreement is reached on that date for Buyco to purchase five freezers for a total price of \$10,000 with delivery to be on March 1. A written contract is signed by both parties on February 10. The written contract provides for a delivery date of March 15. Buyco refuses to accept the freezers on March 15 claiming breach by Selco for failure to deliver on March 1.

Because a modification agreement is an agreement that alters a prior contract, and a contract is the total legal *obligation* resulting from the parties' agreement,⁵⁴ if the prior agreement is unenforceable so that no legal obligation arises, it may be proper to treat the agreement that supersedes the unenforceable agreement not as a modification, but as the only agreement in existence. Thus in Problem Three, Selco could argue that the oral agreement made on February 1 was unenforceable under the Code statute of frauds.⁵⁵ Accordingly, the only agreement that would govern the dispute would be the written agreement of February 10, which includes the March 15 delivery date. That agreement would not be a modification agreement, and an analysis of section 2-209 to determine its enforceability would not be required.

Even if a court accepted this approach, Selco would not necessarily prevail. Buyco could seek reformation of the written contract to reflect the original delivery date. The reformation remedy, apparently available under Code section 1-103,⁵⁶ would require a showing that the written contract does not reflect the actual agreement made between the parties because of a mistake in drafting or fraud.⁵⁷ The Code statute of frauds or parol evidence rule,⁵⁸ however, might bar the admissibility of evidence of the previous oral agreement on the theory that a written executory contract should not be reformed to reflect an unenforceable oral agreement. Nevertheless, courts should be able to avoid the strictures of those rules in order to give effect to the intent of the parties

53. See text accompanying notes 140-53, 170-203 *infra*. See also discussion of U.C.C. § 2-208 at text accompanying notes 204-215 *infra*.

54. See text accompanying note 36 *supra*.

55. Section 2-201(1) of the Code provides:

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.

56. The equitable remedy of reformation seeks to make the writing of the parties reflect the parties' true intentions. See D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 256 (1973). Reformation is available under the Code to the extent that it is not "specifically displaced." See U.C.C. § 1-103, note 183 *infra*. See generally Hillman, *supra* note 4.

57. See D. DOBBS, *supra* note 56, at 256.

58. See U.C.C. §§ 2-201, 2-202.

and to enforce the actual agreement made between the parties.⁵⁹

The written agreement of February 10 could be treated as a modification agreement if the statute of frauds is viewed as merely providing an affirmative defense to an existing enforceable obligation. Instead of wrestling with the issues of reformation, statute of frauds, and parol evidence, the court then would be required to determine whether the parties intended in good faith to alter their agreement as to the delivery date.⁶⁰ Thus, whether or not the written agreement is treated as a modification agreement, the basic issue in Problem Three is the date of delivery agreed on by the parties. Nevertheless, the litigation will be significantly different, depending on whether the dispute is cast as one involving interpretation of the writing of February 10, or one involving determination of its enforceability as a modification.

B. Modification Formation v. Agreement Formation

Contracting parties often do not reach agreement at one meeting or after the exchange of one set of writings. Rather, a series of meetings and communications culminates in agreement, although it is often difficult to determine at what point agreement is actually reached.⁶¹ The Code sections dealing with contract formation respond to this commercial reality by eliminating many of the formalities of common-law contract formation.⁶² For example, section 2-207(1) abandons the so-called "mirror image" rule, thereby allowing agreement formation even though an acceptance contains additional or different terms.⁶³ Under section 2-204(1), agreements can be formed by the parties' conduct as well as by verbal or written communications when evidence of intent to contract exists.⁶⁴ Section 2-204(2) directs that the exact moment of the contract's formation need not be isolated.⁶⁵ By broadening the rules of contract formation, the Code has blurred the distinction between contract formation and modification formation.⁶⁶ As a result, whether a contested term is part of the original contract or an attempted modification of the contract is sometimes difficult to determine. Resolution of the issue affects the approach of the court and the litigants and can affect the outcome of the dispute.

59. See D. DOBBS, *supra* note 56, at 643-44, 749-52.

60. See U.C.C. §§ 2-209(1) & Comment 1; 1-203; text accompanying notes 111-126 *infra*.

61. This observation is evidenced by the large number of cases that have wrestled with the issue of when a contract was formed. See, e.g., *Mississippi & Dominion Steamship Co. v. Swift*, 86 Me. 248, 29 A. 1063 (1894).

62. See generally J. WHITE & R. SUMMERS, *supra* note 11, at 40-42.

63. Under the common-law "mirror image" rule, an acceptance must contain no new provisions and must agree to all terms of the offer to be operative. Section 2-207(1), however, states that an expression of acceptance "operates" as an acceptance "even though it states terms additional to or different from those offered or agreed upon . . ." See note 79 *infra*.

64. U.C.C. § 2-204(1) provides: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."

65. U.C.C. § 2-204(2) provides: "An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."

66. See text accompanying notes 75-76, 90-92 *infra*.

PROBLEM FOUR

*Buyco sends a letter to Selco on the same day that the parties sign a written contract for the sale by Selco to Buyco of five slush freezers. The letter states that Buyco has the option to resell the equipment to Selco one year after delivery. The sales contract is silent on the point. At the end of the year Buyco wishes to resell the equipment to Selco. Selco refuses to repurchase the equipment and claims that the letter was a modification of the original contract that was never accepted by Selco.*⁶⁷

To determine whether Buyco's resale option in Problem Four is enforceable, a court must decide whether the option was part of the original agreement between the parties or, if not, whether the option was an enforceable modification of the original agreement. Under the general formation provision of section 2-204(1) of the Code, the option is part of the original agreement if the parties orally agreed that the option would be included in the agreement and intended that Buyco's letter would confirm that agreement. If the parties did not reach an oral agreement on the resale option prior to Buyco's letter, the option would not become part of the original agreement under section 2-204(1).⁶⁸ Nevertheless, the court still would need to determine whether the resale option in Buyco's letter was enforceable as a modification agreement. The principal issue in the modification inquiry would be whether Selco agreed to change the already existing agreement for the sale of the freezers to include the option.⁶⁹

If the resale option is part of the original agreement, Selco can raise the defense of the section 2-201 statute of frauds and argue that it never signed the writing providing for the option.⁷⁰ Section 2-201, however, does not require that every written communication between the parties be signed. Instead, it requires that there be "some writing" sufficient to prove that a contract has been made by the parties. Perhaps if Buyco can demonstrate that the parties intended for the letter to be part of "the contract," which is evidenced by the separate signed writing, Selco's statute of frauds argument should fail. If the resale option is part of the original agreement, Buyco also can assert that its letter was a confirmation of the contract that satisfies the section 2-201(2) exception to the statute of frauds requirement or that performance of the con-

67. Problem Four is loosely based upon the facts of *In re Estate of Upchurch*, 62 Tenn. App. 634, 466 S.W.2d 886 (1970).

68. If Buyco's letter was a confirmation "operating as an acceptance" under U.C.C. § 2-207(1), the option to resell would not become part of the contract because it is a material term under U.C.C. § 2-207(2)(b). See notes 79-80 *infra*. The letter probably was not such a confirmation and § 2-207 probably should not apply because the letter simply tried to introduce a new term, the resale option, and did not confirm other aspects of the deal.

69. In *Cambern v. Hubbling*, 307 Minn. 168, 238 N.W.2d 622 (1976), the court held that buyers, to whom calves were delivered, never assented to a clause in a receipt that excluded seller's liability for sickness or death of the calves. In the absence of actual agreement to accept the clause as part of the original agreement, or as a modification of the agreement, the clause is, of course, unenforceable.

70. See U.C.C. § 2-201(1) (set forth at note 55 *supra*).

tract makes the letter admissible under section 2-201(3)(c).⁷¹

If the litigation between the parties centers on whether an enforceable modification agreement has been formed, different issues will be involved. Under section 2-209(1) no consideration by Buyco for the resale option would be required. The litigation, however, may focus upon the good faith of Buyco in achieving the modification.⁷² Section 2-209(3), which requires compliance with Article 2's statute of frauds for modifications "within" its provisions, may require that Selco sign the modification,⁷³ although section 2-209(4), which recognizes waivers, may enable Buyco to argue that no signing was required. Selco's silence after receipt of Buyco's letter may constitute a waiver of the statute of frauds.⁷⁴

Because different issues arise if the question of the enforceability of the resale option is treated as one of modification formation rather than agreement formation, the question must be categorized properly. Thus, although the Code de-emphasizes the need for finding the precise moment when an agreement is formed,⁷⁵ in Problem Four a court must determine whether the parties reached an agreement on the sale of the slush freezers without the resale option, or whether the option was intended to be part of the agreement between the parties. In other words, the moment when the original bargain has been struck must be isolated.⁷⁶

PROBLEM FIVE

Selco and Buyco enter into negotiations for the sale to Buyco of five slush freezers. Shortly before Selco's delivery, Buyco sends Selco a telegram that states: "Enter our order '039" and proceed immediately with procurement. Confirmation will follow shortly." The telegram is followed immediately by a letter of similar tenor: "Our '039" will be issued shortly to cover our requirements, and you are to proceed immediately with procurement of all materials." Selco ultimately receives document "039" (still before the time for delivery), which is entitled "Confirmation." The Confirmation contains the following notation: "In order to become a valid and binding agreement between us, order

71. See note 131 *infra* for a discussion of § 2-201(2). Section 2-201(3)(c) states that an agreement is enforceable "with respect to goods for which payment has been made and accepted or which have been received and accepted" Comment 2 to § 2-201 states that "[t]he overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment."

72. See text accompanying notes 111-126 *infra*; see also *Morgan Brothers v. Haskell Corp.*, 24 Wash. App. 773, 604 P.2d 1295 (1979). If the letter is part of the original contract, good faith still could be an issue under U.C.C. § 1-203. Because the Code substitutes the issue of good faith for the requirement of consideration in contract modification, however, see U.C.C. § 2-209(1) & Comment 1, good faith is more likely to be litigated in the context of contract modification.

73. See text accompanying notes 140-153 *infra*.

74. See text accompanying notes 188-193 *infra*.

75. U.C.C. § 2-204(2).

76. See *R. NORDSTROM*, *supra* note 43, at 119-20. On facts similar to Problem Four, the court in *In re Estate of Upchurch*, 62 Tenn. App. 634, 466 S.W.2d 886 (1970), held that the letter was either part of the original contract or a modification thereof. *Id.* at 644-45, 466 S.W.2d at 890-91.

must be accepted by you." Included on the reverse side of "039" is an arbitration provision. Selco signs "039" and returns it to Buyco. Upon delivery of the goods Buyco refuses to pay and claims defects in the freezers. When litigation ensues Buyco seeks a stay of court proceedings on the basis of the arbitration provision.⁷⁷

The basic issue between the parties concerns the legal effect of the arbitration provision contained in document "039." At least three separate interpretations are plausible under the Code. First, since document "039" includes a provision requiring a signed acceptance by Selco, and the document was signed and accepted, arguably the parties' intent was that "039" was "the contract" and that the arbitration provision would be part of that contract.⁷⁸ Such a finding would make it unnecessary to consider whether the "039" arbitration clause modified a previous agreement that did not include the arbitration provision.

Second, in view of the heading of "039" ("Confirmation"), it could be argued that "039" was a written confirmation that operated as an acceptance under U.C.C. section 2-207(1).⁷⁹ Under this interpretation the additional term in the confirmation, the arbitration provision, ordinarily would not become part of the contract under section 2-207(2)(b) because it is material.⁸⁰ According to Comment 3 to section 2-207, however, if the arbitration term was "expressly agreed to" by Selco it would be enforceable.⁸¹ Presumably the Comment contemplates that inclusion of the additional term in the confirmation and express agreement to the term by the recipient of the confirmation constitute a modification of the agreement. If so, the standard for proving a modification under section 2-207 appears to be more stringent than under section 2-209. Under section 2-207 the modification must be "expressly agreed to" while no such requirement is found under sections 2-209 and 2-204(1).⁸²

Because Selco signed and returned the confirmation to Buyco, the arbitration provision probably was "expressly agreed to" by Selco, and an enforcea-

77. Problem Five is loosely based on the facts of *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330 (5th Cir. 1970).

78. The intent of the parties determines when an agreement has been made. *See, e.g.*, *United States Indus., Inc. v. Semco Mfg., Inc.*, 562 F.2d 1061, 1067 (8th Cir. 1977); U.C.C. § 2-204(1). The issue stated in the text is similar to the common-law issue of whether a writing was merely a memorial of a prior enforceable oral contract, or whether the parties intended to have no enforceable contract until a writing was signed. *See, e.g.*, *Mississippi & Dominion Steamship Co. v. Swift*, 86 Me. 248, 29 A. 1063 (1894).

79. U.C.C. § 2-207(1) provides:

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

80. U.C.C. § 2-207(2)(b) provides: "The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: . . . (b) they materially alter it."

81. *See also* *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330, 333 (5th Cir. 1970).

82. Because an enforceable modification agreement is a contract, *see* text accompanying notes 33-41 *supra*, the general contract formation provisions of §§ 2-204 through 2-207 apply equally to modification formation. *See* text accompanying notes 93-94 *infra*.

ble modification of the original agreement probably was formed. Selco could argue, however, that in light of the stringent "expressly agreed to" standard of section 2-207, the general dilution of the "duty to read" requirement in contract law,⁸³ and the apparent purpose of section 2-207(2)(b) to avoid enforcement of material provisions foisted on unsuspecting parties, the arbitration provision should not constitute an enforceable modification simply because Selco signed the confirmation and failed to contest the existence of the arbitration provision. Section 2-207 was drafted in light of the commercial practice of ignoring form contracts—perhaps even signed ones.⁸⁴ Selco could assert that its signature on the confirmation is not reliable evidence that it "expressly agreed to" the arbitration term. Of course, even under this reasoning, if additional negotiations took place after the signing of "039" that clearly demonstrated the parties' intent to add the arbitration provision, the provision then could be enforced as a modification.⁸⁵

A third interpretation of Problem Five is that, assuming that the parties already had formed a contract prior to document "039," the document should be treated neither as an "expression of acceptance" nor as a confirmation that "operates" as an acceptance under section 2-207(1).⁸⁶ Section 2-207 would not apply, but again the modification issue would arise. Under sections 2-209 and 2-204(1), Selco's failure to contest the arbitration provision and its signature on document "039" probably would be sufficient to prove that Selco agreed to the modification. Although sections 2-209 and 2-204(1) do not require that a modification be "expressly agreed to," Selco still could assert that in light of the commercial practice to ignore form contracts, document "039" should not be treated as a modification in the absence of additional evidence of intent to modify.

Section 2-207 of the Code has not been well received by courts or commentators.⁸⁷ Most of the criticism has focused upon the difficulties in applying section 2-207 to contract formation disputes, and has not considered the relationship of section 2-207 to modification issues.⁸⁸ Nevertheless, both contract formation and modification formation under section 2-207 must be analyzed to determine the legal effect of the arbitration provision in Problem Five.

83. For example, in insurance contracts the "objectively reasonable expectations" of an insured will be enforced even if the policy has negated those expectations. *See, e.g.,* *Rodman v. State Farm Mutual Ins. Co.*, 208 N.W.2d 903, 906 (Iowa 1973). Of course, a merchant may not be excused as readily from the duty to read as a consumer.

84. *See, e.g.,* J. WHITE & R. SUMMERS, *supra* note 11, at 24.

85. U.C.C. § 2-207(3) also would support a finding that the parties' overall conduct demonstrated that they had agreed to include the arbitration provision.

86. *See, e.g.,* *Lincoln Pulp & Paper Co., Inc. v. Dravo Corp.*, 445 F. Supp. 507 (D. Me. 1977). *But see* U.C.C. § 2-207, Comment 1 (document would be a confirmation).

Still another interpretation of the facts of Problem Five is plausible. Perhaps Confirmation "039" is a counter-offer under § 2-207(1) on the theory that "039" required acceptance of its terms. Presumably, the counter-offer was accepted when Selco signed and returned the form.

87. *See, e.g.,* J. WHITE & R. SUMMERS, *supra* note 11, at 38-39.

88. *See generally id.* at 24-39.

PROBLEM SIX

On February 15, Selco and Buyco enter into a signed written agreement for the sale to Buyco of five slush freezers. After the agreement has been signed, Selco's sales representative congratulates Buyco's officer and comments that the slush freezers Selco will deliver to Buyco should be "free from any defects for at least five years." The written agreement is silent on the point. After delivery Buyco is dissatisfied with the performance of the slush freezers and brings an action against Selco for breach of warranty. One of Buyco's claims is that Selco breached an express warranty that the freezers would be free from defects for five years.

Under section 2-313(1)(a) of the Code, express warranties may be added to an agreement if they are part of the "basis of the bargain."⁸⁹ Assuming that an utterance cannot become part of the "basis of the bargain" after the deal has been closed,⁹⁰ the time of contracting—the point in time when a contract has been formed—is important under section 2-313. A post-contract affirmation may be enforceable as a modification of the agreement according to Comment 7 to section 2-313, but the rules of section 2-209 would apply to determine its enforceability.

If the comments of Selco's sales representative in Problem Six had been made before the deal was closed and an express warranty under section 2-313(1)(a) had been formed, the warranty would survive attack under any of the provisions of section 2-209 of the Code because the warranty would not be a modification of the sales contract. For example, even if the written agreement barred oral modification, section 2-209(2), which enforces provisions barring oral modification in certain circumstances,⁹¹ would not apply to bar the warranty. In the problem, however, section 2-209 would control the enforceability of the affirmation because the sales representative's comments were made after the deal had been closed. If the written agreement barred oral modification, the affirmation would be unenforceable under section 2-209(2).⁹²

89. U.C.C. § 2-313(1)(a) provides:

Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

The "basis of the bargain" language is far from clear. See J. WHITE & R. SUMMERS, *supra* note 11, at 332-37. See also *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974); *Jones v. Abriani*, 350 N.E.2d 635 (Ind. App. 1976).

90. Comment 7 to § 2-313 states that the "sole question [as to whether an affirmation becomes part of the contract] is whether the language [is] fairly to be regarded as part of the contract. If language is used after the closing of the deal . . . the warranty becomes a modification . . ." White and Summers argue that warranties can arise under § 2-313(a) even after a consumer has "handed over the money." See J. WHITE & R. SUMMERS, *supra* note 11, at 336-39.

91. See notes 127-139 and accompanying text *infra*.

92. The warranty still might be enforceable as a waiver under § 2-209(4). See notes 170-203 and accompanying text *infra* for a discussion of that section. Even if the written agreement did not bar oral modification, Buyco would have to show that the sales representative's affirmation

C. Modification Formation v. Minimization of Damages

Because an enforceable modification agreement is a contract,⁹³ the U.C.C. rules of contract formation apply equally to modification formation. The general goal of the rules of contract formation, and hence modification formation, is to avoid the needless formalities of contract formation under previous law so that agreements can be enforced when the parties have intended to contract.⁹⁴ One thorny problem of modification formation is determining whether a contracting party who continued with performance after a contract alteration intended to enter a modification agreement or continued performance merely to minimize loss. The Code has included section 1-207 and 2-607(3)(a) to deal with the problem, but the sections may have increased the confusion rather than diminished it.

PROBLEM SEVEN

On February 15, Selco and Buyco enter into a written agreement for the sale to Buyco of five slush freezers to be delivered on March 15. On February 20, Selco notifies Buyco in writing that it cannot deliver the freezers until April 15 because of delays in the receipt of raw materials from its suppliers. Buyco responds on February 21 in writing that it will accept the freezers on April 15, but that the delay in delivery will cause Buyco substantial losses because it will result in a slowdown of its production of ice cream. Buyco accepts the freezers on April 15 and pays the contract price on that date for them. On August 1, Buyco brings an action against Selco for lost profits due to the delay in delivery.

Two issues of modification formation are represented by the facts of Problem Seven. First, what is the legal significance of Buyco's February 21 agreement to accept the freezers on April 15? Second, what is the legal significance of Buyco's actual acceptance of the freezers on April 15? On the first issue, Buyco may assert that its agreement to accept late delivery constituted an effort to minimize loss, and that the letter of February 21 evidenced Buyco's intent to reserve its right to seek damages for Selco's delay. In response, Selco can claim that Buyco's agreement to accept late delivery constituted an agreement to change the date of delivery, not an attempt to minimize loss upon breach.

At common law, whether Buyco accepted a modification of the delivery date in its February 21 letter or merely notified Selco that it would take the late freezers to avoid loss while reserving its rights to seek damages for the delay, depended on whether the parties entered into an accord and satisfaction. An accord is a "substitut[e] . . . performance differing from that originally due,"⁹⁵ "satisfaction," which has the legal effect of barring recourse for

constituted an agreement to modify under § 2-209(1) or an attempt at modification under § 2-209(4). See J. WHITE & R. SUMMERS, *supra* note 11, at 338.

93. See text accompanying notes 35-40 *supra*.

94. See notes 63-66 and accompanying text *supra*.

95. L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 220 (3d ed. 1972).

the breach of the original contract, occurs either when the substitute contract is made, or when it is performed, depending on the intent of the parties.⁹⁶ If Buyco and Selco entered into an accord and satisfaction, Buyco would be barred from seeking damages for the late delivery. Whether Buyco and Selco entered into an accord and satisfaction would be determined by the intent of the parties.⁹⁷ Many common-law cases entertained the presumption that acceptance of an offer to alter a contract formed an accord or an accord and satisfaction and was not merely an effort to minimize loss.⁹⁸ According to these cases, therefore, Buyco would have the burden of persuading the trier of fact that in agreeing to accept the goods on April 15 it only attempted to minimize loss.

The effect of the U.C.C. on these common-law rules is unclear. Section 1-207 requires an "explicit" reservation of rights to preserve any rights whenever a party assents to a substitute performance offered by the other party.⁹⁹ Therefore, the Code may require a finding in favor of Selco in Problem Seven. Buyco was not explicit in reserving rights; it merely noted that it would incur losses due to the delay. Comment 2 to section 1-207, however, may aid Buyco. By referring to the section as one "method of procedure" to preserve rights, Comment 2 suggests that rights might be reserved by other methods.¹⁰⁰ Presumably section 1-207 does not require the use of qualifying words such as "without prejudice," but rather it indicates only that these words are sufficient to satisfy the common-law burden of persuasion that an accord and satisfaction was not intended.¹⁰¹ This interpretation of section 1-207 is consistent

96. *Id.* at 222. See also Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the U.C.C., and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 565 & n.51 (1976); Problem 16 *infra*.

97. See, e.g., *N.B. Borden & Co. v. Vinegar Bend Lumber Co.*, 7 Ala. App. 335, 62 So. 245 (1913); *Harrison v. Henderson*, 67 Kan. 194, 72 P. 875 (1903).

98. See, e.g., *United States ex rel. Int'l Contracting Co. v. Lamont*, 155 U.S. 303 (1894); *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 464-65 (10th Cir. 1940); Hillman, *supra* note 96, at 570.

99. Section 1-207 of the Code provides: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient." The purpose of § 1-207 is discussed in Hawkland, *The Effect of U.C.C. Section 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COM. L.J. 329, 331 (1969); McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 825-28 (1978). Most cases construing the section have involved payment of a debt with a check that the payee has indorsed with protest. In *Shea-Kaiser-Lockheed-Healy v. Department of Water*, 73 Cal. App. 3d 679, 140 Cal. Rptr. 884 (1977), however, the court applied the section when a seller delivered goods with explicit reservation of rights after buyer's breach. See also *Cities Serv. Helex Inc. v. United States*, 543 F.2d 1306 (Ct. Cl. 1976).

100. "This section does not add any new requirement of language of reservation where not already required by law, but merely provides a specific measure on which a party can rely as he makes or concurs in any interim adjustment in the course of performance." U.C.C. § 1-207, Comment 2.

101. In *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743 (Tex. Civ. App. 1977), the buyer accepted six late shipments of grain sorghum after seller repudiated the contract. Seller contended that buyer waived the right to assert the breach because buyer failed to reserve its rights under § 1-207. The court held that buyer had not waived its rights, even though it had failed to reserve them explicitly, because buyer had refused to honor seller's drafts and had demanded that seller honor the contract. The court stated that "[t]he statute is permissive rather than

with the basic approach of the Code to avoid the formalities of contract formation. When it is clear that a reasonable contracting party would know that the other party was not agreeing to a modification, but was merely attempting to minimize loss, the injured party should not be penalized by a failure to preserve rights "explicitly." Nevertheless, perhaps section 1-207 suggests that in any case in which the reservation of rights is *not* explicit, the party claiming such a reservation should be required to prove it.¹⁰²

On the second issue in Problem Seven—the legal significance of Buyco's acceptance of the freezers on April 15—Selco can argue that Buyco's acceptance of the goods was a waiver of the time for performance provision. A waiver might be found under section 2-209(4), which provides that "an attempt at modification . . . can operate as a waiver;"¹⁰³ under section 1-103, the common-law outlet;¹⁰⁴ or under section 2-607(3)(a), which provides that the buyer must notify the seller of breach or be barred from any remedy.¹⁰⁵

A claim of waiver by acceptance under section 2-209(4) or section 1-103 raises issues similar to those involving whether the parties made an accord and satisfaction. If Buyco's letter to Selco on February 21 was reasonable notice that Buyco would take the goods only to minimize loss, acceptance of the goods should not constitute a section 2-209(4) or common-law waiver of Buyco's right to seek damages for the delay.¹⁰⁶ The success of a claim that Buyco is barred under section 2-607(3)(a) from any remedy because it accepted the goods depends on whether Buyco's letter of February 21 constituted reasonable notice of breach. Presumably, if Buyco's letter of February 21 was reasonable notice that it would take the goods only to minimize loss, it also should suffice as reasonable notice of breach under section 2-607(3)(a), thereby permitting Buyco to seek damages for the delay.¹⁰⁷

Suppose Buyco had accepted the freezers on April 15 without having sent its letter on February 21 "reserving rights." Would notification of the breach sent to Selco after acceptance preserve Buyco's right to seek damages for the delay? Selco could assert that the section 1-207 requirement of explicit reservation displaces section 2-607(3)(a) when the aggrieved party receives advance notice of the anticipated delay. Comment 2 to section 1-207, however, rebuts

mandatory." *Id.* at 747. See also *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*, 265 N.W.2d 655, 661-62 (Minn. 1978) (oral "protest" of notice of late delivery sufficient to preserve rights); U.C.C. § 1-207, Comment 2 ("[This section] does [not] disturb the policy of those cases which restrict the effect of a waiver of a defect to reasonable limits under the circumstances, even though no such reservation is expressed.").

102. See Problem Twelve *infra* for a discussion of whether the statute of frauds of § 1-107 protects Buyco from being bound to an oral modification of the delivery date in situations in which Buyco fails to reserve rights explicitly.

103. See text accompanying notes 170-203 *infra*.

104. See note 183 and accompanying text *infra*.

105. Section 2-607(3)(a) states that: "Where a tender has been accepted . . . the buyer must within a reasonable time . . . notify the seller of breach or be barred from any remedy."

106. No "attempt at modification" under § 2-209(4) or intentional relinquishment of a right under § 1-103 would have occurred. See notes 170-203 and accompanying text *infra*.

107. See *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 975-76 (5th Cir. 1976).

that argument.¹⁰⁸ In the alternative, Selco could argue that a reasonable time for notification under section 2-607(3)(a) expired on delivery of the goods.¹⁰⁹

II. ENFORCEABILITY OF CONTRACT MODIFICATIONS UNDER THE U.C.C.

Once it has been determined that the parties have entered into a modification agreement, the next task is to determine whether the modification agreement is an enforceable contract. Section 2-209 of the Code governs many of the issues of modification enforceability. The section contains both broad principles and specific rules, but, primarily because of infelicitous drafting, the section is not very successful in balancing the need for flexibility with the need for certainty. Attention must be focused on the basic goal of the section—"to protect and make effective all necessary and desirable modifications . . . without regard to the technicalities which at present hamper such adjustments"¹¹⁰—so that the section will be interpreted in a way that facilitates enforcement of freely made modifications and polices effectively against coerced or fraudulent modifications.

A. Good Faith in Achieving the Modification¹¹¹

PROBLEM EIGHT

On February 15, Selco and Buyco enter into a written agreement for the sale to Buyco of five slush freezers to be delivered on March 15 for \$2,000 per freezer. On March 1, Selco notifies Buyco that it will deliver on March 15 only if Buyco agrees in writing to pay \$2,200 for each freezer. Buyco needs the freezers and cannot get them elsewhere. Therefore, it agrees in writing to pay \$2,200, but on delivery it refuses to pay any more than \$2,000 per freezer. Selco brings an action to enforce Buyco's agreement to pay \$2,200 per freezer. Buyco defends by claiming that it agreed to the price increase under duress and that Selco violated its obligation of good faith performance.

At common law Buyco's promise to pay \$2,200 for each freezer was unenforceable under the preexisting duty rule.¹¹² Because Selco had the preexisting duty of delivering the freezers for \$2,000 each, Buyco's promise to pay more lacked new consideration by Selco to support it. Although an impediment to freely made changes in contract terms, the preexisting duty rule helped deter change brought about by the economic coercion of one party. Little incentive existed to coerce a modification that would be unenforceable

108. Comment 2 to § 1-207 states that the section "does not affect or impair" § 2-607(3)(a).

109. The New York Law Revision Commission concluded that the Code was unclear on this question. See 1 STUDY, *supra* note 2, at 331-32.

110. U.C.C. § 2-209, Comment 1. The Comments are sources of the Code's purposes and policies. See Hillman, *supra* note 4, at 681 & n.165.

111. This subject is treated extensively in Hillman, *supra* note 15.

112. See, e.g., 2 WILLISTON, *supra* note 11, § 12-2, at 3; Hillman, *Contract Modification in Iowa—Recker v. Gustafson and the Resurrection of the Preexisting Duty Doctrine*, 65 IOWA L. REV. 343, 345-46 (1980).

under the rule.¹¹³ Section 2-209(1) of the Code rejects the preexisting duty rule.¹¹⁴ The Code approach to policing against coercion in the formation of modifications is the obligation of good faith performance—only modifications made in good faith are enforceable.¹¹⁵ Presumably those modifications made as a result of economic coercion are not made in good faith.

The Code approach leaves unanswered many issues relevant to the outcome of Problem Eight. The Code does not determine who should bear the burden of proving that a modification was or was not in good faith. The Code also is silent on factors that are relevant to the determination of good or bad faith in achieving modifications. Does Buyco's lack of market alternatives require a finding of Selco's bad faith? Is coercion by Selco equivalent to bad faith? Should the availability of judicial remedies to Buyco preclude a finding of coercion? What factors, if any, should permit Selco to hold out for more money?¹¹⁶

Modification cases dealing with the good faith issue have not answered these questions adequately, and they sometimes have reached curious results.¹¹⁷ This suggests that the Code's heavy reliance on the broad standard of good faith is not successful in the modification context. Further guidance may be required to enable contracting parties to determine the amount of pressure each party may fairly place on the other in attempting to achieve a modification.¹¹⁸

The common-law economic duress rules could provide guidance in resolving disputes such as Problem Eight. These rules could be employed directly as a supplement to the Code under section 1-103, or indirectly as a method of determining good faith. Under an economic duress approach, if the party opposing the modification had no legitimate alternative to accepting the modification, *and* if the means employed for achieving the modification were unlawful (for example, threats were made), then the promise made by the

113. Hillman, *supra* note 15, at 855. The preexisting duty rule was sometimes circumvented by the creation of sham additional consideration. *See id.* at 853.

114. *See* text accompanying note 14 *supra*. *See generally* Hillman, *supra* note 15.

115. U.C.C. § 1-203. *See* Hillman, *supra* note 15, at 856-62. The rules of economic duress, which supplement the Code under § 1-103, also are available to police contract modification. *Id.* at 900. *See* note 183 *infra*.

116. These and other questions are addressed in Hillman, *supra* note 15.

117. *See id.* at 862-76.

118. An approach is suggested in *id.* at 880-901. Good faith and unconscionability have been referred to as "standards" that function as "residual categories" essential to the proper functioning of any legal system. The purpose of these "standards" is to enable the legal system to change while ensuring stability through continuity. *See* Ellinghaus, *supra* note 4, at 759-60. I am not suggesting that "standards" such as good faith should not have been included in the Code, only that for contract modification other approaches to policing against coerced modifications may have been superior. *See also* Hillman, *supra* note 15, at 878-79. As Professor Ellinghaus has stated, draftsmen can be criticized for choosing "to fling into the fray a 'residual category' at a time when . . . it has not yet become clear that the disparate phenomena intended to be embraced by that category are in fact usefully subsumable in such a way." Ellinghaus, *supra* note 4, at 760.

The New York Law Revision Commission, studying the Code prior to its enactment, suggested that "good faith" would not be successful in the context of § 2-209. 1 STUDY, *supra* note 2, Doc. No. 65(c), at 641.

party claiming duress is unenforceable.¹¹⁹ In Problem Eight, because Buyco forfeited substantial rights by agreeing to the price increase, and because reasonable persons do not often give up substantial rights for nothing in return, perhaps Selco should have the burden of demonstrating the absence of duress.¹²⁰ Selco could shift the burden back to Buyco by showing that it was reasonable for Buyco to sacrifice substantial rights in the context of Problem Eight.¹²¹ To prevail in the litigation, Selco also could attempt to demonstrate that Buyco had other choices, or that Selco's means in achieving the modification were proper.¹²²

PROBLEM NINE

On February 15, Selco and Buyco enter into a written agreement for the sale of five slush freezers to Buyco. The writing provides for a delivery date of March 15. On March 1, Selco notifies Buyco that it can deliver only one slush freezer because of a shortage of raw materials created by a shutdown of major supply sources. Buyco needs any quantity of freezers that can be supplied and cannot get them elsewhere. Buyco agrees in writing to take one slush freezer from Selco on March 15 in "full satisfaction." Buyco later brings an action for breach of the February 15 contract and claims that its agreement to take one freezer was made under duress.

Because Buyco has no alternative source of supply, the principal issue in determining whether Buyco was under duress in agreeing to the modification concerns Selco's conduct.¹²³ If the shortage of raw materials was not severe or if the shutdown of supply was foreseeable, Selco should not be permitted to extract concessions by threatening not to deliver or by being unable to deliver because of its own negligence. If, on the other hand, the shortage of raw materials was severe and the shutdown of supply was unforeseeable on February 15, the February 15 agreement might be commercially impracticable under section 2-615 of the Code.¹²⁴ If Selco's performance was commercially

119. See Hillman, *supra* note 15, at 880-84. The questions of what constitutes a reasonable alternative and what means are lawful in achieving a modification are discussed in *id.* at 890-98. See also *Erie County Water Auth. v. Hen-Gar Constr. Corp.*, 27 U.C.C. REP. 49 (W.D.N.Y. 1979).

120. See Hillman, *supra* note 15, at 883-88 for a more complete analysis of the assignment of burden of proof.

121. Selco could attempt to show that it was reasonable for Buyco to agree to pay more, for example, to keep Selco as a supplier in the future. See *id.* at 889-90.

122. See *id.* at 890-98.

123. See text accompanying note 119 *supra*.

124. U.C.C. § 2-615(a) provides:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

impracticable, Selco would be released from the duty of performing the February 15 contract. Accordingly, no inference that the agreement of March 1 resulted from a wrongful threat of nonperformance of the original contract could arise.¹²⁵ Selco would have had the right not to perform the February 15 contract, and a notification to Buyco of the refusal to perform would not be wrongful.

Any contract doctrine that renders the original agreement unenforceable should have the same effect. For example, if Selco had been excused from performance of the slush freezer contract on the grounds of mistake, refusing to perform would not be improper and, upon reaching a new agreement, no inference that the second agreement was procured in bad faith should arise.¹²⁶

B. Statute of Frauds

PROBLEM TEN

A "contract of sale" prepared by Selco and sent to Joseph Buyer, a consumer, sets forth an agreement for Buyer to purchase five slush freezers for \$2,000 per freezer. A clause of the writing provides that "the parties can modify this agreement only by a signed written agreement." Buyer signs the contract of sale but does not separately sign the provision barring oral modification. Prior to delivery Buyer orally negotiates with Selco for a reduction of the purchase price. The parties orally agree on the price of \$1,800 per freezer. Selco later refuses to deliver for less than \$2,000 per freezer.

Section 2-209(2)¹²⁷ of the Code enables parties to bar oral modification of their written agreement by including in the agreement a provision to that effect.¹²⁸ The apparent purpose of this "private statute of frauds" is to enable

For further discussion of commercial impracticability as it relates to contract modification, see Hillman, *supra* note 15, at 897-98 & n.210.

125. See Hillman, *supra* note 15, at 897-98 & n.210.

126. The doctrine of mistake is available under U.C.C. § 1-103. See note 183 *infra*. See Hillman, *supra* note 15, at 898 n.212 for further discussion.

Section 2-614(1) specifically states that if the delivery term of an agreement becomes impracticable, a commercially reasonable substitute must be accepted. Since the seller would have the right to expect the buyer to accept a reasonable substitute delivery, the issue of the seller's good faith again is removed from the case.

The agreement that replaces the original unenforceable agreement is not technically a modification agreement because a modification agreement replaces an enforceable contract. See text accompanying notes 54-60 *supra*.

127. Section 2-209(2) provides: "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."

128. U.C.C. § 2-209, Comment 3.

The rescission language in § 2-209(2) is required to make a provision barring oral modification effective. In the absence of a provision barring oral rescission as well as oral modification, the parties could orally rescind their agreement and enter a new oral agreement that alters the original rescinded contract, thereby circumventing the provision barring oral modification. See 1 STUDY, *supra* note 2, Doc. No. 65(c), at 643, 728-29.

Professor Nordstrom suggests that the "probable result" of § 2-209(2) would be that "many printed forms will contain a no-modification-unless-in-writing" clause. R. NORDSTROM, *supra* note 43, at 121.

contracting parties to protect themselves from inadvertent or unwise oral agreements to modify their contracts.¹²⁹ Theoretically, a formal writing emphasizes the gravity of the decision to modify and provides time for the parties to contemplate their decision.¹³⁰ Unfortunately, the section is inartfully worded and may not achieve its purpose.

The first clause of section 2-209(2) requires that an agreement to exclude oral modification must be signed to be enforceable, but the clause does not specify who must sign the agreement. Are both parties required to sign the agreement or is it a sufficient defense that the party urging the enforceability of an oral modification has signed the agreement? By analogy to section 2-201(1), which requires that agreements for the sale of goods for \$500 or more must be "signed by the party against whom enforcement is sought," it can be argued that only the party against whom enforcement of the provision barring oral modification is sought—the party urging the enforceability of the oral modification—must sign the agreement barring oral modification to make it enforceable. Buyer signed the "contract of sale" in Problem Ten; therefore enforcement of the provision excluding oral modification is not precluded under the first clause of section 2-209(2).¹³¹

Under the second clause of section 2-209(2),¹³² a provision barring oral modification in an agreement supplied by one merchant to another merchant does not have to be "separately signed" by the second merchant to be enforceable, but a provision barring oral modification in an agreement supplied by a merchant to a consumer must be separately signed by the consumer to be enforceable.¹³³ The specific language of section 2-209(2) does not make it clear whether the required "separate signing" must be of the written agreement containing the provision barring oral modification or of the specific provision itself.¹³⁴ Nevertheless, because the first clause of section 2-209(2) already

129. See *Timbie, Modification of Written Contracts in California*, 23 HASTINGS L.J. 1549, 1551 (1972).

130. See *id.*; A. MUELLER & A. ROSETT, *CONTRACT LAW AND ITS APPLICATION* 171-72 (2d ed. 1977).

131. See also *Monroe, Inc. v. Jack B. Parson Construction Co.*, 604 P.2d 901 (Utah 1979) (signed writing requirement of § 2-209(2) satisfied by writing directed at third party).

Additional problems in construing the signed writing requirement of the first clause of § 2-209(2) may confront its interpreters. The relationship between the section's requirement of a signed agreement excluding oral modification and the merchant exception to the statute of frauds in § 2-201(2) is unclear. If both Selco and Buyer were merchants, and Buyer had not signed the contract of sale, the oral modification apparently would be enforceable under § 2-209(2). Nevertheless, § 2-201(2) states that a writing in confirmation of a contract sent by one merchant to another, sufficient against the sender to satisfy the statute of frauds, will also satisfy the statute of frauds as against the recipient if the recipient "has reason to know its contents" and does not give written notice of objection within 10 days. If the agreement prepared by Selco and sent to Buyer was "a writing in confirmation of the contract" that satisfied the statute of frauds against Selco, perhaps § 2-201(2) should apply to uphold the provision barring oral modification. As § 2-201(2) applies only when the recipient of the writing "has reason to know its contents," it can be argued that the signed agreement requirement of § 2-209(2) serves little purpose when the recipient of the agreement "has reason to know" that it contains a provision excluding oral modification.

132. "[B]ut except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party." U.C.C. § 2-209(2).

133. U.C.C. § 2-209, Comment 3.

134. *Id.* provides: "[N]ote that if a consumer is to be held to [a written modification clause] on

requires that the written agreement be signed by the party urging enforceability of the oral modification, the second clause must be designed to add an additional enforceability requirement—a separate signing by the consumer of the specific provision barring oral modification.¹³⁵ If the provision itself must be separately signed, the oral modification in Problem Ten is enforceable because Buyer signed the contract of sale but did not separately sign the provision excluding oral modification.

Presumably, the separate signing requirement is designed to protect consumers, who benefit by oral modification, by preventing provisions barring oral modification from being buried in agreements.¹³⁶ The separate signing requirement, however, may disadvantage consumers in some situations. Suppose that in Problem Ten the oral modification was to increase the purchase price of the freezers \$50 per freezer. Under the express language of section 2-209(2), the oral modification presumably would be enforceable even though Selco had drafted the provision barring oral modification and both parties had signed the agreement. As Buyer was a consumer and had not separately signed the provision barring oral modification, the provision would be unenforceable. Therefore, perhaps the separate signing requirement should apply only when a nonmerchant asserts the enforceability of an oral modification. This interpretation would be more consistent with the presumed purpose of section 2-209(2) to protect consumers.

In light of the infelicitous language of section 2-209(2), it is not surprising that the courts have had difficulty construing the section. One court ignored a written stipulation that a written modification must be signed by both parties;¹³⁷ another construed section 2-209(2) to require a separate signing of the private statute of frauds provision only when *both* parties to the contract *are* merchants.¹³⁸ Even assuming that the potential exists for more reasoned judicial opinions construing section 2-209(2), apparently a provision barring oral modification can be waived under section 2-209(4).¹³⁹ Thus, even if the provision barring oral modification were enforceable in Problem Ten, Selco still

a form supplied by a merchant, it must be separately signed." (emphasis added). Does the "it" in the comment refer to the clause or to the form? The text of § 2-209(2) suffers from the same ambiguity. See N.C. GEN. STAT. § 25-2-209 (1965), North Carolina Comment (emphasis added): "The last part of subsection (2) provides that a merchant-seller's contract form limiting modification by a buyer (who is not a merchant), specifying that it shall be modified only by a writing, will not limit the nonmerchant buyer unless he separately signs the *instrument* containing such limitation."

135. See 1 STUDY, *supra* note 2, Doc. No. 65(c), at 643.

136. "The added provision as to a printed clause, in subsection (2), is designed to prevent entrapment of one party by a printed required-writing clause in the other party's printed form. . . ." *Id.* (emphasis added).

137. *In re Estate of Upchurch*, 62 Tenn. App. 634, 642-48, 466 S.W.2d 886, 889 (1970).

138. *Trust Co. v. Montgomery*, 136 Ga. App. 742, 743, 222 S.E.2d 196, 197 (1975). See also *United States Fibres, Inc. v. Proctor & Schwartz, Inc.*, 358 F. Supp. 449 (E.D. Mich. 1972), *aff'd*, 509 F.2d 1043 (6th Cir. 1975) (writing required when both parties are merchants).

Section 2-209(2) does not explain the requirements of a signed written modification that will satisfy the private statute of frauds. Presumably, the minimal requirements of § 2-201 (quantity term, signed by the party to be charged) are sufficient to satisfy § 2-209(2).

139. See *Thomas Knutson Shipbuilding Corp. v. George W. Rodgers Constr. Co.*, 6 U.C.C. REP. 323 (N.Y. Sup. Ct., Suffolk County 1969); *Gold Kist, Inc. v. Pillow*, 582 S.W.2d 77 (Tenn.

could be held to the oral modification if it constituted a section 2-209(4) waiver. The awkwardness of section 2-209(2) and the availability of the waiver argument under section 2-209(4) dilute any protection afforded contracting parties by the private statute of frauds of section 2-209(2).

PROBLEM ELEVEN

In a writing signed by both Selco and Buyco, Buyco orders five slush freezers for \$10,000. The writing contains a clause stating that Selco has agreed not to include certain parts that ordinarily are sold with the freezers for an additional \$400. Before delivery Buyco orally orders the parts, and Selco agrees to deliver them. Upon delivery Buyco takes the freezers but is unwilling to take the parts. Selco seeks damages for Buyco's refusal to take the parts.

A party may have abundant evidence of intent to modify a contract, but in the absence of a writing memorializing the modification agreement, the agreement may not be enforceable under the statute of frauds of section 2-209(3).¹⁴⁰ The purpose of the modification statute of frauds is to "protect against false allegations of oral modifications."¹⁴¹ Like subsection (2) of section 2-209,¹⁴² because of poor drafting and the waiver provision of section 2-209(4), section 2-209(3) has resulted in more confusion than certainty.

The section 2-209(3) requirement of satisfaction of the statute of frauds when the contract as modified is within the provisions of section 2-201 is open to many plausible interpretations. These different interpretations can be seen in the context of Problem Eleven. First, because the parties' original contract for the sale of slush freezers was within section 2-201 (more than \$500),¹⁴³ it can be argued that the oral agreement to supply the parts for \$400 is also within section 2-201 and requires a writing because the total contract price is still greater than \$500.¹⁴⁴ Second, it can be argued that no writing is required because the modification agreement to supply the parts was for less than \$500. Third, section 2-209(3) indicates that section 2-201 must be satisfied if the contract "as modified" is within section 2-201. Perhaps no writing is required in Problem Eleven because the modification does not bring the contract (as modified) within the statute of frauds for the first time. Fourth, because the only term that must appear in writing under section 2-201 is the quantity term, perhaps only modifications that alter that term require a writing.¹⁴⁵ Thus,

App. 1979); text accompanying notes 170-203 *infra*. See also Note, *Oral Modification of Sales Contracts and the Statute of Frauds*, 21 *DRAKE L. REV.* 593, 602-05 (1972).

140. 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."

141. U.C.C. § 2-209, Comment 3.

142. See text accompanying notes 127-139 *supra*.

143. See note 55 *supra*.

144. See, e.g., *Van Den Broeke v. Bellanca Aircraft Corp.*, 576 F.2d 582, 584 (5th Cir. 1978). The New York Law Revision Commission apparently adopted this view of § 2-209(3). 1 *STUDY*, *supra* note 2, Doc. No. 65(c), at 643.

145. But see R. NORDSTROM, *supra* note 43, at 123. Professors White and Summers mention the alternatives discussed in the text and others:

because Selco and Buyco did not modify the quantity term—the agreement is still for five slush freezers—perhaps their oral agreement is enforceable.

In interpreting section 2-209(3) to determine when a modification is “within” section 2-201, courts must balance the contribution made by the writing requirement against the need to avoid technicalities barring enforcement of voluntary modifications. It will be argued later in this Article that, at least in the modification context, the statute of frauds is not very effective in combating fraud and that other approaches may suffice to police against fraudulent allegations of oral modification.¹⁴⁶ Thus, because contracting parties often modify their agreements informally,¹⁴⁷ and because the charge of the Code is responsiveness to commercial realities,¹⁴⁸ more harm than good emanates from a stringent statute of frauds approach.¹⁴⁹ Courts, therefore, should interpret section 2-209(3) narrowly to require a writing only when the modification itself is for an amount greater than \$500 and involves the quantity term. Under this interpretation of section 2-209(3), the oral agreement between Selco and Buyco in Problem Eleven would be enforceable.

If under section 2-209(3) a modification is “within” section 2-201, how is section 2-201 satisfied? Presumably all of the rules and exceptions to the writing requirement of section 2-201 would apply to modification agreements.¹⁵⁰ For example, the section 2-209(3) statute of frauds could be satisfied under section 2-201(3)(b) by an admission in court that a modification agreement exists¹⁵¹ or under section 2-201(3)(c) by acceptance of goods after oral modification.¹⁵² Furthermore, even if the modification is “within” the provisions of

Section 2-209(3) states that “[t]he requirements of the statute of frauds section of this Article (2-201) must be satisfied if the contract as modified is within its provisions.” The impact of this provision is not clear. We see at least the following possible interpretations: (1) that if the original contract was within 2-201, any modification thereof must also be in writing; (2) that a modification must be in writing if the term it adds brings the entire deal within 2-201 for the first time, as where the price is modified from \$400 to \$500; (3) that a modification must be in writing if it falls in 2-201 on its own; (4) that the modification must be in writing if it changes the quantity term of an original agreement that fell within 2-201; and (5) some combination of the foregoing. Given the purposes of the basic statute of frauds section 2-201, we believe interpretations (2), (3), and (4), are each justified, subject, of course, to the exceptions in 2-201 itself and to any general supplemental principles of estoppel.

J. WHITE & R. SUMMERS, *supra* note 11, at 44-45.

146. See text accompanying notes 195-203 *infra*.

147. “[E]xperience in every jurisdiction that has enacted a statute barring oral modification of written contracts demonstrates that, no matter how explicit the statutory prohibition, private parties will continue to make and rely on . . . oral agreement.” Timbie, *supra* note 129 at 1575-76. See also *id.* at 1551. The many cases dealing with oral modification under the U.C.C. bear out Timbie's point. See, e.g., *In re Humboldt Fir, Inc.*, 426 F. Supp. 292 (N.D. Cal. 1977); cases cited at notes 176 and 181 *infra*. See also J. WHITE & R. SUMMERS, *supra* note 11, at 43; Levie, *supra* note 11, at 355-61; Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 936 (1958).

148. See U.C.C. § 1-102(2)(b); Kirst, *supra* note 47, at 812-13, authorities cited 870 n.141. Cf. Timbie, *supra* note 129, at 1551 (policy considerations weigh against a strict rule barring oral modification). See also note 4 *supra*.

149. See text accompanying notes 195-203 *infra* for further evaluation of the statute of frauds in the modification context.

150. See U.C.C. § 2-201; J. WHITE & R. SUMMERS, *supra* note 11, at 54-72.

151. E.g., *Dangerfield v. Markel*, 252 N.W.2d 184, 189 (N.D. 1977).

152. See R. NORDSTROM, *supra* note 43, at 123.

section 2-201, the requirement of a writing can be waived under section 2-209(4). As will be discussed later, the availability of this section contributes to the dilution of the impact of 2-209(3).¹⁵³

PROBLEM TWELVE

On February 15, Selco and Buyco enter into a written agreement for the sale to Buyco of five slush freezers for \$10,000, with delivery on March 15. On February 20, Selco notifies Buyco orally that it will be unable to deliver until April 15 because of a delay in receipt of raw materials from its supplier. Buyco responds orally on February 21 that it will accept the freezers on April 15. Buyco accepts delivery of the freezers when tendered on April 15, but later brings an action against Selco for damages resulting from the delay in delivery.

Assuming that Buyco intended to accept a modification of the agreement and did not agree to the delay in delivery merely to minimize loss,¹⁵⁴ does the oral response of Buyco on February 21 constitute an acceptance of an agreement to modify? Although the promise to accept the freezers one month late was not supported by consideration, we have seen that section 2-209(1) eliminates that requirement.¹⁵⁵ Furthermore, section 2-209(3) may not require a writing for an enforceable modification agreement.¹⁵⁶ Even if section 2-209(3) required a writing, Buyco may have waived the March 15 delivery date under section 2-209(4) or section 1-103.¹⁵⁷ Despite these arguments in Selco's favor, section 1-107 of the Code¹⁵⁸ could be read to supersede sections 2-209 and 1-103 and to require a writing for the enforceability of Buyco's promise to accept late delivery.¹⁵⁹ In the absence of consideration, section 1-107 seems to require a signed written waiver or renunciation to discharge a "claim or right arising out of an alleged breach."¹⁶⁰ Under this interpretation of section 1-

153. See note 194 and accompanying text *infra*.

154. See text accompanying notes 95-102 *supra*. Assume further that Selco's duty to deliver on time was not commercially impracticable under § 2-615. See text accompanying notes 124-126 *supra*.

155. See notes 112-122 and accompanying text *supra*.

156. The modification agreement in Problem Twelve does not come within § 2-201 for the first time, it does not affect the quantity term, and it may be less than \$500 in value. See notes 144-45 and accompanying text *supra*.

157. Section 2-209(4) and § 1-103 waivers are discussed in text accompanying notes 170-203 *infra*.

158. Section 1-107 provides: "Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party."

159. See, e.g., *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d 782, 788 (1972). See also 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 162-63 (1964). At common law, waiver of anticipatory breach did not require a writing, even in the absence of new consideration. See, e.g., *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d 782, 788 (1972). Apparently any act indicating an election to continue performance after material breach constituted a waiver of the breach. See, e.g., *Cities Serv. Helex, Inc. v. United States*, 543 F.2d 1306, 1313-14 (Ct. Cl. 1976). Query whether § 1-107 displaces the common-law rule. See notes 160-67 and accompanying text *infra*.

160. See note 158 *supra*. Note that an actual breach is not required under § 1-107, merely an alleged breach.

Waiver and renunciation under § 1-107 are apparently indistinguishable. The Comment to

107, if Selco's notification that it could not deliver on time was an anticipatory repudiation¹⁶¹ and Buyco treats the repudiation as a present breach,¹⁶² Selco's duty to deliver on time would not be discharged even if Buyco's oral communication that it would take the freezers on April 15 otherwise would have sufficed as an acceptance of an offer to modify or a waiver.¹⁶³

Section 1-107 probably should not be read to preclude the enforcement of section 2-209 oral agreements and section 2-209(4) waivers in breach and repudiation situations. Instead, perhaps the section represents only one method of relinquishing claims arising out of breach or repudiation. Under this interpretation, agreements to modify and waivers constituting attempts at modification also could suffice as methods of relinquishing claims for breach or for anticipatory repudiation.¹⁶⁴ When the evidence clearly supports a finding that the parties intended to enter into a modification agreement, this interpretation would be in accord with the policy of the Code to disregard technicalities and to enforce the intent of the parties.¹⁶⁵ Another method of enforcing the oral modification in Problem Twelve would be to restrict the written waiver re-

§ 1-107 indicates that consideration is not required for an "effective renunciation or waiver of rights or claims . . . where *such renunciation* is in writing and signed and delivered by the aggrieved party." (Emphasis added). The New York Law Revision report on § 1-107 stated that "renunciation" seems to be the same thing as 'release,' a manifestation of intent to discharge." 1 STUDY, *supra* note 2, at 203.

161. In determining whether Selco's notification of February 20 was an anticipatory repudiation the court would look to § 2-610 of the Code. Section 2-610 provides in part:

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or (b) resort to any remedy for breach . . . and (c) in either case suspend his own performance

The section is silent on how to determine whether a given communication is a repudiation or is merely an attempt to negotiate a modification. Comment 1 offers some help: "Anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." See also *Jon-T Farms, Inc. v. Goodpasture*, 554 S.W.2d 743, 746 (Tex. Civ. App. 1977) (repudiation occurs when one party declares that he will not perform or will perform only on conditions that go beyond the contract). A finding of anticipatory repudiation also requires a showing that the delay in delivery would "substantially impair the value of the whole contract" to Buyco. Section 2-610 suggests a subjective test of substantial impairment. A court could refer to common-law material breach cases to determine whether the delay in Problem Twelve would constitute substantial impairment. See, e.g., *Allen v. Wolf River Lumber Co.*, 169 Wis. 253, 172 N.W. 158 (1919).

162. See U.C.C. §§ 2-610(b), 2-711(1).

163. See, e.g., *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d 782, 787 (1972).

164. The Official Comment to § 1-107 is unclear on whether the section was meant to preempt § 2-209 in breach and repudiation situations. The Comment states that "there may . . . be an oral renunciation or waiver sustained by consideration . . . subject to . . . Section 2-209," suggesting that waivers of breach or repudiation in the absence of consideration are controlled by § 1-107. The Comment, however, adds that, "[a]s is made express in [§ 2-209] this Act fully recognizes the effectiveness of waiver and estoppel," suggesting, perhaps, that § 1-107 is not meant to preclude oral waivers, even of a breach or repudiation, under § 2-209.

A good argument can be made that § 1-103 common-law oral waivers of claims for breach or repudiation without consideration were meant to be displaced by § 1-107. If an aggrieved party can orally waive claims arising from breach or repudiation without consideration, § 1-107 would appear to have little purpose.

165. See U.C.C. § 2-209, Comment 1.

quirement of section 1-107 to cases of actual or alleged breach by the non-waiving party, not repudiation.

Interpreting section 1-107 to require a written waiver or renunciation as the only method of surrendering a claim or right arising out of a breach or repudiation may serve one useful purpose. Assume that in Problem Twelve Buyco had agreed to the delay in delivery only to minimize loss. Under section 1-207, it should be recalled, Buyco's failure to "explicitly" reserve the right to seek damages for breach may raise the presumption that it had entered into an enforceable accord and satisfaction.¹⁶⁶ By requiring a written waiver of the claim by Buyco, section 1-107 seemingly would protect Buyco from inadvertently losing its claim against Selco even though Buyco did not explicitly reserve its rights. Assuming that Buyco did not affirmatively mislead Selco, Buyco probably should be protected in this situation.

It appears that sections 1-107 and 1-207 may conflict in the context of Problem Twelve. In the absence of an explicit reservation of rights by Buyco, section 1-207 may raise the presumption that Buyco agreed to a modification of the time for performance. Section 1-107, however, may require a signed written waiver of Buyco's right to cease performance and seek damages for Selco's repudiation, and therefore, without such a writing, Buyco's "promise" to accept the freezers on April 15 would have no legal effect. This conflict probably should be resolved by enforcing the intent of the parties as evidenced by their communications and the surrounding circumstances, regardless of whether there was an "explicit" reservation of rights or the absence of a communication that constituted a "written waiver or renunciation." This result could be achieved by construing section 1-107 to represent only one method of relinquishing rights¹⁶⁷ or by excluding anticipatory repudiation situations from its coverage. By the same token, section 1-207 must be construed as containing one, but not the only, method of reserving rights, in order to protect parties that go forward in the face of breach only to minimize loss. While these interpretations restrict sections 1-107 and 1-207, they are consistent with the need to mirror the commercial world that does not always observe the formalities of explicit reservations and written waivers.¹⁶⁸

The Code does not make clear whether the writing requirement of section 1-107 itself can be waived. An analogy to section 2-209 can be made to support such a proposition. Both sections 2-209(3) and 1-107 set forth writing requirements for a contracting party to give up rights. Since the statute of frauds provision of section 2-209(3) can be waived,¹⁶⁹ perhaps the statute of frauds provision of section 1-107 also can be waived.

166. See notes 100-102 and accompanying text *supra*.

167. But see *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d 782 (1972); 1 W. HAWKLAND, *supra* note 159, at 162-63.

168. See notes 147-148 and accompanying text *supra*.

169. See text accompanying notes 170-203 *infra*.

C. *Waiver and Estoppel*

PROBLEM THIRTEEN

In a writing signed by both Selco and Buyco, Buyco orders five slush freezers for \$10,000. The writing contains a clause stating that Selco has agreed not to include certain parts that ordinarily are sold with the freezers for an additional \$400. Before delivery, Buyco orally orders the parts, and Selco agrees to deliver them. Upon delivery Buyco takes the freezers but is unwilling to take the parts. Selco seeks damages for Buyco's refusal to take the parts.

In Problem Eleven these facts were analyzed to determine whether the order of the parts required a writing to be enforceable. For Problem Thirteen we will assume that a court has found that a writing was required. Nevertheless, Selco still can claim that Buyco's oral order of the parts and Selco's agreement to deliver them "operate as a waiver" under section 2-209(4) of the Code.¹⁷⁰

The first task in evaluating Selco's claim is to determine what conduct "can operate as a waiver" under section 2-209(4). Unfortunately, the term "waiver" has many common-law meanings,¹⁷¹ and its usage in section 2-209(4) has contributed to problems in interpreting the section. At common law "waiver" referred to an intentional relinquishment of a right or advantage supported by consideration; a relinquishment of a right followed by reliance on the relinquishment (reliance or estoppel waiver); and a unilateral relinquishment of a right (unilateral waiver).¹⁷²

The first two common-law definitions of waiver, requiring, respectively, consideration to support, or reliance on, the relinquishment of a right, seem more restrictive than the Code approach. Section 2-209(4) by its express terms includes "attempt[s] at modification or rescission" that fail under section 2-209(2) or (3).¹⁷³ The Code does not define this language, but apparently it refers to modification *agreements* under section 2-209(1), like the agreement between Selco and Buyco in Problem Thirteen, that do not satisfy the statute of frauds of section 2-209(2) or (3). Because modification agreements need not be supported by consideration nor must they be relied on, presumably no con-

170. Section 2-209(4) provides: "Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver."

171. See, e.g., *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d 782 (1972); 3 WILLISTON § 679, at 257-58 (3d ed. 1961).

172. See, e.g., *McNamara v. Miller*, 269 F.2d 511 (D.C. Cir. 1959) (estoppel waiver); *Farmers Elevator Co. v. Anderson*, 170 Mont. 175, 178, 552 P.2d 63, 65 (1976) (unilateral waiver); *Carfi v. DeMartino*, 181 Misc. 428, 46 N.Y.S.2d 134 (1944) (unilateral waiver); *Voelker v. Joseph*, 62 Wash. 2d 429, 383 P.2d 301 (1963) (consideration waiver). See also R. NORDSTROM, *supra* note 43, at 124.

173. See, e.g., *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d 782, 787-88 (1972). See also 1 STUDY, *supra* note 2, Doc. No. 65(c), at 644-45. In *In re Humboldt Fir, Inc.*, 426 F. Supp. 292, 297 (N.D. Cal. 1977), for example, seller granted two extensions for the taking of timber by buyer. The second extension was not executed, but it was held to operate as a waiver under § 2-209(4).

The New York Law Revision Commission suggested that the term "attempt at modification" was too restrictive. 1 STUDY, *supra* note 2, Doc. No. 65(c), at 645.

sideration or reliance is required to constitute an "attempt at modification or rescission" under section 2-209(4). In addition, section 2-209(5) states that section 2-209(4) waivers of executory terms may be retracted unless materially relied on, suggesting that section 2-209(4) waivers may exist without reliance.¹⁷⁴ Of course, the opportunity for the waiving party to retract section 2-209(4) waivers that have not been relied on diminishes the importance of non-reliance waivers.¹⁷⁵

While the first two definitions of waiver may be more restrictive than the Code usage, the third definition, requiring a unilateral relinquishment of a right, seems broader than the Code approach. If the "attempt at modification or rescission" language does mean that section 2-209(4) requires an *agreement* that fails to satisfy the writing requirements of section 2-209(2) or (3), then the section requires more than a showing of a unilateral relinquishment of a right.¹⁷⁶

If modification agreements that fail under section 2-209(2) or (3) "can operate as waiver[s]" even without reliance on them or consideration,¹⁷⁷ do all such modification agreements "operate as waiver[s]"? If all modification agreements that fail to satisfy section 2-209(2) or (3) are enforceable as waivers, section 2-209(2) and (3) seem to have little utility other than making oral modification agreements that require a writing under them subject to retraction until materially relied on.¹⁷⁸ Presumably, the drafters intended a greater role for these sections.

Perhaps the drafters intended to preclude from enforcement as waivers "attempt[s] at modification" that consist of oral agreements to add entirely new terms (in contrast to agreements to delete or change existing terms).¹⁷⁹ This interpretation of section 2-209(4) not only is consistent with each of the

174. See MURRAY, *supra* note 43, at 187. See also notes 216-23 and accompanying text *infra*.

175. In Problem 13, for example, Buyco could have retracted the order of the parts until they were delivered. Assuming that delivery constitutes reliance on the parts order, after delivery it is irrelevant to the question of the enforceability of the parts order whether § 2-209(4) includes waivers that have not been relied on. Nevertheless, the availability of non-reliance waivers under § 2-209(4) would be crucial in some situations. For example, suppose the contract between Selco and Buyco contained an arbitration provision but the parties agreed to delete the provision in a subsequent oral agreement that is held to be unenforceable under § 2-209(3). If either party then fails to perform and the other (who cannot show reliance on the agreement to avoid arbitration) seeks a judicial resolution of the dispute, the court's decision whether to compel arbitration will be based on whether the agreement to avoid arbitration was enforceable under § 2-209(4) as a non-reliance waiver.

176. See, e.g., J.T. Jenkins Co. v. Kennedy, 45 Cal. App. 3d 474, 483, 119 Cal. Rptr. 578, 584 (1975); Farmers Elevator Co. v. Anderson, 170 Mont. 175, 180, 552 P.2d 63, 66 (1976); Gold Kist, Inc. v. Pillow, 582 S.W.2d 77, 79 (Tenn. App. 1979). See also Franklin Grain & Supply Co. v. Ingram, 44 Ill. App. 3d 740, 743, 358 N.E.2d 922, 925 (1976) (acceptance of late delivery of fertilizer held to be "compulsory," therefore no waiver of time for performance term); Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc., 265 N.W.2d 655, 661-62 (1978) (affirmative oral acquiescence to a later delivery date insufficient to extend the delivery term because of the lack of a writing under § 2-209).

177. Waivers may also be established under U.C.C. § 2-208(3). See text accompanying notes 204-215 *infra*.

178. See text accompanying notes 188-193 *infra* for a further discussion of the effect of conduct operating as a waiver.

179. See, e.g., U.C.C. § 2-207(1) and (2) (Code recognition of the difference between addi-

common-law definitions of waiver that require *relinquishment* of a right or an advantage, but it also preserves an important function for section 2-209(2) and (3). In Problem Thirteen, for example, the parties' oral agreement to delete the "no parts" provision would "operate as a waiver" under this interpretation. If the parties had agreed orally to an entirely new term, such as an arbitration provision, however, the oral agreement would not operate as a waiver.¹⁸⁰ Because most oral modification agreements involve the deletion or alteration of existing terms,¹⁸¹ interpreting section 2-209(4) in this fashion should not impede enforcement of most voluntary modifications. Furthermore, by requiring a writing to enforce agreements to add entirely new terms, some protection may be afforded against fraud in situations that, because of their relative infrequency, may be more suspect.¹⁸²

Despite some evidence that the drafters intended section 2-209(4) to chart its own waiver course, section 1-103 still might permit one (or more) of the common-law definitions of waiver to apply to disputes such as Problem Thirteen. For example, even if unilateral waivers are not within section 2-209(4), they may supplement the Code under section 1-103. Suppose that Buyco had expressed its willingness to waive the "no parts" clause and to accept the parts but that Selco had not responded or relied in any way. Selco could argue that Buyco had waived the "no parts" clause and that the waiver was enforceable under section 1-103. Although section 2-209(4) is inartfully worded, perhaps the "attempt at modification or rescission" language of the section, which suggests that an agreement is required, is meant to preclude unilateral waivers from supplementing the rules of contract modification.¹⁸³ Nevertheless, if

tional and different terms). See also *Double-E Sportswear Corp. v. Girard Trust Bank*, 488 F.2d 292, 298 (3rd Cir. 1973) (Garth, J., dissenting).

Another explanation for the "can operate as a waiver" language is that the drafters intended that reliance on the "attempt at modification" or consideration would be necessary before the "attempt at modification" *did* operate as a waiver. The reasons for concluding that reliance or consideration are not necessary, discussed in text accompanying notes 173-75, refute this argument.

Still another explanation for the "can operate as a waiver" language is that the drafters used that language solely because they were mindful that § 2-209(4) waivers can be retracted unless materially relied on under § 2-209(5). The difficulty with this explanation is that it would broaden the availability of waiver at the expense of limiting severely the domain of § 2-209(2) and (3). See text accompanying note 178 *supra*.

180. It is possible to argue that the party opposing arbitration waived the right not to have the arbitration provision included in the agreement. This interpretation, however, is inconsistent with the common-law approach to waiver, overemphasizes the implication of silence, and permits the enforcement of virtually all oral agreements that fail to satisfy § 2-209(2) and (3).

181. Most of the reported cases involve alteration of the time for performance. See, e.g., *In re Humboldt Fir, Inc.*, 426 F. Supp. 292 (N.D. Cal. 1977); *Trust Co. v. Montgomery*, 136 Ga. App. 742, 222 S.E.2d 196 (1975); *Franklin Grain & Supply v. Ingram*, 44 Ill. App. 3d 740, 358 N.E.2d 922 (1976); *Barbarossa & Sons, Inc. v. Iten Chevrolet, Inc.*, 265 N.W.2d 655 (Minn. 1978); *Farmers Elevator Co. v. Anderson*, 170 Mont. 175, 552 P.2d 63 (1976); *Mott Equity Elevator v. Svihovec*, 236 N.W.2d 900 (N.D. 1975); *Wilson v. Gifford-Hill & Co., Inc.*, 570 P.2d 624 (Okla. Ct. App. 1977). See also *West Point-Pepperell, Inc. v. Bradshaw*, 377 F. Supp. 154 (M.D. Ala. 1974) (modification of price term).

182. Oral agreements to add new terms that are relied on may be enforceable under the common-law doctrine of promissory estoppel. See text accompanying note 185 *infra*.

183. Section 1-103 provides in part: "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." To the extent that outside

Selco could not show an agreement to modify, but could show that it reasonably relied on a waiver of the "no parts" provision, then perhaps the waiver is enforceable under section 1-103. Waivers that are reasonably relied on in the absence of agreement should supplement section 2-209(4) because the section probably is not intended to displace the general doctrine of estoppel.¹⁸⁴

Many recent common-law cases have used promissory estoppel principles to enforce promises made as a part of oral bargains that are unenforceable under the statute of frauds.¹⁸⁵ When the grounds for estoppel are present, should this approach supplement section 2-209(4) to permit the enforcement of oral modification agreements to add entirely new terms? Although an affirmative response diminishes the importance of section 2-209(2) and (3), little reason exists for insulating the statute of frauds from the promissory estoppel argument in the modification context when the statute of frauds is subject to the promissory estoppel approach in original agreement formation situations. In addition, the policies of enforcing the actual agreement made between parties and avoiding technicalities of modification mandate that the promissory estoppel approach supplement section 2-209(4). This approach does not conflict with the position that section 2-209(4) precludes "attempts at modification" that consist of oral agreements to add new terms.¹⁸⁶ Although these oral agreements may be enforceable under the promissory estoppel approach, detrimental reliance must be shown, and the remedy may be different than if the agreement were enforced as a section 2-209(4) "attempt at modification." If the oral agreement to add a new term were enforceable under section 2-209(4), the remedy probably would be geared to the expectancy of the party receiving the waiver. Under section 1-103, however, the remedy is "to be limited as justice requires" and may consist of a reliance recovery only.¹⁸⁷

Assuming that it is possible to determine when conduct "operates" as a waiver under section 2-209(4), the next question is what is the effect of conduct "operating" as a waiver? Is the waiver of the statute of frauds or of the execu-

law has not been explicitly displaced by the Code, it supplements the Code under § 1-103. Whether a specific provision of the Code displaces outside law often is difficult to determine. See generally Hillman, *supra* note 4. That article suggests that the Code text and its purposes and policies must be considered to determine whether outside law has been displaced. Thus, because § 2-209(4) specifically refers to "attempt[s] at modification," and because § 2-209 includes statute of frauds provisions, it can be argued that § 2-209(4) displaces unilateral waivers, which would not require an attempt at modification and would render the writing requirements impotent.

184. See Summers, *General Equitable Principles under Section 1-103 of the Uniform Commercial Code*, 72 NW. L. REV. 906, 913 (1978).

Although § 2-209(5) states that waivers that are materially relied on cannot be retracted, see notes 222-223 and accompanying text *infra*, the section does not prove that reliance waivers without agreement are intended to supplement the Code. If under § 2-209(4) modification agreements that fail to satisfy the statute of frauds "operate" as waivers, perhaps the term waiver in § 2-209(5) is referring only to these oral modification agreements. Section 2-209(5) could mean only that oral agreements that fail to satisfy the statute of frauds can be retracted until relied on. Nevertheless, by recognizing the doctrine of estoppel, § 2-209(5) lends credence to the argument that estoppel also should supplement § 2-209(4).

185. See, e.g., *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 342-43 (Iowa 1979); RESTATEMENT (SECOND) OF CONTRACTS § 217A (Tent. Draft 1-7, 1973).

186. See notes 179-182 and accompanying text *supra*.

187. See RESTATEMENT (SECOND) OF CONTRACTS § 217(1) & (2) (Tent. Draft 1-7, 1973).

tory term of the contract that is the subject of the modification?¹⁸⁸ Some cases have supported the view that "an attempt at modification" under section 2-209(4) operates as a waiver of the statute of frauds.¹⁸⁹ Presumably, once it is found to exist, the oral modification agreement that constitutes the "attempt at modification" then is enforceable without further evidence.¹⁹⁰ Other cases involving agreements that have included provisions barring oral modification have supported the view that an oral modification agreement is effective under section 2-209(4) if, and only if, a specific intent to waive the statute of frauds of section 2-209(2) is found.¹⁹¹ Still other cases have taken the position that an attempted modification, ineffective under section 2-209(2) or (3), can operate as a waiver of the executory term of the contract that was the subject of the attempted modification.¹⁹²

Because parties freely negotiating to modify particular terms of an agreement presumably intend their oral modifications to be enforceable,¹⁹³ perhaps modification agreements that do not satisfy the statute of frauds implicitly lead to waivers, both of the term that is the subject of the modification and of the statute of frauds. Under this interpretation, Selco would present evidence of the oral agreement and would claim that the agreement constituted a waiver of both the term refusing the parts and the statute of frauds. Of course, this interpretation further dilutes the writing requirements of section 2-209(2) and (3) by broadening the availability of the section 2-209(4) waiver argument—no specific waiver of the statute of frauds would have to be shown.

The stated purpose of section 2-209(3)—to avoid "false allegations of oral modification"—is served, if at all, only by a narrow interpretation of section 2-209(4). We have seen that section 2-209(4) is sufficiently vague so that courts attempting to find efficiency in section 2-209(2) and (3) can interpret section 2-209(4) to encompass only oral agreements to change existing terms, to require evidence of intent to waive the statute of frauds, and even to require reliance or consideration.¹⁹⁴ Courts also can interpret section 2-209(4) to bar common-

188. R. NORDSTROM, *supra* note 43, at 124; see J. WHITE & R. SUMMERS, *supra* note 11, at 53.

189. See, e.g., Double-E Sportswear Corp. v. Girard Trust Bank, 488 F.2d 292, 297 n.7 (3rd Cir. 1973); Farmers Elevator Co. v. Anderson, 170 Mont. 175, 178-80, 552 P.2d 63, 65-66 (1976).

190. But see Farmers Elevator Co. v. Anderson, 170 Mont. 175, 181, 552 P.2d 63, 66 (1976).

191. See, e.g., Indussa Corp. v. Reliable Stainless Steel Supply Co., 369 F. Supp. 976 (E.D. Pa. 1974); C.I.T. Corp. v. Jonnett, 419 Pa. 435, 439, 214 A.2d 620, 622 (1965).

192. E.g., Double-E Sportswear Corp. v. Girard Trust Bank, 488 F.2d 292, 296 (3rd Cir. 1973) (dissenting opinion); J.T. Jenkins Co. v. Kennedy, 45 Cal. App. 3d 474, 483, 119 Cal. Rptr. 578, 584 (1975); Mott Equity Elevator v. Svihovec, 236 N.W.2d 900, 907 (N.D. 1975) (dictum). See also U.C.C. § 2-209, Comment 4. Some commentators believe that this Comment supports the view that the waiver is of the statute of frauds. See 1 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-209:13 (2d ed. 1970); R. NORDSTROM, *supra* note 43, at 124. Section 2-209(5) states that "a party who has made a waiver affecting an executory portion of the contract" (emphasis added) can retract that waiver, suggesting that a § 2-209(4) waiver is of an executory term and not of the statute of frauds.

193. See note 147 and accompanying text *supra*.

194. See text accompanying notes 170-203 *supra*. The New York Law Revision Commission apparently believed that § 2-209(4) waivers require reliance. See 1 STUDY, *supra* note 2, at 644. But see R. NORDSTROM, *supra* note 43, at 124: "[W]aiver is a sufficiently ambiguous word so that courts can admit evidence of almost any alleged oral modification to see whether that evidence—although not sufficient to operate as a modification in and of itself—will 'operate' as a waiver."

law supplementation under section 1-103. Courts that are inclined to restrict the availability of waiver, however, should balance the contribution made by the writing requirement against the need to avoid technicalities barring the enforcement of freely made modification agreements.

The policy arguments in favor of statute of frauds provisions in the context of modification law are not overly persuasive. Will the statute of frauds avoid fraudulent allegations of oral modification?¹⁹⁵ With the existence of a waiver provision, protection against fraud is problematical because a party can fraudulently assert that an oral waiver has been made. Even if there were no waiver provision, the protection-against-fraud rationale for section 2-209(3) is suspect. First, the presence of a signed writing does not prove that a modification actually was made. The signature may have been forged or made at a preliminary stage of negotiations.¹⁹⁶ Second, because parties frequently modify their agreements orally, the potential for fraud may be increased by the statute of frauds. Parties who actually have entered into an oral modification agreement but then find themselves in litigation may be tempted to allege falsely that no modification has been made.¹⁹⁷ Third, the potential for fraud can be diminished without resorting to the statute of frauds. If the burden of persuasion is placed on the modification proponent to demonstrate that the parties reached agreement on modification, presumably bare allegations of modification will be insufficient. Our jury system should be a sufficient check on the potential for fraud. Flexibility in the law of contract modification should not be sacrificed for fear that the jury system cannot weed out those guilty of fraud and perjury.¹⁹⁸

A second general policy argument in favor of the statute of frauds is that it increases certainty by making clear to the parties and to the courts the nature of the agreement between the parties.¹⁹⁹ Again, this argument is inadequate. The Code's minimal writing requirement for both contract and modification formation hardly leads to clear written agreements.²⁰⁰

A third policy argument in favor of the statute of frauds is that it emphasizes the seriousness of the transaction and may prevent parties from entering into coerced or foolish (but binding) modification agreements.²⁰¹ A party who

195. See U.C.C. § 2-209, Comment 3. The dispute over whether the statute of frauds serves a useful purpose is, of course, not new. See generally J. WHITE & R. SUMMERS, *supra* note 11, at 72-74; Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted*, 59 YALE L.J. 821, 829-34 (1950); Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 747 (1931); Note, *The Status of a "No Oral Modification" Clause Under the Restatement (Second) of Contracts*, 31 U. PITT. L. REV. 314, 318-19 (1969).

196. J. WHITE & R. SUMMERS, *supra* note 11, at 73.

197. *Id.*; Timbie, *supra* note 129, at 1576.

198. Courts usually will enforce alterations of contracts made orally and will ignore the statute of frauds if they are convinced that an alteration has been agreed on. See, e.g., *Gold Kist, Inc. v. Pillow*, 582 S.W.2d 77 (Tenn. App. 1979). In *Gold Kist*, despite a written agreement barring oral modification, the court used § 2-209(4) and "equitable principles" to enforce an oral alteration of the contract that never was denied by the party asserting the statute of frauds.

199. See Timbie, *supra* note 129, at 1575.

200. See U.C.C. § 2-201(1).

201. See Timbie, *supra* note 129, at 1550-51. Perhaps the drafters felt that statute of frauds

is subject to coercion, however, can be coerced into entering an unfair modification and into signing a writing that satisfies the statute of frauds. The absence of a writing does not prove that a modification agreement was involuntarily made, just as the presence of a writing does not prove that a modification was voluntarily made. The rules of economic duress are simply a better safeguard against coercion than the statute of frauds. In addition, it is highly questionable whether a writing requirement can persuade a party not to enter into a foolish modification agreement. Even assuming that a writing can "snap" a party out of foolishness, the party is not protected because of the opportunity to waive rights foolishly under section 2-209(4).

While the shortcomings of the statute of frauds in the modification context may outweigh its contributions, thereby suggesting that a broad approach to section 2-209(4) is proper, it could be argued that the availability of waiver at least should be limited in situations in which the parties have included a provision barring oral modification in their agreement under section 2-209(2). In that situation the Code policy in favor of freedom of contract²⁰² suggests that parties should be permitted to restrict the procedures for altering their contracts. Nevertheless, Comment 4 to section 2-209 directly suggests that section 2-209(4) was drafted to prevent provisions barring oral modification from restricting "the legal effect of the parties' actual later conduct." In addition, when it is clear that the parties have intended to alter their agreement, freedom of contract *is served* by enforcing the alteration. Accordingly, section 2-209(4) should be interpreted broadly, regardless of whether the parties have included a provision barring oral modification in their original agreement.²⁰³

Because the commercial reality is that parties frequently and informally enter into voluntary oral alterations of their agreements, because the stated goal of section 2-209 is to facilitate the enforcement of these agreements, and because the statute of frauds may serve little purpose (at least in the modification context), the waiver provision of section 2-209(4) should be interpreted broadly. In light of commercial practices, a proper balancing of the need for flexibility and certainty is achieved by interpreting section 2-209(4) to permit enforcement of "attempts at modification" that consist of oral agreements to change or delete existing terms, to enforce these agreements without consideration or reliance and without specific evidence that the parties intended to waive the statute of frauds, and to permit common-law supplementation of section 2-209(4) by reliance waivers in the absence of agreement and by promissory estoppel.

PROBLEM FOURTEEN

Selco and Buyco enter into a written contract for the sale to Buyco of

provisions were needed to close the floodgates opened by the repudiation of the preexisting duty rule. See Note, *supra* note 195, at 318-19.

202. See U.C.C. § 1-102(3).

203. See notes 127-139 and accompanying text *supra* for a discussion of the operation of U.C.C. § 2-209(2).

five slush freezers. They agree that one slush freezer will be delivered on the first of each month for five months. For the first three months Selco delivers on the third of the month, and Buyco accepts on that date without protest. Buyco refuses to accept the fourth delivery that is also two days late. Selco claims that Buyco's acceptance of the first three deliveries on the third of the month constitutes an enforceable course of performance between the parties.

Section 2-208(3) states that a course of performance inconsistent with an express term "shall be relevant to show a waiver or modification" of the term.²⁰⁴ Many courts have found that a section 2-209(4) waiver may consist of a course of performance established by section 2-208(3).²⁰⁵ The course of performance must be "accepted" or "acquiesced in without objection."²⁰⁶ Continuing performance while objecting to the other party's performance, therefore, should not be considered a waiver.²⁰⁷ In Problem Fourteen Buyco acquiesced in the late deliveries and may have established a course of performance that will serve as a waiver of the original delivery term.

Some problems of interpretation arise in construing sections 2-208 and 2-209 together. First, section 2-208(2) states that "express terms shall control course of performance" when the two are inconsistent.²⁰⁸ Does this provision breathe new life into the express delivery term in Problem Fourteen?²⁰⁹ Section 2-208 attempts to treat differently course of performance evidence offered to establish the meaning of a writing (section 2-208(1)) and course of performance evidence offered to establish a waiver of a term of a writing (section 2-208(3)).²¹⁰ Apparently the drafters of the Code intended that the priority rule of section 2-208(2) should be applied only when course of performance evidence is offered to determine the meaning of a writing under section 2-208(1) and not to establish a waiver of a term under section 2-208(3).²¹¹ They apparently failed to realize that when the proffered course of performance conflicts with the writing, the evidence invariably will be admitted under section 2-208(3) because the party seeking its admission, such as Selco in Problem Four-

204. U.C.C. § 2-208(3) provides: "Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance."

205. See, e.g., *Polycon Indus., Inc. v. Hercules, Inc.*, 471 F. Supp. 1316, 1324 (E.D. Wis. 1979); *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 749 (Iowa 1976); *Blue Rock Indus. v. Raymond Int'l, Inc.*, 325 A.2d 66, 78-79 (Me. 1974); *Farmers Elevator Co. v. Anderson*, 170 Mont. 175, 179-81, 552 P.2d 63, 65-66 (1976).

206. U.C.C. § 2-208(1).

207. See, e.g., *A & G Constr. Co., Inc. v. Reid Bros. Logging Co.*, 547 P.2d 1207, 1212 n.3 (Alaska 1976).

208. See, e.g., *Division of the Triple T Serv., Inc. v. Mobil Oil Corp.*, 60 Misc. 2d 720, 731-32, 304 N.Y.S.2d 191, 203-04 (Sup. Ct., Westchester County, 1969). See also *Kirst, supra* note 47.

209. The problem is reminiscent of the difficulties in harmonizing the § 1-205(4) requirement that express terms "control" course of dealing and usage of trade with the charge in § 1-205(3) to supplement agreements with evidence of course of dealing and usage of trade. See notes 47-53 and accompanying text *supra*.

210. Compare U.C.C. §§ 2-208(1) & (2) with § 2-208(3).

211. See, e.g., *Blue Rock Indus. v. Raymond Int'l, Inc.*, 325 A.2d 66, 78-79 (Me. 1974) ("Under section 2-208(3) of the Code, a course of performance inconsistent with any term of the contract is relevant to show a waiver of that term under section 2-209.").

teen, simply will couch its offer in terms of waiver rather than construction of the writing. Although a subversion of the express language of section 2-208(1) and (2), this result is consistent with overall Code policy of enforcing the parties' intent, whether evidenced by the agreement or by subsequent conduct.

Additional problems of interpretation exist in conjunction with section 2-208. Section 2-208(3) expressly makes section 2-208 "subject" to section 2-209.²¹² Thus, the section incorporates by reference all of the ambiguities of section 2-209(4) and (5).²¹³ If the parties' section 2-208 course of performance constitutes a section 2-209(4) waiver, may the "waiver" be retracted under section 2-209(5) so that Buyco can require the fifth delivery to be made on time in Problem Fourteen? Comment 3 to section 2-208 suggests that a course of performance waiver can be retracted.²¹⁴

Assuming that a course of performance waiver can be retracted, is the notice requirement to retract a waiver under section 2-209(5) the same whether the waiver is a course of performance waiver or an "attempt at modification" waiver under section 2-209(4)?²¹⁵ Because an "attempt at modification" waiver may constitute an actual agreement to modify that does not satisfy the statute of frauds, perhaps its retraction should require more stringent notification than retraction of a course of performance.

PROBLEM FIFTEEN

In a writing signed by both Selco and Buyco, Buyco orders five slush freezers for \$10,000. The writing contains a clause stating that Selco has agreed not to include certain parts that ordinarily are sold with the freezers for an additional \$400. Before delivery, Buyco orally orders the parts, and Selco agrees to deliver them. Still before delivery, Buyco notifies Selco that it will not take the parts. Selco seeks damages for Buyco's refusal to take the parts.

Under section 2-209(5) a waiving party can retract the waiver unless there has been a material change of position by the other party in reliance on the waiver that would make retraction unjust.²¹⁶ When the waiver has been materially relied on and retraction would be unjust, the waiving party is estopped

212. *But see* *Polycon Indus., Inc. v. Hercules, Inc.*, 471 F. Supp. 1316, 1324 (E.D. Wis. 1979) (court found that acceptance of late performance was a waiver under section 2-208, but did not consider whether section 2-209(4) and (5) applied).

213. *See* text accompanying notes 170-203 *supra*; text accompanying notes 216-223 *infra*.

214. *Accord, In re Humboldt Fir, Inc.*, 426 F. Supp. 292, 297-98 (N.D. Cal. 1977). The Comment assumes *a priori* that such an approach is necessary "to preserve the flexible character of commercial contracts . . ." U.C.C. § 2-208, Comment 3.

215. *See* text accompanying notes 170-203 *supra*; notes 216-223 and accompanying text *infra*.

216. Section 2-209(5) provides:

A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of the term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

See, e.g., *Ampex Corp. v. Appel Media, Inc.*, 374 F. Supp. 1114, 1119-20 (W.D. Pa. 1974); *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 749 (Iowa 1976).

to retract the waiver.²¹⁷ Although the section is unclear on the point, presumably retractable section 2-209(5) waivers consist of both section 2-209(4) "attempt at modification" waivers and common-law reliance waivers, which, as we have said, should supplement the Code under section 1-103.²¹⁸

Under the express terms of section 2-209(5) only a waiver can be retracted, not an enforceable modification agreement. Accordingly, assuming that in Problem Fifteen the oral agreement on the parts is enforceable either as a modification agreement or as a waiver,²¹⁹ whether Buyco can "retract" its order of the parts depends on which characterization of the transaction is correct. If an enforceable modification agreement has been made, Buyco cannot retract; if the oral agreement is an attempt at modification that acts as a waiver, or is a common-law waiver, Buyco can retract the waiver if section 2-209(5) otherwise is satisfied.²²⁰ Whether Buyco's order of the parts and Selco's agreement to deliver them constitute an enforceable modification agreement or a waiver depends on whether the transaction required a writing for enforceability. That in turn depends upon interpreting section 2-209(3), which, unfortunately, is simply not clear on the question.²²¹

If it is determined that Buyco's order of the parts and Selco's agreement to deliver them constitute a common-law waiver or an attempt at modification that acts as a waiver, Selco still can prevail in barring the retraction of the waiver if it can demonstrate that it has materially changed position in reliance on Buyco's waiver and that retraction would be "unjust." Presumably, a material change of position does not require actual performance by Selco, although performance usually should suffice.²²² Even if a "material change of position" in reliance upon the waiver has occurred, under the curious language of section 2-209(5) a retraction of the waiver might not be "unjust." Whether a "material change of position" in reliance upon a waiver has occurred and whether a retraction is "unjust" will be unclear in many cases, making it difficult to predict whether a party can retract the waiver or whether the other party can stand on the contract as waived.²²³

217. See J. WHITE & R. SUMMERS, *supra* note 11, at 46.

218. Presumably reliance waivers without agreement are not displaced by § 2-209(4). See note 184 and accompanying text *supra*.

219. The oral agreement could be unenforceable either as a modification agreement because of failure to satisfy the writing requirement of § 2-209(3), or as a waiver, if § 2-209(4) were interpreted to require reliance on the waiver or consideration. See text accompanying notes 140-153, 170-193 *supra*.

220. See text accompanying note 223 *infra*.

221. See text accompanying notes 140-153 *supra*.

222. See note 175 *supra*.

223. The dilemma is similar to that faced by a contracting party attempting to determine whether the other party has materially breached the contract so that the injured party can cease its own performance. See, e.g., *Norrington v. Wright*, 115 U.S. 188, 205-07 (1885). The problem is even more difficult in the context of retraction of waiver, however, because not only must there be a material change of position, but retraction also must be unjust. "Unjust" is hopelessly vague in this context. See 1 STUDY, *supra* note 2, Doc. No. 65(c), at 647.

Section 2-209(5) requires a "reasonable" notice of retraction. What constitutes reasonable notice is a question of fact for the jury. See, e.g., *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 749 (Iowa 1976). Notice of retraction of a waiver may be excused in some circumstances. See *id.*

D. The Effect of an Enforceable Modification

PROBLEM SIXTEEN

On February 15, Buyco and Selco enter into a written contract for the sale to Buyco of five slush freezers for \$2,000 each, with delivery on March 15. On March 1, the parties enter into an enforceable written modification of the price term and agree upon a price of \$1,600 per freezer. On March 15, Buyco refuses to accept delivery, and Selco seeks loss of bargain damages. Selco claims that damages should be determined according to a \$2,000 per freezer contract price.

At common law, whether Selco could recover damages based upon a \$2,000 contract price or upon a \$1,600 contract price depended on whether the March 1 agreement was an accord executory or an accord and satisfaction.²²⁴ If the parties intended that the original contract would not be expunged—that satisfaction would not occur—until the March 1 contract was satisfactorily executed, the March 1 contract would be termed an “accord executory,” and, on its breach, Selco could seek damages under the February 15 contract price of \$2,000. If the parties intended that the March 1 contract would supersede and expunge the February 15 contract even before the execution of the March 1 contract, the March 1 contract would be termed an “accord and satisfaction,” and, on its breach, Selco could seek damages only under the \$1,600 price term because the February 15 contract no longer would be enforceable.²²⁵

The Code is silent on whether these common-law rules supplement section 2-209. Because the Code does not specifically displace them,²²⁶ and because the rules are consistent with the purposes and policies of the Code to enforce the intent of the parties, the rules should supplement section 2-209.²²⁷ The presumptions created by the common law for determining when the parties intended satisfaction to occur—when the modification was made or when it was executed—also should survive the Code.²²⁸

III. SUMMARY AND CONCLUSIONS

One of the principal “purposes and policies” of the U.C.C. is to provide a framework of rules responsive to commercial realities and to give effect to the intent of the parties when possible.²²⁹ In light of the frequency with which commercial parties alter their agreements, the Code approach to contract modification must facilitate the enforcement of freely made alterations of

224. See text accompanying notes 95-98 *supra*.

225. See Hillman, *supra* note 96, at 565-66.

226. See note 183 and accompanying text *supra*; U.C.C. § 1-103.

227. See, e.g., *Fratelli Gardino, S.P.A. v. Caribbean Lumber Co.*, 447 F. Supp. 1337, 1341-42 (S.D. Ga. 1978), *aff'd in part*, 587 F.2d 204 (5th Cir. 1979); *Gorge Lumber Co., Inc. v. Brazier Lumber Co., Inc.*, 6 Wash. App. 327, 493 P.2d 782, 787 (1972).

228. See RESTATEMENT OF CONTRACTS § 419 (1932).

229. See §§ 1-201(3), 1-201(11), 1-205, Comment 1, 2-208, Comment 1, 2-209, Comment 1. “The concept of construing a commercial transaction in accordance with the parties’ intent pervades the Code.” *Stewart-Decatur Security Sys. v. Von Weise Gear Co.*, 517 F.2d 1136, 1140 n.11 (8th Cir. 1975). See also text accompanying note 148 *supra*.

agreements in order to foster the policy of responsiveness to commercial practices. At the same time, the Code approach must contribute to the elimination of coerced and fraudulent modification agreements. Instead of achieving these goals, the U.C.C. modification law is lost in a sea of confusing rules and overbroad principles.

The Code is not very helpful in explaining when the rules of contract modification should apply. Because of the Code's failure to define modification, the potential exists for the application of section 2-209 to deny the enforcement of a contract term in situations in which a party is seeking simply to enforce the original agreement.²³⁰ Conversely, the potential exists for the failure to apply section 2-209 to uphold a modification in situations in which the parties have intended to modify their agreement.²³¹ In addition, the Code's approach to contract formation exacerbates the difficulties of determining when the parties have formed a modification agreement. While the broad contract formation rules are sensible in most contexts, they accentuate the need for clear guidance on when the rules of contract modification should apply.²³² Finally, sections 1-107, 1-207, and 2-607(3)(a) of the Code further confuse the already difficult task of determining whether a modification agreement has been made or whether a party has continued performance only to minimize damages.²³³

The Code should have defined a modification agreement as "the bargain of the parties in fact to change a legal obligation that results from the parties' original agreement."²³⁴ This definition would aid in sorting out modification issues from other issues. It also would clarify that the Code approach seeks to enforce the intent of the parties as determined from their language and from surrounding circumstances, and that the formal requirements of section 1-207 need not be satisfied to preserve rights upon going forward with performance.

The Code rules relating to the enforcement of modifications emphasize the difficulties in harmonizing the need for certainty and flexibility in commercial legislation. Generally, the Code opted for a mix of broad principle and specific rule, but the result may have impeded rather than fostered the enforcement of freely made modifications and the elimination of coerced modifications. The Code eliminates the need for additional consideration to support modifications, and it attempts to police against coerced modifications through the obligation of good faith performance.²³⁵ The flexible approach of the Code is helpful—the requirement of consideration at common law impeded the enforcement of modifications that were voluntarily made. Nevertheless, some guidance on the application of the principle of good faith performance in the context of contract modification would have been helpful to ensure that voluntary modifications are enforced and that coerced ones are not enforced.

230. See generally text accompanying notes 28-51 *supra*.

231. See generally text accompanying notes 52-53 *supra*.

232. See generally notes 67-92 and accompanying text *supra*.

233. See generally text accompanying notes 94-109 & 166-68 *supra*.

234. See generally note 40 and accompanying text *supra*.

235. See generally text accompanying notes 111-126 *supra*.

Perhaps the rules of economic duress should supplement the Code on the theory that the rules aid in defining the absence of good faith in modification formation or that they are available under section 1-103.²³⁶

The modification statute of frauds and waiver provisions of section 2-209 may constitute the most serious shortcomings of the Code in the contract modification area. The Code apparently has balanced the need for flexibility and certainty by requiring a written modification agreement when the parties have included a provision barring oral modification in their original signed writing or when the modification is "within" section 2-201, while permitting oral modification agreements to "operate" as waivers.²³⁷ The Code does not adequately define the proper roles for these provisions, thereby virtually enabling the waiver proponent to assert that all oral modification agreements are enforceable under section 2-209(4). This Article suggests that in light of commercial practices to modify agreements informally, the goal of section 2-209 to reduce technicalities, and the weaknesses of the statute of frauds, the statute of frauds provisions should be interpreted restrictively,²³⁸ and the waiver provision should be interpreted broadly.²³⁹ In addition, section 2-209(4) should not preclude supplementation by estoppel principles. Under this approach, the enforcement of freely made modifications can be accomplished, and the Code goal of facilitating commercial practices and avoiding technicalities that hamper modification can be achieved.

236. See generally text accompanying notes 119-122 *supra*. See also Hillman, *supra* note 15.

237. See Problems 10, 11, & 13 and accompanying text *supra*.

238. See text accompanying notes 146-149, 195-203 *supra*. See also Timbie, *supra* note 129, at 1575-76 (Statute of frauds "has failed to induce the parties to commit their agreements to writing," thus the policies supporting it have failed.).

239. See text accompanying note 203 *supra*. "The concept of 'waiver' is sufficiently flexible to allow a court to justify its decision whenever a signed writing has allegedly been modified by a later oral agreement." R. NORDSTROM, *supra* note 43, at 124.