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# The Regulation of Contractual Change: A Guide to No Oral Modification Clauses for North Carolina Lawyers

Martin H. Brinkley

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# THE REGULATION OF CONTRACTUAL CHANGE: A GUIDE TO NO ORAL MODIFICATION CLAUSES FOR NORTH CAROLINA LAWYERS

MARTIN H. BRINKLEY

*The fundamental reason parties make contracts, and an underlying purpose of contract law, is to prevent change. From the viewpoint of the parties, the benefit of negotiating and executing a written agreement lies in securing the terms of the deal so that neither party can alter the agreement unilaterally without having to compensate the other side. For many years parties have sought to seal their bargain further by incorporating clauses that purport to prohibit oral modifications or waivers of the agreement's terms.*

*The law that has developed around these "no oral modification" and "no oral waiver" clauses, both in North Carolina and other states, is counterintuitive and has proved confusing to practicing lawyers and their clients alike. Rarely negotiated, the clauses are frequently struck down at common law because they unduly foreclose the parties' ability to bring about contractual change. Judges faced with particular factual situations, moreover, deploy the doctrines of waiver and estoppel to allow enforcement of contractual changes even when the agreement contains "no oral modification" or "no oral waiver" clauses. The failure of the North Carolina courts to use the terms "waiver," "modification," and "estoppel" distinctly and consistently poses an additional challenge to lawyers seeking to understand the law of contractual change and counsel clients appropriately.*

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\* Partner, Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, L.L.P., Raleigh, North Carolina. A.B., 1987, Harvard University; J.D., 1992, University of North Carolina. I am grateful to my law partner, Scott A. Miskimon, and to my colleague, Dorinda L. Peacock, for providing comments on a draft of this Article. I wish also to express my great appreciation to my primary editor, James O. Moore, V, and to the members of the Board of Editors of the *North Carolina Law Review* for their patience and dedication throughout the editorial process.

*This Article attempts to describe and clarify North Carolina law on the enforceability of “no oral modification” and “no oral waiver” clauses. It traces the development of applicable North Carolina case law and addresses certain practical problems that arise when the clauses are employed indiscriminately. The Article concludes with a proposal for statutory reform that would offer predictability to parties seeking to prevent unintended contractual changes while affording flexibility to judges concerned about achieving fair results in individual cases.*

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## I. THE MYSTERY OF NOM CLAUSES

Provisions that forbid oral modification or oral waiver of a written agreement—so-called “no oral modification” and “no oral waiver” clauses<sup>1</sup> (referred to here as “NOM” and “NOW” clauses)—are almost as commonplace as written contracts themselves.<sup>2</sup> In a simple contract, a combined NOM and NOW clause might read: “This Agreement cannot be amended, modified or waived except by

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1. The difference between NOM and NOW clauses is the same as the difference between modification and waiver. They are independent concepts in contract law. See *infra* Part II (suggesting definitions for “waiver,” “modification,” and “estoppel”). Because few published cases deal with NOW clauses in North Carolina, this Article’s primary focus is on NOM clauses, although many of the applicable principles and problems are the same.

2. A survey conducted in a law firm database of thirty randomly selected form agreements covering a wide array of factual circumstances failed to disclose a single agreement that did not contain a NOM or NOW clause, or both. The clauses are equally common in preprinted form documents (such as bank form loan documents) and in documents prepared by other law firms.

a written instrument signed on behalf of the party to be charged,” or “No purported modification of this agreement or waiver of any provision of this agreement shall be binding upon X unless such modification or waiver shall be evidenced by a writing signed by X.” In a more complex document, the clause might read:

No amendment or waiver of any provision of this Agreement, the Notes or any of the other Loan Documents, nor consent to any departure by any of the Loan Parties therefrom, shall in any event be effective unless the same shall be in writing and signed by each of the Loan Parties party to such Loan Document and directly affected by such amendment, waiver or consent and signed by the Lenders, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

Both the breadth and the precision of the language used in conventional NOM and NOW clauses are limited only by the ingenuity of the lawyers who draft them. But the underlying motivation is always the same: parties who have labored (especially parties who have paid lawyers to labor) over a complicated written agreement want that agreement to be the complete and perpetual embodiment of their commitments. The goal is contractual certainty, which may be worth a great deal at the inception of a new business relationship. Should a change be needed, parties who have only recently begun dealing with each other will want the change to be brokered at the negotiating table and reduced to writing, in the same way as the original agreement. They do not want deviations from the letter of the agreement that may arise in the course of the other party's performance to effect a wholesale change in the contract, particularly a change that a court might enforce in the other party's favor. The purpose of a written contract, from the parties' perspective, is to lock in the deal and foreclose the possibility of informally achieved changes.<sup>3</sup> For these reasons, business people and

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3. See generally David V. Snyder, *The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver, and Estoppel*, 1999 WIS. L. REV. 607 (1999) (providing a comprehensive and penetrating discussion of the tension between certainty and flexibility in contract law, as reflected in statutory and contractual efforts to regulate modification, waiver, and estoppel). This Article owes much to Professor Snyder's analysis, particularly his discussion of the true meaning of the terms “waiver,” “modification,” and “estoppel.” See *id.* at 624–29; see also E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* 41–42 (1998) (suggesting that concepts of expectation and reliance, so long dominant in contract law, may have led to ignoring other important considerations, such as certainty and flexibility).

their lawyers view the ever-present NOM and NOW clauses as a source of comfort: "At least we can be sure," they think, "that the agreement we have signed is the only one we have to worry about until we decide to write up a new one."

The difficulty is that contracts are meant to be performed; parties do not always feel the same warm assurance about NOM and NOW clauses one or two years after the execution of an agreement that they felt at outset of the relationship. By then, the lawyers have moved on to other matters and the business people have "booked" the contract on the firm's financial statements. Performing the contract has become the task of salespeople, manufacturers' representatives, general contractors and subcontractors, or middle management. Changes in the parties' business needs inevitably arise, and when they do, the charms of contractual certainty that seemed so alluring at the closing table will have faded. Confronted with the practical challenges of contract performance, parties may pursue an opposing array of values: pliancy, flexibility, and the ability to change the deal informally. Is it really worth going back to the drafting table to make a "technical" change? It is this tension between flexibility and reliance, this antithesis between contract and change,<sup>4</sup> that has led to the difficulties raised by NOM and NOW clauses in litigated cases.

This Article has four goals. First, it seeks to bring to light the heart of the thorny problem that NOM and NOW clauses present: the tension between the quest for certainty and the need for flexibility in the world of business relationships and the law of contracts (Parts I and II). Second, the Article attempts to impose a measure of analytical order on the perplexing array of judicial opinions emanating from the North Carolina appellate courts that have dealt directly with NOM or NOW clauses or the related concepts of waiver, modification, and estoppel (Parts III and IV).<sup>5</sup> Third, the Article brings to the attention of North Carolina lawyers various practical ramifications of the use of NOM and NOW clauses (Parts V and VI). Finally, the Article proposes a legislative solution that gives contracting parties a freer hand in forging the rules that will govern their business relationship while affording courts a means of achieving fair results under particularized facts. Although the intent

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4. See Snyder, *supra* note 3, at 636-39 (articulating the concept of an antithesis between contract (certainty) and change (flexibility)).

5. Cf. Robert A. Hillman, *Standards for Revising Article 2 of the UCC: The NOM Clause Model*, 35 WM. & MARY L. REV. 1509, 1522 (1994) (suggesting that "principles such as freedom of contract and fairness do not help us find our way out of the forest of NOM clauses") [hereinafter Hillman, *Standards*].

of parties who include a NOM or NOW clause in a written agreement should be respected, giving NOM and NOW clauses full legal effect under all factual circumstances inevitably will result in substantial injustice where a party has reasonably and materially changed its position in good faith reliance on an oral amendment. In the interest of fairness, the law must accommodate both of these concerns while avoiding the uncertainty that has plagued this field of contract law. The legislative solution proposed here<sup>6</sup> attempts to strike a compromise between the parties' competing desires for both certainty and flexibility in their contractual relationships.

Perhaps because they are ubiquitous,<sup>7</sup> NOM and NOW clauses have acquired a sort of invisibility to lawyers and their clients. Business lawyers who have practiced for decades may not be able to recall a single occasion when a NOM or NOW clause was even touched upon in contract negotiations. In their efforts to anticipate every contingency and to memorialize the parties' business deal as accurately as possible, competent transactional lawyers ignore NOM and NOW clauses just as they do many of the other "boilerplate" terms that are often found near the end of the contract document. Such provisions are, understandably, the last of their worries. What harm can it do to say that the agreement may only be amended or modified in writing? NOM and NOW clauses are easily agreed upon

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6. Neither the idea nor the specific language of the proposal is original. See Snyder, *supra* note 3, at 656 n.233 (proposing specific legislative enactments dealing with NOM clauses). As discussed in Part VII below, the text of the legislation recommended here is almost entirely Professor Snyder's, who in turn notes that he "did not make up these sections from scratch." *Id.* Professor Snyder states that his proposed statute reflects "revised draft provisions that had already received careful attention" from study groups and drafting committees of the UCC Permanent Editorial Board and their reporters. *Id.*

7. See *supra* note 2 and accompanying text. One Practising Law Institute manuscript suggests that a NOM clause should be included in "every commercial agreement," and goes so far as to state that allegations of purported breach of an oral amendment to an agreement containing a NOM clause "cannot withstand a dispositive motion unless the party claiming reliance on the [alleged oral] 'agreement' can point to some conduct or detrimental reliance 'unequivocally referable' to the alleged amendment." Brad S. Karp, *The Litigation Angle in Drafting Commercial Contracts*, in 2000-01 PRACTICING LAW INSTITUTE, DRAFTING CORP. AGREEMENTS ANNUAL HANDBOOK 489, 494 (Ronald B. Risdorf & Maryann A. Waryjas eds., 2001). For the reasons stated in Part VI *infra*, this statement is too broad. Cf. James P. Nehf, *Writing Contracts in the Client's Interest*, 51 S.C. L. REV. 153, 159 (1999) ("A careful drafter should consider whether the client is likely . . . to abide by the requirement of getting a written modification when one does occur. If the client's goals are hindered by the NOM clause, it should not be included."). The requirement that detrimental reliance be "unequivocally referable" to an amendment is the standard in New York for proving an exception to section 15-301(1) of New York General Obligations Law, which validates NOM clauses. See N.Y. GEN. OBLIG. LAW § 15-301(1) (McKinney 2001). This standard is difficult to meet in litigation.

and usually overlooked as the lawyers and their clients focus on securing the business terms firmly within the document.

For written contracts that are entered into in the ordinary course of business, the parties' consideration of NOM and NOW clauses rarely goes beyond a cursory review. But for more complex transactions that require opinion letters from counsel, the matter is thrown into a different light. Lawyers representing parties in these transactions are often asked to render the opinion that the transactions are enforceable in accordance with their terms, subject to certain exceptions. For opinions rendered by careful North Carolina lawyers, one of those exceptions is likely to be the enforceability of the NOM or NOW clause.

According to the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, NOM and NOW clauses are potentially unenforceable under North Carolina law.<sup>8</sup> The Committee's 1999 report, *Third Party Legal Opinions in Business Transactions*, suggests that North Carolina lawyers opining on the enforceability of agreements containing NOM or NOW clauses should include in their lists of exceptions to the standard formulation of the enforceability opinion (sometimes referred to as the "remedies" opinion) the following statement: "We do not express an opinion as to the enforceability of . . . any provisions of the Agreement that require waivers or amendments to be made only in writing."<sup>9</sup> The Committee's commentary on this suggestion cites three North Carolina Court of Appeals decisions, introducing the citation with the modifying signal "*see, e.g.*," which indicates there is additional North Carolina appellate case law standing for the proposition that NOM and NOW clauses are unenforceable.<sup>10</sup>

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8. *Third Party Legal Opinions in Business Transactions*, REP. LEGAL OPINION COMMITTEE (N.C. Bar Assoc./Bus. L. Sec., Cary, N.C.), Jan. 1, 1990, § 10.2.d, at 44 [hereinafter *N.C. Legal Opinion Report*].

9. *Id.*; see also *Third-Party Legal Opinion Report Including the Legal Opinion Accord* 28-29, 47 BUS. LAW 167 (American Bar Assoc. Committee on Legal Opinions ed., 1991) (stating that the "general principles of equity" limitation included in the remedies opinion "covers the effect of judicially developed rules concerning the manner and continuing effect of waivers and modification, notwithstanding a provision in a contract requiring written waivers and modifications").

10. *N.C. Legal Opinion Report* § 10.2.d, at 44 (holding that parol agreements may waive or modify contracts with NOM or NOW clauses) (citing *Son-Shine Grading, Inc. v. ADC Constr. Co.*, 68 N.C. App. 417, 422-23, 315 S.E.2d 346, 349-50 (1984)); *Triangle Air Conditioning, Inc. v. Caswell County Bd. of Educ.*, 57 N.C. App. 482, 488, 291 S.E.2d 808, 812 (1982) (holding that parties may waive the terms of a contract by their conduct); *W.E. Garrison Grading Co. v. Piracci Constr. Co.*, 27 N.C. App. 725, 729, 221 S.E.2d 512, 515 (1975) (holding that conduct or a later parol agreement may modify the terms of a previously written contract)).

When drafting an opinion letter addressing the enforceability of a written agreement governed by North Carolina law, or when negotiating an agreement drafted by other counsel that will be governed by North Carolina law, a lawyer should indicate that any NOM or NOW clauses included in the agreement may be unenforceable. More often than not, this disclosure leaves opposing counsel silent and bewildered.<sup>11</sup> A faxed copy of *Son-Shine Grading, Inc. v. ADC Construction Co.*,<sup>12</sup> one of the more recent modern North Carolina appellate cases on the enforceability of NOM and NOW clauses, typically produces more silence, although it usually has the salutary effect of squelching opposition to including an appropriate exception in the enforceability opinion. The pressure of rendering an opinion letter in connection with a rushed closing rarely affords the lawyers an opportunity to examine the clauses in meaningful detail.

At least three reasons explain the bar's confusion over NOM and NOW clauses. First, the notion that NOM and NOW clauses are unenforceable is counterintuitive to both transactional and litigation lawyers, who are steeped in the theory and culture of freedom of contract.<sup>13</sup> It seems natural for parties to attempt to make their contract impervious to oral modification. Why should parties whom the law broadly permits to frame the terms of their own bargain not be allowed to control how a painstakingly drafted agreement can be modified or amended, or how specific clauses of that agreement can be waived? If the parties are prepared to take the trouble of putting into writing an agreement that is not legally required to be so memorialized in order to be enforceable, should they not be allowed to require amendments, modifications, and waivers to be in writing as well? Should not the law encourage the precision and caution that follows from putting contracts of all types into writing? Won't a writing provide evidence that will help the parties repel mistaken or fraudulent attacks on their written agreement?<sup>14</sup>

Second, North Carolina law on the enforceability of NOM and NOW clauses, like the law of some other states and federal

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11. Cf. Snyder, *supra* note 3, at 639 ("A few modern lawyers, and certainly many of their clients, would be surprised to learn that the treatment of NOM and NOW clauses under the common law has not changed much.").

12. 68 N.C. App. 417, 315 S.E.2d 346 (1984).

13. Cf. Snyder, *supra* note 3, at 639 ("This rule [that NOM and NOW clauses are unenforceable at common law] may seem odd, especially in contract law, which devotes much of its energy to giving effect to parties' agreements.").

14. Professor Lon Fuller observed that legal formalities serve an evidentiary function in that they provide evidence of the purpose and meaning of a contract. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).



jurisdictions, is undeveloped and confused.<sup>15</sup> Despite attempts to analyze the basic principles that affect the enforceability of NOM clauses, North Carolina appellate courts have not resolved the most basic questions. For example, it is unclear whether NOM clauses are always unenforceable as a blanket proposition. The lawyer must first consider whether the agreement in question is within the various scattered provisions of North Carolina's Statute of Frauds<sup>16</sup>—a familiar public policy that renders certain classes of agreements unenforceable unless they are reduced to writing and signed by the party to be bound—or whether the agreement is a contract for the sale or lease of goods governed by Articles 2<sup>17</sup> or 2A<sup>18</sup> of the North Carolina Uniform Commercial Code ("UCC").

Finally, the North Carolina Court of Appeals, which has been the almost exclusive source of applicable case law over the last four decades, has not distinguished carefully between written agreements that are within the Statute of Frauds and those that are outside it.<sup>19</sup> Nor has the court of appeals articulated the rationale supporting the

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15. See *Autotrol Corp. v. Cont'l Water Sys. Corp.*, 918 F.2d 689 (7th Cir. 1990) (applying Texas law); *Wisconsin Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986) (applying Wisconsin law); *Estate of Connelly v. United States*, 298 F. Supp. 815 (D.N.J. 1975), *aff'd* 551 F.2d 545 (3d Cir. 1977); *Orient Ins. Co. v. McKnight*, 64 N.E. 339 (Ill. 1902); *Copeland v. Hewett*, 53 A. 36 (Me. 1902); *Bartlett v. Stanchfield*, 19 N.E. 549 (Mass. 1899) (Holmes, J.); *Beebe v. Ohio Farmers' Ins. Co.*, 53 N.W. 818 (Mich. 1892); *Headley v. Cavileer*, 82 A. 908, 910 (N.J. 1912); *Beatty v. Guggenheim Exploration Co.*, 122 N.Y. 378, 381 (N.Y. 1919) (Cardozo, J.); *Clark v. West*, 86 N.E. 1 (N.Y. 1908), *aff'd* 95 N.E. 1125 (1911); *Foster Wheeler Enviroresponse, Inc. v. Franklin County Convention Facilities Auth.*, 678 N.E.2d 519 (Ohio 1997); *Wagner v. Graziano Constr. Co.*, 136 A.2d 82 (Pa. 1957); *Mix v. Royal Ins. Co.*, 32 A. 460 (Pa. 1895); *Union Cent. Life Ins. Co. v. Whetzel*, 65 N.E. 15, 17 (Ind. App. 1902); *Ross-Langford v. Mercantile Town Ins. Co.*, 71 S.W. 720 (Mo. Ct. App. 1902); *Smaldone v. Ins. Co. of N. Am.*, 44 N.Y.S. 201 (App. Div. 1897).

16. For a non-exclusive list of items governed by the North Carolina Statute of Frauds, see *infra* notes 168–78 and accompanying text. As discussed in Part V below, modifications of contracts that are within the Statute of Frauds must likewise satisfy the Statute to be enforceable. See *infra* notes 180–81 and accompanying text.

17. N.C. GEN. STAT. § 25-2-201(1) (2001).

18. *Id.* § 25-2A-201(1)(b).

19. The court of appeals has simply applied Article 2's separate rule regarding the efficacy of oral modifications to contracts for the sale of goods to which Article 2 applies. The court has applied the common law rule of unenforceability in non-UCC cases. There has been no effort—perhaps because the court thought it unnecessary—to clarify overtly which rule applies where. Compare, e.g., *Mulberry-Fairplains Water Ass'n v. Town of N. Wilkesboro*, 105 N.C. App. 258, 265–66, 412 S.E.2d 910, 915 (1992) (holding that a contract for the sale of water constitutes a sale of goods governed by Article 2), and *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 453, 337 S.E.2d 616, 617–18 (1985) (applying Article 2 to an output contract for the sale of peanuts), with *Shields, Inc. v. Metric Constructors, Inc.*, 106 N.C. App. 365, 370, 416 S.E.2d 597, 600 (1992) (applying common law rule to construction contract).

rule. Instead, the court has quoted from equally unhelpful opinions of the Supreme Court of North Carolina.<sup>20</sup> Some of the more illuminating supreme court cases involve subject matter that today would be governed by Article 2 of the UCC, casting doubt on their value as precedent. Theories of waiver, modification, and estoppel are sometimes asserted in judicial opinions,<sup>21</sup> but North Carolina courts rarely have articulated clear reasons for the results they have reached.

## II. WAIVER, MODIFICATION, AND ESTOPPEL: SOME ATTEMPTS AT A WORKABLE DEFINITION

The most challenging aspect of understanding the law of NOM and NOW clauses arises from the failure of judges to define consistently the salient terms that frame the analysis in their opinions. These terms are “waiver,” “modification,” and “estoppel.” Judges regularly employ, but rarely define, the term “waiver.” Professor Corbin’s simile is memorable: “The term waiver is one of those words of indefinite connotation in which our legal literature abounds; like a cloak, it covers a multitude of sins.”<sup>22</sup> Another similarly overused and abused word is “estoppel.”<sup>23</sup> “Courts may use such words to reach fair results, but undisciplined use of the terms has led to a swamp of muddy thinking.”<sup>24</sup> Dean Roscoe Pound called terms like waiver, modification, and estoppel “solving words [that] are but substitutes for thought. . . . [W]hat enables them to endure is a convenient elasticity and vagueness of outline that gives a certain play

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20. See *J.R. Graham & Son, Inc. v. Randolph County Bd. of Educ.*, 25 N.C. App. 163, 167–68, 212 S.E.2d 542, 544–45 (1975); *Fishel & Taylor v. Grifton United Methodist Church*, 9 N.C. App. 224, 227, 175 S.E.2d 785, 786 (1970). Both cases cite Supreme Court of North Carolina decisions that are discussed in this Article. See *infra* notes 99–107 and accompanying text (discussing *Allen Bros. v. Raleigh Sav. Bank*, 180 N.C. 608, 105 S.E. 401 (1920)); *infra* notes 108–25 and accompanying text (discussing *Whitehurst v. FCX Fruit & Vegetable Serv.*, 224 N.C. 628, 32 S.E.2d 34 (1944)); *infra* notes 129–40 and accompanying text (discussing *Childress v. C.W. Myers Trading Post*, 247 N.C. 150, 100 S.E.2d 391 (1957)).

21. Compare *H.M. Wade Mfg. Co. v. Lefkowitz*, 204 N.C. 449, 453, 168 S.E. 517, 519 (1933) (referring to concepts of waiver and modification without clear differentiation), with *Wachovia Bank & Trust Co. v. Rubish*, 306 N.C. 417, 426–27, 293 S.E.2d 749, 755–56 (1982) (acknowledging confusion between concepts of waiver and estoppel in earlier Supreme Court of North Carolina cases).

22. Snyder, *supra* note 3, at 624 n.81 (quoting Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 754 (1919) (citation omitted)).

23. “What Corbin said about ‘waiver,’ Williston said about ‘estoppel.’” Snyder, *supra* note 3, at 624 n.82 (citing American Law Institute, *Proceedings at Fourth Annual Meeting*, 4 A.L.I. Proc. App. at 90–106 (1926)).

24. Snyder, *supra* note 3, at 625 n.83.

to the judicial instinct while preserving the appearance of rigid logical deduction.”<sup>25</sup> Courts are hardly the only sinners: scholars, sometimes in a good faith effort to eliminate murkiness, have introduced phrases such as “waiver-estoppel”<sup>26</sup> and “reliance waiver”<sup>27</sup> that seem, at least to the practitioner, only to further obfuscate the terms.

North Carolina judicial decisions in the field of contract law have done little to bring clarity to this morass of slipshod reasoning. Opinions from the early twentieth century are the worst culprits. A 1933 Supreme Court of North Carolina decision cited repeatedly through the 1970s (and which is further cited in the North Carolina commentary to section 2-209 of the UCC) employed the words “modified,” “set aside,” “rescinded,” “waived,” “abandoned,” and “waiver” in a single paragraph while citing a treatise on “estoppel.”<sup>28</sup> Although the North Carolina courts have made conscientious efforts in a few recent cases to draw careful doctrinal distinctions between waiver, modification, and estoppel,<sup>29</sup> a rigorous treatment of the concepts in judicial opinions remains elusive. The discussion that follows is an effort to redress this uncertainty.

It would be pointless to cite all of the numerous North Carolina cases that define “waiver” as “a voluntary and intentional relinquishment of a known right.”<sup>30</sup> The formulaic use of this

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25. Roscoe Pound, *Foreword* to JOHN S. EWART, *WAIVER DISTRIBUTED AMONG THE DEPARTMENTS: ELECTION, ESTOPPEL, CONTRACT, RELEASE* iii, v (1917).

26. Beth A. Eisler, *Modification of Sales Contracts Under the Uniform Commercial Code: Section 2-209 Reconsidered*, 57 TENN. L. REV. 401, 434 (1990). Justice Exum used the phrase “waiver by estoppel” in *Wachovia Bank & Trust Co. v. Rubish*, 306 N.C. 417, 427, 293 S.E.2d 749, 756 (1982), discussed *infra* notes 41–51 and accompanying text.

27. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 1.6, at 41 (4th ed. 1995).

28. *H.M. Wade Mfg. Co. v. Lefkowitz*, 204 N.C. 449, 453–54, 168 S.E. 517, 518–19 (1933), *cited in, e.g.*, *Salem Towne Apartments, Inc. v. McDaniel & Sons Roofing Co.*, 330 F. Supp. 906, 911 (E.D.N.C. 1970); *J.R. Graham & Son, Inc. v. Randolph County Bd. of Educ.*, 25 N.C. App. 163, 167, 212 S.E.2d 542, 544 (1975); *Fishel & Taylor v. Grifton United Methodist Church*, 9 N.C. App. 224, 227, 175 S.E.2d 785, 786 (1970); *see* N.C. GEN. STAT. § 2-209 N.C. cmt. (2001) (citing *Lefkowitz*, 204 N.C. at 453–54, 168 S.E. at 518–19).

29. Justice Exum’s opinion in *Wachovia Bank & Trust Co. v. Rubish*, 306 N.C. 417, 425–28, 293 S.E.2d 749, 754–56 (1982), discussed *infra* notes 41–52 and accompanying text, is an outstanding example of one justice’s struggle with the problem of rigorous terminology in the areas of waiver and estoppel. Another useful treatment is Justice Sharp’s opinion in *Lenoir Mem’l Hosp., Inc. v. Stancil*, 263 N.C. 630, 633–34, 139 S.E.2d 901, 903–04 (1965).

30. *See, e.g.*, *Davenport v. Travelers Indem. Co.*, 283 N.C. 234, 239, 195 S.E.2d 529, 533 (1973) (defining waiver); *see also* *Clemmons v. Nationwide Mut. Ins. Co.*, 267 N.C. 495, 504, 148 S.E.2d 640, 647 (1966) (same); *Fetner v. Rocky Mount Marble & Granite Works*, 251 N.C. 296, 302, 111 S.E.2d 324, 328 (1959) (stating that the elements of waiver are (1) the existence of a right, advantage or benefit at the time of the waiver; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to

definition in judicial opinions is so ubiquitous that the phrase has almost become an incantation for practicing lawyers. The definition is misleading, however, because it reveals nothing about the quantum of intention and purposefulness required to establish a waiver in North Carolina. The Supreme Court of North Carolina has suggested that a waiver can be inferred from a party's conduct—but how much conduct, and of what kind? A useful example of inferring a waiver from conduct is *H.M. Wade Manufacturing Co. v. Lefkowitz*,<sup>31</sup> a case that today would likely be decided under section 2-209(4) of the UCC.<sup>32</sup>

In *Lefkowitz*, a retail merchant bought fixtures for his store from a manufacturer.<sup>33</sup> The merchant and the manufacturer entered into a written agreement providing that the merchant's use of the fixtures for a period of five days after delivery would constitute an acceptance of the fixtures and that all claims for damages, errors, or shortages not filed within that period of time (the so-called "drop dead period") would be waived.<sup>34</sup> When the merchant reported a number of product defects to the manufacturer after the "drop dead" period had elapsed, the manufacturer's sales representative visited the merchant several times and made repeated promises that the fixtures would be repaired.<sup>35</sup> The Supreme Court of North Carolina ordered a new trial on the issue of whether the sales representative's conduct was "of such a nature and quality as to warrant an inference of waiver or intention to waive" the "drop dead" period for notifying the manufacturer of defects.<sup>36</sup> The lack of a generally accepted definition of "waiver" has been complicated by the court's failure to recognize

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relinquish such right, advantage or benefit); RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (1981) (defining waiver); BLACK'S LAW DICTIONARY 1574 (7th ed. 1999) (defining waiver).

31. 204 N.C. 449, 168 S.E. 517 (1933).

32. The contract at issue involved a sale of goods and related installation services. *Id.* For a discussion of North Carolina state and federal court cases applying Article 2 of the UCC to cases involving mixed contracts for goods and services, see JOHN N. HUTSON, JR. & SCOTT A. MISKIMON, NORTH CAROLINA CONTRACT LAW § 6-5-2(A), at 454-55 (2001 & Supp. 2003) [hereinafter HUTSON & MISKIMON]. The North Carolina commentary suggests that section 2-209(4) "would seem to be in accord with prior law in North Carolina." N.C. GEN. STAT. § 25-2-209 N.C. cmt. (2001) (citing, *inter alia*, *Lefkowitz*, 204 N.C. at 449, 168 S.E. at 517).

33. *Lefkowitz*, 204 N.C. at 453, 168 S.E. at 518. \*

34. *Id.*

35. *Id.*

36. *Id.* at 453-54, 168 S.E. at 518-19; *cf.* *United States Fid. & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 357 (Tex. 1971) (inferring from an insurance adjuster's attempt to settle a claim that the insurer had waived the condition requiring the insured to file timely proof of loss).

in some instances the presence of consideration or reliance as a contributing factor in the court's analysis.

The North Carolina courts are not alone in failing to apply clear definitions. The problem is common to state courts across the country but received little scholarly attention until Professor David Snyder, in a penetrating 1999 article, illuminated the issue by proposing workable definitions of "waiver," "modification," and "estoppel."<sup>37</sup> Professor Snyder's proposed definitions are helpful because they emphasize the various modes of conduct that lead to different legal results. He defines the terms as follows:

1. A "waiver" results from a unilateral act dispensing with a contractual condition.
2. A "modification" results from an agreement to change a preexisting contract.
3. An "estoppel" results when the conduct of one party induces cognizable reliance by the other party so that in justice the first party is precluded from contradicting its earlier conduct.<sup>38</sup>

Each of these definitions deserves further discussion and comparison with the concepts applied in North Carolina common law decisions.

#### A. Waiver

Professor Snyder's definition of "waiver" is considerably narrower than the definition the Supreme Court of North Carolina has employed. That is the essence of its appeal. Under his definition, only the unilateral act of one party can constitute a waiver. No action is needed on the part of the person who benefits from the waiver. Agreement, consideration, and reliance are not required. "A waiver cannot create duties for the waiving party or discharge the non-waiving party's promise."<sup>39</sup> Professor Snyder says waivers are, therefore, traditionally "restricted to conditions that are 'procedural or technical,' or at least 'comparatively minor.'"<sup>40</sup>

The Supreme Court of North Carolina's efforts to define "waiver" suggest that the meaning of the term, at least as it is used in

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37. See Snyder, *supra* note 3.

38. Snyder, *supra* note 3, at 626.

39. Snyder, *supra* note 3, at 626-27.

40. Snyder, *supra* note 3, at 626 (citing, *inter alia*, RESTATEMENT (SECOND) OF CONTRACTS § 84(1) cmts. a, d (1981) (discussing "waiver of a defense not addressed to the merits" and minor conditions, respectively)).

North Carolina, is broader and ultimately harder to pin down than Professor Snyder's straightforward formulation. One of the court's more intellectually honest attempts to acknowledge the myriad and confusing ways in which the term "waiver" can be used is Justice Exum's opinion in *Wachovia Bank & Trust Co. v. Rubish*.<sup>41</sup> In that case, Mike Rubish entered into a ten-year lease for an undeveloped parcel of land on which he built golf, dining, and other entertainment facilities.<sup>42</sup> The agreement granted Rubish an option to extend the lease term for six additional five-year periods, with escalating rent during each extension term.<sup>43</sup> Rubish could extend the term by giving the owner " 'written notice of his intention to do so not later than ninety (90) days prior to the expiration of the then current term of [the] lease.' "<sup>44</sup> When the owner died, the fee interest in the property was devised to a trust with Wachovia Bank and Trust Company as the named trustee.<sup>45</sup> Although the trustee was unable to find a writing from Rubish to the owner purporting to extend the lease, correspondence, tax returns, and ledger books established that the lease had been renewed for two additional five-year terms.<sup>46</sup> Near the end of the second renewal term, when Rubish failed to give written notice of his intention to renew for a third term within the ninety-day period prescribed by the lease, the trustee informed Rubish that the lease had terminated, ceased accepting rental payments, and brought an action for summary ejectment and damages.<sup>47</sup>

After being instructed that "[w]aiver is the intentional surrender of a known right or privilege," and that "intention may be expressed or implied from acts or conduct naturally and justly leading the other party to believe that a right has been intentionally foregone,"<sup>48</sup> the jury found that the trustee had waived the requirement of written notice in the lease. Judgment was entered in Rubish's favor.<sup>49</sup> On appeal Justice Exum, writing for a unanimous court, stated: "[t]he primary questions for decision are whether there is evidence to support defendant's assertion of waiver or estoppel, or both, and whether the jury was properly instructed on these issues."<sup>50</sup> Justice

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41. 306 N.C. 417, 293 S.E.2d 749 (1982).

42. *Id.* at 419, 293 S.E.2d at 751.

43. *Id.*

44. *See id.* at 419–20, 293 S.E.2d at 751–52 (quoting the lease).

45. *Id.* at 420, 293 S.E.2d at 752.

46. *Id.*

47. *Id.* at 421, 293 S.E.2d at 752.

48. *Id.* at 424, 293 S.E.2d at 754.

49. *Id.* at 423, 293 S.E.2d at 753.

50. *Id.* at 424, 293 S.E.2d at 754.

Exum explained:

The giving of notice to extend a lease in accordance with the terms of the lease is a condition precedent to extension of the lease. Such notice, however, is for the benefit of the lessor and may be waived by him. The meaning of "waiver" in this context is at best elusive. " 'Waiver' has been defined as 'an intentional relinquishment of a known right.' A person *sui juris* may waive practically any right he has unless forbidden by law or public policy. The term, therefore, covers every conceivable right—those relating to procedure and remedy as well as those connected with the substantial subject of contracts. Sometimes [waivers] partake of the nature of estoppel and sometimes of contract. . . . No rule of universal application can be devised to determine whether a waiver does or does not need a consideration to support it. It is plain, then, that in the *nature* and *occasion* of the particular waiver must lie the answer as to whether or not it requires such consideration."<sup>51</sup>

Justice Exum did not independently create a new definition of "waiver"; his articulation is an accurate restatement of some of the Supreme Court of North Carolina's earlier formulations.<sup>52</sup> Justice Exum's statement, however, highlights essential differences between the more nuanced use of "waiver" in the North Carolina case law and the narrowly limited definition proposed by Professor Snyder. Under Professor Snyder's definition, waivers never require consideration, and nothing that does require consideration ever constitutes a waiver *per se*.

Is waiver a unilateral act that never requires consideration, as Professor Snyder says, or is it an act the "nature and occasion"<sup>53</sup> of which may require consideration in order to be valid as a waiver, as *Rubish* suggests? The two definitions are obviously distinguishable. There is little hope that Professor Snyder's straightforward definition will ever be employed by the North Carolina appellate courts. The existing case law is too extensive and the magnetism of precedent, however inconsistent and confusing, is too powerful for the courts to avoid entangling themselves with the definitional morass of the past as new cases arise. For the practicing lawyer seeking to make sense of

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51. *Id.* at 425, 293 S.E.2d at 754–55 (citations omitted) (quoting *Clement v. Clement*, 230 N.C. 636, 639–40, 55 S.E.2d 459, 461 (1949)).

52. Justice Exum's opinion cites *Kearney v. Hare*, 265 N.C. 570, 144 S.E.2d 636 (1965), *Coulter v. Capitol Fin. Co.*, 266 N.C. 214, 146 S.E.2d 97 (1966), and *Clement v. Clement*, 230 N.C. 636, 55 S.E.2d 459 (1949).

53. *Rubish*, 306 N.C. at 425, 293 S.E.2d at 754.

the North Carolina cases, however, it is worthwhile to know that a simpler definition exists, that it would be helpful if the courts were to adhere to it, and that the variations on “waiver” that the North Carolina courts have introduced over the decades are not a model of clarity. When analyzing the North Carolina cases, an essential question to ask is whether the waiver is directed at the future or the past. In other words, does the waiver apply to a condition that has already failed or to a condition that has not yet matured into a duty of performance?

### B. Modification

In contrast to “waiver,” Professor Snyder’s definition of “modification” is somewhat more consistent with the prevailing way the term has been employed by the North Carolina appellate courts. A modification is an *agreement* to change an existing contract. Modification requires bilateral action, i.e., an agreement of the parties; this is the central distinction between modification and waiver. Modifications are themselves contracts, requiring consideration<sup>54</sup> and having the full permanent and binding effect of an original agreement. Modifications are, however, commonly thought to carry something forward from the original contract on which they are based.<sup>55</sup>

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54. The exceptions are cases in which a modification does not require consideration to be binding. For example, agreements modifying contracts within Article 2 of the UCC “need[] no consideration to be binding.” N.C. GEN. STAT. § 25-2-209 (2001).

55. Whether the term “modification” is used in the North Carolina appellate case law, as opposed to the terms “novation” or “rescission,” is more a matter of which word the court prefers in deciding what legal significance will be given to a particular set of factual circumstances, rather than which word best expresses the analytical grounds of the decision. A modification is an agreement to change some aspect of an existing contract without substituting an entirely new contract in its place. A novation is a new agreement that replaces an existing agreement, either by substitution of one set of obligations for another, see *Lipschutz v. Weatherly*, 140 N.C. 365, 369, 53 S.E. 132, 133 (1906), or by substitution of parties, see *Hamilton v. Benton*, 180 N.C. 79, 83–84, 104 S.E. 78, 81 (1920). A rescission (sometimes referred to by its synonyms “cancellation” or “abandonment”) is a contract to end a contract—that is, an agreement between parties to an existing contract that the existing contract shall no longer bind either of them. See, e.g., *Brannock v. Fletcher*, 271 N.C. 65, 74, 155 S.E.2d 532, 541 (1967) (stating that “[a] rescission implies the entire abrogation of the contract and a restoration of the benefits received from the other party”) (citations omitted); *S. Pub. Util. Co. v. Town of Bessemer City*, 173 N.C. 482, 485, 92 S.E. 331, 333 (1917) (recognizing that a written agreement may be orally “abandoned” by the parties); *Faust v. Rohr*, 167 N.C. 360, 361, 83 S.E. 622, 622 (1914) (same); *Redding v. Vogt*, 140 N.C. 562, 567, 53 S.E. 337, 338 (1906) (same). Because a rescission is itself a contract, it requires consideration to be enforceable. See, e.g., *Lipschutz*, 140 N.C. at 369, 53 S.E. at 133 (explaining that contract rescission is void if it is without consideration); *Brown v. Catawba Lumber Co.*, 117 N.C. 287, 297, 23 S.E. 253, 256



Under the common law, modifications require consideration to be enforceable.<sup>56</sup> This is the general rule in North Carolina,<sup>57</sup> although there are statutory exceptions for contracts involving the sale<sup>58</sup> or lease of goods<sup>59</sup> and for premarital agreements,<sup>60</sup> as well as the common law exception where promissory estoppel is used as a substitute for consideration to defend against an action to enforce an original contract, later amended.<sup>61</sup> Without consideration the modification will not be effective, the contract cannot be enforced as modified, and the parties are simply left in the same positions as

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(1895) (noting that only a “promise either under seal or supported by consideration” can rescind a contract).

In a sense, a modification always works as both a rescission and a novation because a new contract is substituted in place of the original. This is so despite the fact that much of the original contract may be carried forward into the modified contract. Even where there is considerable similarity between the old agreement and the new, the modified agreement is nevertheless a different agreement, however familiar its terms may be. Thus, it could be argued that no modification ever occurs without a rescission and a novation. Use of the terms (particularly “novation”) tends to be confined to particular factual contexts, with the North Carolina courts relying more on precedent than analysis in reaching a decision. For a general discussion of rescission and novation with citation to representative North Carolina cases, see HUTSON & MISKIMON, *supra* note 32, § 3-26, at 229-31. *Cf.* Snyder, *supra* note 3, at 627 (noting that the distinction between modification and rescission “does not work on either a theoretical or a practical level,” and using the term “modification” broadly to encompass “an agreed change to a contract, regardless of whether the contract is abandoned, rescinded, discharged in whole or in part, or terminated”).

56. See generally HUTSON & MISKIMON, *supra* note 32, § 3-26, at 225-29 (discussing “Modification and Waiver”).

57. See, e.g., Brenner v. Little Red Sch. House, Ltd., 302 N.C. 207, 215-16, 274 S.E.2d 206, 212 (1981) (ordering new trial on issue of fact as to whether contract was properly modified); Wheeler v. Wheeler, 299 N.C. 633, 637, 263 S.E.2d 763, 766 (1980) (outlining four exceptions in which consideration is not needed for a party to waive the breach of a contractual provision); Lenoir Mem'l Hosp., Inc. v. Stancil, 263 N.C. 630, 634, 139 S.E.2d 901, 903 (1965) (holding that a waiver of a substantial right or privilege requires consideration). North Carolina declines to follow section 89 of the Second Restatement, which holds that modification of a contract that has not been fully performed (that is, an executory contract) is binding without consideration if it is “fair and equitable” in view of changed circumstances that the parties did not anticipate, or if the promisee relied to its detriment on a promise modifying the promisee’s duty. RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1981). It should be noted that under some circumstances the doctrine of promissory estoppel may be employed in North Carolina as a substitute for consideration where the promisee uses the contract as modified to defend against an action by the promisor to enforce the original agreement. For a discussion of the defensive use of promissory estoppel, see HUTSON & MISKIMON, *supra* note 32, § 3-43.

58. N.C. GEN. STAT. § 25-2-209(1) (2001).

59. *Id.* § 25-2A-208(1).

60. *Id.* § 52B-6 to -7. All three exceptions reflect the positions of drafters of uniform acts (i.e., the Uniform Commercial Code and the Uniform Premarital Agreement Act).

61. See *supra* note 57.

before the attempted modification took place.<sup>62</sup> If consideration is present, however, the modification can be successfully asserted as a defense in an action to enforce the original agreement.<sup>63</sup>

The Supreme Court of North Carolina has added to the confusion between the terms "waiver" and "modification" by holding that an executory contract can be modified under a waiver theory where the waiver is supported by consideration.<sup>64</sup> The requirement that a waiver be supported by consideration in order to be valid arises "where there has been an understanding between the parties that one or more of the terms of a contract will no longer be binding on the party claiming waiver."<sup>65</sup> This statement is itself somewhat misleading, in that it fails to distinguish between the types of contractual rights that may not be validly waived without consideration. Rights that are "formal," even if executory, may be waived effectively without consideration, while "substantial" rights can only be waived upon a showing that consideration was given for the waiver, or that the elements of estoppel were present.<sup>66</sup> That is, an *agreement* to waive a substantial right or privilege in an existing contract must be supported by consideration like any other modification, which is in fact what such an agreement actually is.<sup>67</sup>

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62. See, e.g., *Stonestreet v. S. Oil Co.*, 226 N.C. 261, 263, 37 S.E.2d 676, 677 (1946) (holding that consideration was lacking from plaintiff to support modification of lease under which defendant allegedly agreed to reimburse plaintiff for well dug on leased premises and where plaintiff admitted making no promise in return for defendant's promise); *Wooten v. S.R. Biggs Drug Co.*, 169 N.C. 64, 68, 85 S.E. 140, 143 (1915) (holding that no consideration was present to support attempted oral modification of written agreement in which defendant allegedly gave plaintiff the right to bid on sale of equipment and thereby earn commissions).

63. See, e.g., *Acme Mfg. Co. v. McCormick*, 175 N.C. 277, 279, 95 S.E. 555, 556 (1918) (holding that a defendant's consent to the issuance of an insurance policy on his own life constitutes consideration and thus can be used as a defense against an action to enforce the original agreement). *Hutson & Miskimon* contains abstracts of several cases that illustrate the requirement of consideration to support a modification of personal services contracts and contracts for the sale of land. See *HUTSON & MISKIMON*, *supra* note 32, § 3-26, at 227-28 & nn.282-89.

64. See, e.g., *Clement v. Clement* 230 N.C. 636, 640, 55 S.E.2d 459, 461 (1949) (ordering new trial on account of error in jury instructions where defendant offered no evidence of consideration given in exchange for plaintiff's alleged waiver of right to receive interest payments). Justice Seawell stated: "[n]o rule of universal application can be devised to determine whether a waiver does or does not need a consideration to support it." *Id.*

65. *HUTSON & MISKIMON*, *supra* note 32, § 3-26, at 229; see *Wachovia Bank & Trust Co. v. Rubish*, 306 N.C. 417, 427, 293 S.E.2d 749, 755 (1982).

66. *Rubish*, 306 N.C. at 426, 293 S.E.2d at 755 (citing *Lenoir Mem'l Hosp., Inc. v. Stancil*, 263 N.C. 630, 633-34, 139 S.E.2d 901, 903 (1965)).

67. That is, unless an estoppel can be shown. *Rubish*, 306 N.C. at 426, 293 S.E.2d at 755; *Clement*, 230 N.C. at 640, 55 S.E.2d at 461.

An understanding of this kind is first and foremost an agreement, not a unilateral waiver.<sup>68</sup> As such, it is distinguishable from cases where a contract has been breached and the innocent party elects to waive the other party's breach; there the waiver is valid even if not supported by consideration (or an estoppel) because it is, in effect, a waiver of the other party's nonperformance (along with the waiving party's remedies for the same) rather than a waiver of an executory portion of the contract.<sup>69</sup>

### C. Estoppel

The North Carolina appellate decisions generally concur with Professor Snyder's definition of estoppel. Estoppel is distinguishable from waiver and modification because it requires reliance. Estoppel is like modification and unlike waiver in that it is bilateral; both parties to the contract must do something. Estoppel is unlike modification, moreover, in that it does not require an agreement and therefore does not need consideration to be binding.

Far more than modification, estoppel exists in the eye of the beholder. It is, in essence, a doubtful conclusion drawn by a judge that justice requires one party to a contract to be prevented from denying the effect of his own conduct on the other party. What this really means will be evident to any experienced lawyer: estoppel is hard to pin down, depending as it does on uncertain requirements such as "reasonableness" and "foreseeability." Was it reasonable for the other party to rely? Could the party to be estopped have foreseen that the other party would rely on his conduct? Unlike modification, which is nothing more nor less than a new binding contract that can be analyzed under traditional contract law, "whether a supposed estoppel will have any effect at all is probably unknowable until a court gives its opinion."<sup>70</sup> The Supreme Court of North Carolina explained the difference between waiver and estoppel at length in a 1919 opinion:

But upon the question of waiver it may be said that it takes place where one person dispenses with the performance of

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68. Even Justice Sharp was less than completely vigilant in her definition of a "waiver" as effecting a modification: "Waiver is the intentional surrender of a known right or privilege, which surrender *modifies* other existing rights or privileges or *varies the terms* of a contract." *Lenoir Mem'l Hosp., Inc. v. Stancil*, 263 N.C. 630, 633, 139 S.E.2d 901, 903 (1965) (emphasis added).

69. See, e.g., *Rubish*, 306 N.C. at 427, 293 S.E.2d at 755 (noting that waiver by estoppel does not require consideration).

70. Snyder, *supra* note 3, at 628.

something which he has a right to exact of another, and it is said to be a technical principle introduced and applied by the courts for the purpose of defeating forfeitures. While it belongs to the family of estoppel and the doctrine of estoppel has a fundamental relation to it, being the foundation upon which it, to some extent, rests, they are nevertheless distinguishable terms, though it may be difficult to draw the distinction between them which will give to each a clear legal significance and scope, separate from and independent of the other, as they are not infrequently used by the courts as convertible terms . . . . There are, however, several essential differences between them, and they may be thus illustrated: Waiver is the voluntary surrender of a right, while estoppel is the refusal to permit its assertion because of the mischief that has been done. Waiver involves both knowledge and intention; one being essential to the other. An estoppel may arise where there is no intent to mislead; waiver depends upon what one himself intends to do; and involves the acts and conduct of only one of the parties; estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position; an estoppel always involves this element. Estoppel results from an act which may operate to the injury of the other party; waiver may affect the opposite party beneficially. Estoppel may carry the implication of fraud, and sometimes fraud is clear, but not so in the case of waiver. The latter is a voluntary act, and exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon that right. Knowledge of the existence of the right, benefit or advantage on the part of the party claimed to have made the waiver is an essential prerequisite to its relinquishment. No one can be said to have waived that which he does not know, or where he has acted under a misapprehension of facts. . . . The question or waiver is mainly one of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be designed, or one party must have so acted as to induce the other to believe that he intended to waiver, when he will be forbidden to assert the contrary.<sup>71</sup>

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71. *Danville Lumber & Mfg. Co. v. Gallivan Bldg. Co.*, 177 N.C. 103, 106-07, 97 S.E. 718, 719-20 (1920) (per curiam). The court later explained:

Though often used interchangeably . . . the terms *waiver* and *estoppel* are not synonymous. Waiver . . . does not necessarily imply that the one against whom it is sought to be invoked has misled the other to his prejudice, whereas estoppel

As discussed above, a modification can be effected under a waiver theory if the parties enter into an agreement to waive a condition to be performed in the future. Such an agreement must be supported either by consideration or by estoppel as a substitute for consideration.<sup>72</sup> Estoppel in this sense is not estoppel in its "true" form, sometimes known as "equitable" estoppel, for which proof of actual misrepresentation is required. In order to prove a waiver by estoppel rather than by consideration, the defendant need not prove all the elements of an equitable estoppel. Rather, he need only prove an express or implied promise by one of the parties to waive an executory provision of the contract and the detrimental reliance on that promise by the other party.<sup>73</sup> Estoppel of this kind is commonly referred to as "promissory estoppel."

Having compared the definitions of waiver, modification, and estoppel expounded by the North Carolina appellate courts to Professor Snyder's definitions, we turn to an examination of the North Carolina courts' treatment of NOM clauses.

### III. NOM CLAUSES AT COMMON LAW FOR AGREEMENTS OUTSIDE THE STATUTE OF FRAUDS AND ARTICLE 2

Can the parties to a written agreement, by including a NOM or NOW clause, legislate what is, in effect, a private statute of frauds that will permit only written modifications, amendments or waivers to their agreement? The common law rule is that they cannot. Any written agreement can be modified or rescinded orally, subject only to the doctrine of consideration and the Statute of Frauds.<sup>74</sup> That is, agreements outside the Statute of Frauds may be modified or

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always involves a prejudicial misleading. Sometimes a waiver partakes of the nature of an estoppel and sometimes of contract.

*Stancil*, 263 N.C. at 633-34, 139 S.E.2d at 903 (citations omitted).

72. See *Rubish*, 306 N.C. at 427, 293 S.E.2d at 755; *Wheeler v. Wheeler*, 299 N.C. 633, 637, 263 S.E.2d 763, 765 (1980).

73. *Rubish*, 306 N.C. at 427-28, 293 S.E.2d at 756. Similarly, in *Colbath v. H.B. Stebbins Lumber Co.*, the Supreme Judicial Court of Maine stated:

[T]o constitute a waiver where there is no consideration, there must be a promise or permission, express or implied in fact, supported only by action in reliance thereon, to excuse performance in the future of a condition or of an obligation not due at the time, when the promise is made, or to give up a defense not yet arisen, which would otherwise prevent recovery on an obligation.

*Colbath v. H.B. Stebbins Lumber Co.*, 144 A. 1, 5 (Me. 1929). *Colbath* was cited by the *Rubish* court, which expressed the belief that "this distinction [as articulated in *Colbath*] will harmonize many decisions and will clarify what appears to be some confusion of definition and expression." *Rubish*, 306 N.C. at 427-28, 293 S.E.2d at 756.

74. See *Childress v. C.W. Myers Trading Post Inc.*, 247 N.C. 150, 154, 100 S.E.2d 391, 394 (1957); see also *infra* notes 129-40 and accompanying text (discussing *Childress*).

rescinded by a subsequent oral agreement even though the original contract was in writing and provided that it could be modified only by a second written agreement.<sup>75</sup> The law will not prevent parties from entering into another contract regardless of provisions in the original contract concerning the manner in which they could make later agreements on the same subject matter.<sup>76</sup>

The common law places value on the parties' inherent legal capacity to enter into contracts at any time. Under the common law rule, it does not matter that the original contract was in writing, or that the original contract would have to be in writing to be enforceable. The past cannot control the future. So long as the amendments, modifications, waivers, or rescission are supported by consideration or a substitute for consideration<sup>77</sup> (and are themselves outside the Statute of Frauds), they will be considered separate contracts from the original and will be enforced, even if purely oral. Thus the paradox: the very principle that makes NOM clauses a rational protection for parties to adopt (that is, freedom of contract in the present) is the same principle that makes NOM clauses unenforceable (that is, freedom of contract in the future). In the words of the Pennsylvania judge: "The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof. . . . The hand that pens a writing may not gag the mouths of the assenting parties."<sup>78</sup> Or the somewhat earlier statement of Cardozo when he was chief judge of the Court of Appeals of New York: "What is excluded by one act is restored by another. You may put it out by the door; it is back in through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again."<sup>79</sup>

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75. One legal encyclopedia states that this is "[t]he rule followed by the courts generally." 17A AM. JUR. 2D *Contracts* § 527 (1991 & Supp. 2001). This Article discusses cases from outside North Carolina to the extent that they have influenced decisions by courts within the state.

76. *Id.*

77. A common substitute for consideration is the "defensive" use of the doctrine of promissory estoppel by a promisee claiming that the promisor agreed to modify the parties' pre-existing contract. For an analysis of the extent to which the North Carolina appellate courts have adopted promissory estoppel as a viable substitute for consideration, see HUTSON & MISKIMON, *supra* note 32, § 3-43, at 261-68. There are also statutory exceptions that make modifications binding even though not supported by consideration. See, e.g., N.C. GEN. STAT. § 25-2-209 (2001) (contracts for the sale of goods); *id.* § 52B-6 (premarital agreements).

78. *Wagner v. Graziano Constr. Co.*, 136 A.2d 82, 83-84 (Pa. 1957).

79. *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 381 (N.Y. 1919) (Cardozo, J.).

As Professor Farnsworth suggests, for many years NOM clauses were a common feature of construction contracts, where they were used "to protect the owner from claims that his project superintendent orally modified the contract so as to have the builder do extra work."<sup>80</sup> This use of NOM clauses is well illustrated by *Bartlett v. Stanchfield*.<sup>81</sup> There, the Supreme Judicial Court of Massachusetts considered a purported oral modification to a written contract for the building of a house which contained a NOM clause. Justice Oliver Wendell Holmes, Jr., explained the rationale for the common law role of NOM clauses:

Attempts of parties to tie up by contract their freedom of dealing with each other are futile. The contract is a fact to be taken into account in interpreting the subsequent conduct of the plaintiff and defendant, no doubt. But it cannot be assumed, as a matter of law, that the contract governed all that was done until it was renounced in so many words, because the parties had a right to renounce it in any way, and by any mode of expression they saw fit. They could substitute a new oral contract by conduct and intimation, as well as by express words.<sup>82</sup>

In the 1929 case of *Teer v. George A. Fuller Co.*,<sup>83</sup> the United States Court of Appeals for the Fourth Circuit applied the common law rule to a case involving modifications to a contract for construction of buildings on the campus of Duke University. The Fourth Circuit relied on Justice Holmes's statement of the policy underlying the common law's traditional position on the enforceability of NOM clauses along with other authorities, "[c]itation of [which] . . . could be given almost without number,"<sup>84</sup> to hold that the plaintiff subcontractor was entitled to recover compensation from the general contractor for additional excavation work plaintiff had performed at the general contractor's request. The court concluded that the "original contract . . . contemplated that such [additional] work should be done upon a written order signed by a properly authorized officer or agent of the defendant [general contractor], and at prices and terms agreed upon between them."<sup>85</sup> While at first blush it may seem odd that the Fourth Circuit did not apply North Carolina law to the facts in *Teer* (an appeal from the

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80. E. ALLAN FARNSWORTH, *CONTRACTS* § 7.6, at 474 (1982).

81. 19 N.E. 549 (Mass. 1889).

82. *Id.* at 550.

83. 30 F.2d 30 (4th Cir. 1929).

84. *Id.* at 33.

85. *Id.*

United States District Court for the Eastern District of North Carolina, which had exercised jurisdiction seemingly on the basis of the parties' diversity of citizenship<sup>86</sup>), it should be remembered that in 1929 the United States Supreme Court had not yet decided *Erie Railroad v. Tompkins*.<sup>87</sup> Under the pre-*Erie* rule that in diversity cases federal courts should fashion federal common law,<sup>88</sup> the Fourth Circuit in effect recognized Justice Holmes's statement as the law to be applied by federal courts in North Carolina.

Although the court made nothing of the point in its opinion, it is clear from the facts that Nello Teer performed the additional work in reliance on a change order made by the defendant's project superintendent. "[T]he plaintiff in good faith performed the additional work so agreed upon as designated by defendant's engineers and other employes [sic] of defendant corporation, and when said work was completed defendant received and accepted the same . . . ."<sup>89</sup> This fact introduces a recurring theme in the law of oral modifications: reliance. In most cases, the party who seeks to escape the effect of a NOM clause has relied on the oral modification or waiver.<sup>90</sup> As the Supreme Court of Pennsylvania stated in one

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86. The plaintiff, Nello L. Teer, apparently was a North Carolina resident "engaged in the business of a grading contractor." *Id.* The defendant was a New Jersey corporation that had been hired as the general contractor "for the construction of a number of buildings for Duke University . . . ." *Id.* The Fourth Circuit did not cite any North Carolina decision in reaching its conclusion (although a number of likely candidates were available), perhaps because the doctrine it applied was almost universally recognized. Nello L. Teer Company today remains a prominent grading firm in the Research Triangle area. The building project at issue in the Fourth Circuit cases was probably a portion of the present West Campus of Duke University, which was under construction in the late 1920s.

87. 304 U.S. 64 (1938).

88. *See* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

89. *Teer*, 30 F.2d at 31.

90. *See, e.g., Allen Bros. v. Raleigh Sav. Bank & Trust Co.*, 180 N.C. 608, 611, 105 S.E. 401, 402-03 (1920) (holding that where developer incurred increased expenditures in improving property and owner "personally knew of and consented to" such expenditures, the owner "abandoned his right to require a written agreement as to such expenditures"); *Son-Shine Grading, Inc. v. ADC Constr. Co.*, 68 N.C. App. 417, 423, 315 S.E.2d 346, 350 (1984) (finding that a grading contractor completed additional excavation work in reliance on oral modification of contract by the general contractor's on-site supervisor); *W.E. Garrison Grading Co. v. Piracci Constr. Co., Inc.*, 27 N.C. App. 725, 727-28, 221 S.E.2d 512, 514 (1975) (finding that a contractor completed additional borrow and mucking work in reliance on the owner's request); *J.R. Graham & Son, Inc. v. Randolph County Bd. of Educ.*, 25 N.C. App. 163, 166-68, 212 S.E.2d 542, 544-45 (1975) (holding that where contractor was instructed to perform additional work beyond original specifications and contractor complied, contractor was entitled to recover for additional work). For further discussion of *Allen Bros.* and *Son-Shine Grading*, see *infra* notes 99-107, 160-62 and accompanying text.



construction case, "when an owner requests a builder to do extra work, promises to pay for it and watches it performed knowing that it is not authorized in writing, he cannot refuse to pay on the ground that there was no written change order."<sup>91</sup> The theme of reliance, as explained below, plays a vital role, if an unacknowledged one, in North Carolina case law dealing with NOM clauses.

#### IV. NORTH CAROLINA JUDICIAL DECISIONS ON NOM CLAUSES IN CONTRACTS OUTSIDE THE STATUTE OF FRAUDS

The Fourth Circuit's failure to cite any Supreme Court of North Carolina decision as authority for the result in *Teer* was not due to lack of precedent.<sup>92</sup> Beginning around the turn of the twentieth century, a flurry of cases dealing with issues of contract waiver, modification, and estoppel appeared in the pages of the *North Carolina Reports*.<sup>93</sup> On the whole, this early case law is undisciplined in recognizing and explaining the analytical distinctions between these three admittedly confusing contract law concepts.<sup>94</sup> The result, in Professor Snyder's words, is "a swamp of muddy thinking."<sup>95</sup>

The earliest Supreme Court of North Carolina decisions in the

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91. *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 244 A.2d 10, 16 (Pa. 1968). As one commentator has noted, *Universal Builders* rejected the requirement imposed in a previous case "that there be a waiver of the no-oral-modification clause prior to and distinct from the oral modification itself." See FARNSWORTH, *supra* note 3, § 7.6, at 493 n.11; *accord* *Pepsi-Cola Bottling Co. v. PepsiCo, Inc.*, 297 A.2d 28, 33 (Del. 1972) ("The prohibition against amendment except by written change may be waived or modified in the same way in which any other provision . . . may be waived or modified, including a change in the provisions of the written agreement by the course of conduct of the parties.").

92. Federal courts sitting in North Carolina now apply North Carolina contract law in diversity cases, unless the law of another state has been selected as the governing law of the contract at issue. See, e.g., *Salem Towne Apts., Inc. v. McDaniel & Sons Roofing Co.*, 330 F. Supp. 906, 911-12 (E.D.N.C. 1970) (applying North Carolina law on waiver of written contracts).

93. See *S. Pub. Util. Co. v. Town of Bessemer City*, 173 N.C. 482, 92 S.E. 331 (1917); *Makuen v. Elder*, 170 N.C. 510, 87 S.E. 334 (1915); *Faust v. Rohr*, 167 N.C. 360, 83 S.E. 622 (1914); *Redding v. Vogt*, 140 N.C. 562, 53 S.E. 337 (1906); *Lipschutz v. Weatherly*, 140 N.C. 365, 53 S.E. 132 (1906).

94. See, e.g., *Lipschutz*, 140 N.C. at 369-70, 53 S.E. at 134 (citing various authorities from other jurisdictions for the proposition that subsequent oral agreements made on sufficient consideration may modify, waive or discharge the original agreement but failing to distinguish between modification and waiver); *Brown v. Catawba River Lumber Co.*, 117 N.C. 287, 297, 23 S.E. 253, 256 (1895) (confusing "waiver" of an original contract with an agreement to modify the same agreement). But see *Danville Lumber & Mfg. Co. v. Gallivan Bldg. Co.*, 177 N.C. 103, 106-07, 97 S.E. 718, 720 (1919) (per curiam) (distinguishing carefully between waiver as the intentional act of one of the parties and estoppel as involving the conduct of both).

95. Snyder, *supra* note 3, at 625.

field of contract modification did not involve the specific question of whether NOM clauses are enforceable, because the contracts themselves did not contain NOM clauses.<sup>96</sup> They focused instead on whether adequate consideration supported the oral modification or rescission of a written agreement.<sup>97</sup> In these early cases, once a contract was made, one party's knowing relinquishment of a right enforceable against the other party and substitution of new obligations were sufficient without more to make the modification binding.<sup>98</sup>

The common ancestor of all North Carolina appellate case law involving the enforceability of NOM clauses is Justice Brown's opinion for the Supreme Court of North Carolina in *Allen Bros. v. Raleigh Savings Bank & Trust Co.*<sup>99</sup> *Allen Bros.* is the first Supreme Court of North Carolina decision that dealt with the enforceability of a NOM clause.<sup>100</sup> In that case, a contract between a property owner and a developer limited the amount the developer could spend on grading streets, laying sidewalks, installing water and sewer lines, and making similar improvements to \$20,000, unless the owner and developer agreed to additional expenditures.<sup>101</sup> The contract provided that "additional development may be made upon mutual consent in writing."<sup>102</sup> The Supreme Court of North Carolina held that because the owner "personally knew of and consented to . . . increased expenditures as being necessary for the proper development of the property," the owner had "abandoned his right to

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96. See, e.g., *Redding*, 140 N.C. at 569–70, 53 S.E. at 337–38 (considering whether second of two contracts was intended to replace the first; no evidence of NOM clause); *Lipschutz*, 140 N.C. at 369–70, 53 S.E. at 134 (considering whether contract for sale of goods had been properly rescinded; no evidence of NOM clause); *Brown*, 117 N.C. at 297, 23 S.E. at 256 (considering whether original contract lacking NOM clause was waived or rescinded).

97. See, e.g., *S. Pub. Util. Co.*, 173 N.C. at 485–86, 92 S.E. at 333 (noting that it is "well settled" that ordinarily a written contract before breach may be varied by a subsequent oral agreement made on sufficient consideration); *Lipschutz*, 140 N.C. at 370–71, 53 S.E. at 134 (holding that defendants elected to rescind their written contract in favor of an oral agreement that was made for valuable consideration).

98. See, e.g., *S. Pub. Util. Co.* 173 N.C. 482 at 485–86, 92 S.E. at 333 (stating that "the release of the obligations of the old [contract] and the substitution of new obligations constitute valuable considerations"); *Lipschutz*, 140 N.C. at 369, 53 S.E. at 134 (finding sufficient consideration in the assumption of a new obligation under the contract).

99. 180 N.C. 608, 105 S.E. 401 (1920).

100. The others are *Whitehurst & Reaves v. FCX Fruit & Vegetable Serv., Inc.*, 224 N.C. 628, 32 S.E.2d 34 (1944), and *Childress v. C.W. Myers Trading Post, Inc.*, 247 N.C. 150, 100 S.E.2d 391 (1957).

101. *Allen Bros.*, 180 N.C. at 609, 105 S.E. at 401.

102. *Id.* at 610, 105 S.E. at 402.

require a written agreement as to such expenditures.”<sup>103</sup> The record on appeal revealed, however, that the trial court had found as a fact that the owner and developer “had consented and agreed together” to eliminate the \$20,000 ceiling on expenditures for improvements.<sup>104</sup> The parties’ mutual promises, one promise (the owner’s waiver of the \$20,000 ceiling requirement) serving as the inducement for the other (the developer’s additional expenditure), were sufficient consideration to make the modification binding despite the absence of a written agreement.<sup>105</sup>

Although its reasoning is somewhat underdeveloped, Justice Brown’s opinion in *Allen Bros.* seems to rest on two basic factual conclusions. First, the parties mutually agreed to eliminate the \$20,000 limit on expenditures, in effect entering into a second contract supported by consideration.<sup>106</sup> Second, because the owner knew the additional expenditures were necessary, he was estopped from insisting on the NOM clause’s requirement of a writing memorializing the increased expenditures.<sup>107</sup>

In a second case, *Whitehurst & Reaves v. FCX Fruit & Vegetable Service, Inc.*,<sup>108</sup> the court’s discussion of NOM clauses was dictum because the contract at issue did not contain a NOM clause. A Wayne County farmer contracted to deliver “the Irish potatoes produced by [him] for sale during the five year period 1940–1944 inclusive” to FCX, a growers’ cooperative.<sup>109</sup> The contract permitted the farmer to sell his potatoes to other buyers for prices higher than FCX was prepared to pay, on the condition that he pay the cooperative “one cent per bag or one and one half cents per barrel” for all potatoes sold to persons other than those participating in the cooperative.<sup>110</sup> The contract contained the following NOM clause: “This instrument contains all of the conditions and terms of the agreement between the parties hereto and cannot be amended or changed except by a paper writing signed by both parties.”<sup>111</sup>

For two years the farmer sold potatoes to FCX under the

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103. *Id.* at 611, 105 S.E. at 402–03.

104. *Id.* at 609, 105 S.E. at 402.

105. *Id.* at 610–11, 105 S.E. at 402–03.

106. *Id.*

107. *Id.* at 611, 105 S.E. at 403 (stating that “[t]he binding effect of a waiver is founded on the doctrine of estoppel”).

108. 224 N.C. 628, 32 S.E.2d 34 (1944).

109. *Id.* at 629, 32 S.E.2d at 35.

110. *Id.*

111. *Id.* Because Article 2 of the UCC was not in existence at the time of the contract’s execution in 1941, the agreement was not within the Statute of Frauds.

agreement.<sup>112</sup> The farmer and FCX then entered into a second written contract whereby the farmer agreed to deliver to FCX, on or before June 20, 1943, "the first 50 cars of U.S. No. 1 Irish Cobbler Potatoes grown or handled by him during the 1943 marketing season," for a price no greater than a ceiling amount set by the United States government.<sup>113</sup> Shortly after the contract was executed, inclement weather delayed production of the farmer's potato crop.<sup>114</sup> When the farmer explained that he would be unable to deliver the crop by June 20, FCX responded that "the potato crop was late in general over the belt," and that "it would be no penalty" for the farmer to deliver the potatoes late.<sup>115</sup>

The farmer shipped eighty-six carloads of potatoes to the cooperative's consignees under the 1943 agreement, with the last shipment made on June 26, 1943.<sup>116</sup> FCX, denying that it had consented to waive the time of delivery of potatoes, responded that it had purchased only three carloads of potatoes under the 1943 agreement and that the remaining eighty-three cars had been purchased under the earlier contract.<sup>117</sup> The farmer sued the cooperative for the difference between the price he should have been paid for potatoes under the 1943 agreement and the price FCX actually paid under the earlier contract.<sup>118</sup>

In his opinion for the Supreme Court of North Carolina, Justice Denny held that evidence of FCX's extension of time for delivery of the potato crop was properly admitted.<sup>119</sup> Moreover, the court interpreted the earlier contract as not compelling FCX to accept all the potatoes tendered by the farmer.<sup>120</sup> The court rejected FCX's argument that evidence of the FCX's acquiescence in the farmer's delay was inadmissible to modify the 1943 agreement.<sup>121</sup> Justice Denny summarized the effect of NOM clauses on the common law rule that written agreements outside the Statute of Frauds can be modified orally as follows:

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112. *Id.* at 630, 32 S.E.2d at 35.

113. *Id.* at 630, 32 S.E.2d at 36.

114. *Id.* at 631, 32 S.E.2d at 36.

115. *Id.* at 631-32, 32 S.E.2d at 36.

116. *Id.* at 633, 32 S.E.2d at 37.

117. *Id.* at 631, 32 S.E.2d at 36.

118. *Id.* at 633-35, 32 S.E.2d at 37-38.

119. *Id.* at 636, 32 S.E.2d at 39.

120. *Id.* at 636-37, 32 S.E.2d at 39. The court noted that the farmer was growing only a small proportion of the potatoes he tendered to FCX. He and a partner were buying the remaining potatoes from other growers. *Id.* at 636, 32 S.E.2d at 39.

121. *Id.* at 636, 32 S.E.2d at 39.

The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. *This principle has been sustained even where the instrument provides for any modification of the contract to be in writing.* It has likewise been sustained where a contract contained a provision to the effect that “[n]o salesman or agent of the company shall have the right to change or modify this contract.”<sup>122</sup>

Although he cited *Allen Bros.* in stating the rule that NOM clauses are unenforceable, Justice Denny’s attention to the point was misplaced. The 1943 agreement did not contain a NOM clause, and that was the agreement the farmer argued had been modified by the FCX’s reassurances about the delivery delay.<sup>123</sup> The *Whitehurst & Reaves* court’s articulation of the rule on enforceability of NOM clauses is, therefore, dictum. Justice Denny’s point was that a later parol agreement can always modify or waive the provisions of a written contract. As in *Allen Bros.*, the court did not clearly commit to an analysis of the case as involving a “subsequent parol agreement” that modified the 1943 contract, or a “question of waiver” of the requirement that potatoes be delivered on the stipulated date.<sup>124</sup> In light of the court’s emphasis on the competing testimony of whether the FCX manager’s reassurances constituted a “waiver” of the delivery date requirement,<sup>125</sup> as well as the absence of consideration for a true modification (the delivery date concession being unilateral), *Whitehurst & Reaves* is a waiver case or at most an “estoppel” case to the extent that the FCX manager’s comments induced the farmer to deliver potatoes under the 1943 agreement despite the delay.<sup>126</sup> Nevertheless, Justice Denny’s formulation of the common law rule that NOM clauses are unenforceable is cited and quoted in later Supreme Court of North Carolina and North Carolina Court of Appeals decisions as authority for disregarding NOM

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122. *Id.* (emphasis added) (citations omitted) (quoting *H.M. Wade Mfg. Co. v. Lefkowitz*, 204 N.C. 449, 451, 453, 168 S.E. 517, 519 (1933)).

123. *Id.*

124. *Id.*

125. *Id.* at 631–32, 634, 32 S.E.2d at 36–37, 38 (“Defendants deny any agreement or consent to waive the time of delivery of potatoes under the 1943 contract and deny that *Whitehurst and Reaves* requested an extension of the time.”).

126. Justice Denny’s opinion says nothing about estoppel. The opinion does, however, mention that the FCX manager “wanted every potato” that the farmer could sell, and that the farmer did deliver eighty-six carloads of potatoes to FCX’s consignees under authority of the 1943 contract. *Id.* at 631–32, 32 S.E.2d at 36.

clauses.<sup>127</sup>

The final Supreme Court of North Carolina decision in descent from *Allen Bros.* remains the most frequently cited.<sup>128</sup> In *Childress v. C.W. Myers Trading Post, Inc.*,<sup>129</sup> Clyde and Edith Childress entered into a two-part contract to purchase a lot in the Old Town subdivision of Winston-Salem, North Carolina, and to hire the defendant corporation to build a house for them on the lot.<sup>130</sup> The contract contained various building specifications and a requirement that work on the house be complete by August 21, 1956.<sup>131</sup> The contract contained a NOM clause that stated: "It is agreed that any substantial variation from the terms of this contract to be binding shall be in writing [sic] and signed by the parties hereto."<sup>132</sup> When finally completed nearly two months after the date specified in the agreement, the constructed house deviated in a number of respects from the contract specifications.<sup>133</sup> The Childresses instituted an action for damages to recover for the defendant's breaches.<sup>134</sup> The defendant's answer admitted the respects in which the house deviated from the contract but averred that the deviations were made at the request of, or were consented to by, the plaintiffs in each instance.<sup>135</sup>

The contract in *Childress* was a Janus-like instrument. The portions of the agreement that related to the purchase of the underlying real property were within the Statute of Frauds and were, therefore, required to be in writing.<sup>136</sup> The portions relating to the

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127. See *Childress v. C.W. Myers Trading Post, Inc.*, 247 N.C. 150, 154, 100 S.E.2d 391, 394 (1957); *Son-Shine Grading, Inc. v. ADC Constr. Co.*, 68 N.C. App. 417, 422, 315 S.E.2d 346, 348-49 (1984); *W.E. Garrison Grading Co. v. Piracci Constr. Co.*, 27 N.C. App. 725, 729, 221 S.E.2d 512, 515 (1975); *J.R. Graham & Son, Inc. v. Randolph County Bd. of Educ.*, 25 N.C. App. 163, 167-68, 212 S.E.2d 542, 544-45 (1975).

128. A number of cases decided by the court of appeals cite *Childress*, omitting reference to *Allen Bros.* or *Whitehurst*. See *Camp v. Leonard*, 133 N.C. App. 554, 554, 515 S.E.2d 909, 914 (1999); *Shields, Inc. v. Metric Constructors, Inc.*, 106 N.C. App. 365, 369-70, 416 S.E.2d 597, 600 (1992); *Pearce v. Am. Defender Life Ins. Co.*, 74 N.C. App. 620, 625-26, 330 S.E.2d 9, 13-14 (1985), *aff'd in part, rev'd in part*, 316 N.C. 461, 343 S.E.2d 174 (1986); *Biggers v. Evangelist*, 71 N.C. App. 35, 45, 321 S.E.2d 524, 531 (1984); *W.E. Garrison Grading Co. v. Piracci Constr. Co.*, 27 N.C. App. 725, 729, 221 S.E.2d 512, 515 (1975); *J.R. Graham & Son, Inc. v. Randolph County Bd. of Educ.*, 25 N.C. App. 163, 168, 212 S.E.2d 542, 545 (1975); *Fishel & Taylor v. Grifton United Methodist Church*, 9 N.C. App. 224, 227, 175 S.E.2d 785, 786 (1970).

129. 247 N.C. 150, 100 S.E.2d 391 (1957).

130. *Id.* at 151-52, 100 S.E.2d at 392.

131. *Id.* at 152, 100 S.E.2d at 392.

132. *Id.*

133. See *id.* at 152-53, 100 S.E.2d at 392-93.

134. *Id.* at 152, 100 S.E.2d at 392.

135. *Id.* at 153, 100 S.E.2d at 393.

136. *Id.* at 154, 100 S.E.2d at 393.

construction of the dwelling, e.g., "its size, the materials to be used, and the time for completion" could be in parol.<sup>137</sup> The court's opinion, written by Justice Rodman, did not determine whether the plaintiffs' conduct resulted in a waiver or modification of the contract. Justice Rodman focused instead on the trial judge's instructions to the jury, which contained several erroneous statements of law.<sup>138</sup> After quoting the same propositions regarding subsequent parol agreements and NOM clauses that were set forth in *Whitehurst & Reaves*,<sup>139</sup> the opinion concluded that if the parties orally assented to extend the time for completion of the building, the parties would be bound thereby, notwithstanding the NOM clause.<sup>140</sup>

*Childress*, now nearly fifty years old, is the last decision rendered by the Supreme Court of North Carolina involving application of a NOM clause. Since then the state supreme court has not opined on this issue; instead, the North Carolina Court of Appeals has had the field to itself,<sup>141</sup> deciding a number of cases involving common law principles of contract modification, waiver, or estoppel.<sup>142</sup> A majority of these cases involved one of the most familiar factual settings for

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137. *Id.*

138. *See id.* at 154–55, 100 S.E.2d at 394.

139. *See id.* at 154, 100 S.E.2d at 394 (containing a substantial portion of the *Whitehurst & Reaves* quotation presented, *supra*, text accompanying note 122).

140. *Id.* at 156, 100 S.E.2d at 395.

141. The opinion of the United States District Court for the Eastern District of North Carolina in *Salem Towne Apartments, Inc. v. McDaniel & Sons Roofing Co.*, 330 F. Supp. 906 (E.D.N.C. 1970), appears to be the only decision on the issue by a court with widely reported decisions since the 1957 decision of the court of appeals. Like most of the court of appeals cases, *Salem Towne Apartments* arose in the context of a construction dispute. The owner of an apartment project brought an action against a roofing contractor and a shingle manufacturer to recover for discoloration in the shingles that were used to reroof the project. The owner ordered the contractor to resume work, relying on the shingle manufacturer's promise that the color would correct itself within 90 days. *See id.* at 908–09. The court held that since the roofs were properly installed, the roofing contractor was paid, and his work was accepted, the owner had waived any rights of action he had against the contractor and was limited to a warranty claim against the shingle manufacturer. *See id.* Thus, the court viewed the owner's actions as falling under the doctrine of waiver. *Id.* at 911 ("The doctrine of waiver in proper cases is now as firmly established as the doctrine of the rigidity and inflexibility of the written word.") (quoting *H.M. Wade Mfg. Co. v. Lefkowitz*, 204 N.C. 449, 453, 168 S.E. 517, 519 (1933)).

142. *See* *Camp v. Leonard*, 133 N.C. App. 554, 562, 515 S.E.2d 909, 915 (1999); *Shields v. Metric Constructors, Inc.*, 106 N.C. App. 365, 416 S.E.2d 597 (1992); *Pearce v. Am. Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E.2d 9, 13–14 (1985), *aff'd in part, rev'd in part*, 316 N.C. 461, 343 S.E.2d 174 (1986); *Biggers v. Evangelist*, 71 N.C. App. 35, 321 S.E.2d 524 (1984); *W.E. Garrison Grading Co. v. Piracci Constr. Co.*, 27 N.C. App. 725, 221 S.E.2d 512 (1976); *J.R. Graham & Son, Inc. v. Randolph County Bd. of Educ.*, 25 N.C. App. 163, 212 S.E.2d 542 (1975); *Fishel & Taylor v. Grifton United Methodist Church*, 9 N.C. App. 224, 175 S.E.2d 785 (1970).

oral modification problems, a dispute over change orders in a construction project.<sup>143</sup> As such they can be viewed as direct descendants of *Childress* and *Allen Bros.*, with *Childress* sometimes being cited by them as authority.<sup>144</sup> Since the adoption of the UCC in North Carolina, the court of appeals has also decided several oral modification cases involving contracts for the sale of goods that are now governed by section 2-209 UCC.<sup>145</sup> These cases are in a sense heirs of *Whitehurst & Reaves*,<sup>146</sup> which if decided today would be an Article 2 case.<sup>147</sup> More accurately, all of the court of appeals cases are analytical successors of the cases applying the common law of waiver, modification, and estoppel decided by the Supreme Court of North Carolina between 1906 and 1957. A brief examination of these cases confirms that the court of appeals consistently follows the higher court's reasoning, as well as its failure to identify clearly the common law doctrine at play under each set of facts.

Five of the court of appeals cases involved construction projects in which a change in the scope of a subcontractor's work was necessary either because of unanticipated site conditions or an owner's decision, typically communicated by a supervising general contractor or an architect, to change plans in midstream.<sup>148</sup> In the

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143. Eight of the cases discussed or cited in this Article involved construction disputes. See *Teer v. George A. Fuller Co.*, 30 F.2d 30 (4th Cir. 1999); *Salem Towne Apartments*, 330 F. Supp. 906 (E.D.N.C. 1970); *Childress*, 247 N.C. at 150, 100 S.E.2d at 391; *Allen Bros. v. Raleigh Sav. Bank & Trust Co.*, 180 N.C. 608, 105 S.E. 401 (1920); *Shields*, 106 N.C. App. at 365, 416 S.E.2d at 597; *Son-Shine Grading, Inc. v. ADC Constr. Co.*, 68 N.C. App. 417, 315 S.E.2d 346 (1984); *W.E. Garrison Grading Co.*, 27 N.C. App. at 725, 221 S.E.2d at 512; *J.R. Graham & Son*, 25 N.C. App. at 163, 212 S.E.2d at 542.

144. *Childress* is cited in *Fishel & Taylor* and *Biggers*. See *Biggers*, 71 N.C. App. at 45, 321 S.E.2d at 531; *Fishel & Taylor*, 9 N.C. App. at 227, 175 S.E.2d at 786.

145. N.C. GEN. STAT. § 25-2-209 (2001). See *Mulberry-Fairplains Water Ass'n v. Town of N. Wilkesboro*, 105 N.C. App. 258, 412, S.E.2d 910 (1992); *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 337 S.E.2d 616 (1985); *Bone Int'l, Inc. v. Johnson*, 74 N.C. App. 703, 707, 329 S.E.2d 714, 717 (1985).

146. 224 N.C. 628, 32 S.E.2d 34 (1944). For a discussion of this case, see *supra* notes 108–23 and accompanying text.

147. Article 2 applies to the sale of “goods,” which it defines as “all things . . . which are movable at the time of identification to the contract for sale.” § 25-2-105.

148. The discussion that follows examines three of the cases, *J.R. Graham & Son, Inc. v. Randolph County Board of Education*, 25 N.C. App. 163, 212 S.E.2d 542 (1975), *W.E. Garrison Grading Co. v. Piracci Construction Co.*, 27 N.C. App. 725, 221 S.E.2d 512 (1976), and *Son-Shine Grading, Inc. v. ADC Construction Co.*, 68 N.C. App. 417, 315 S.E.2d 346 (1984). The other two cases, although citing *Childress* as authority for the proposition that NOM clauses are not enforceable, dealt with the simpler issue of whether there was evidence of a subsequent oral agreement. See *Camp v. Leonard*, 133 N.C. App. 554, 562, 515 S.E.2d 909, 915 (1999) (holding that plaintiff homeowner's “actions do not indicate that he relied upon [construction lender] to monitor construction progress for his benefit”); *Shields v. Metric Constructors, Inc.*, 106 N.C. App. 365, 369–70, 416 S.E.2d 597,



first such case, *J.R. Graham & Son, Inc. v. Randolph County Board of Education*,<sup>149</sup> a contract for construction of a high school contained a NOM clause that required change orders to be in writing.<sup>150</sup> The architect for the project instructed the contractor to perform additional work beyond the original specifications, and the contractor complied.<sup>151</sup> Judge Arnold of the court of appeals, affirming the trial court's conclusion that the contractor was "entitled to recover the cost of additional work not called for in the contracts,"<sup>152</sup> held:

The provisions of a written contract may be modified or waived by a subsequent oral agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. This principle has been sustained even where the instrument provides for any modification of the contract to be in writing.<sup>153</sup>

The court of appeals reached the same result in *W.E. Garrison Grading Co. v. Piracci Construction Co.*<sup>154</sup> and *Son-Shine Grading, Inc. v. ADC Construction Co.*<sup>155</sup> These cases, like the early Fourth Circuit decision in *Teer v. George A. Fuller Co.*,<sup>156</sup> involved plaintiffs who were subcontractors hired to perform grading and excavation work on a building site.<sup>157</sup> The written agreements in both cases contained NOM clauses. In *W.E. Garrison Grading Co.*, the subcontractor performed "borrow and mucking work" in excess of the original contract estimates due to the owner's "substantial

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600 (1992) (stating that where written agreement between roofing contractor and general contractor contained NOM clause and roofing contractor notified general contractor of an additional cost in materials due to the general contractor's adoption of a new set of construction plans, issue arose as to whether the parties entered into a subsequent oral agreement changing the gauge of the roofing material).

149. 25 N.C. App. 163, 212 S.E.2d 542 (1975).

150. *Id.* at 167, 212 S.E.2d at 544.

151. *Id.* at 168, 212 S.E.2d 545.

152. *Id.* at 167, 212 S.E.2d at 544.

153. *Id.* at 167-68, 212 S.E.2d at 544-45 (quoting *Childress v. C.W. Myers Trading Post*, 247 N.C. 150, 154, 100 S.E.2d 391, 394 (1957); *Whitehurst & Reaves v. FCX Fruit & Vegetable Serv., Inc.*, 224 N.C. 628, 636-37, 32 S.E.2d 34, 39 (1944)); see *supra* note 122 and accompanying text. The court of appeals had quoted the same passage from *Childress* five years earlier in reversing a judgment on the pleadings in favor of plaintiff architects, who contended that their written contract to design a church sanctuary could not be modified by a subsequent oral agreement because it contained a NOM clause. See *Fishel & Taylor v. Grifton United Methodist Church*, 9 N.C. App. 224, 227, 175 S.E.2d 785, 786 (1970).

154. 27 N.C. App. 725, 221 S.E.2d 512 (1975).

155. 68 N.C. App. 417, 315 S.E.2d 346 (1984).

156. 30 F.2d 30 (4th Cir. 1929). *Teer* was discussed in Part II above.

157. See *Son-Shine Grading*, 68 N.C. App. at 417, 315 S.E.2d at 347; *W.E. Garrison Grading Co.*, 27 N.C. App. at 726-27, 221 S.E.2d at 513.

deviation from the final site plan” at the request and under the supervision of the owner’s engineer.<sup>158</sup> The court of appeals, quoting the language from *J.R. Graham & Son* and *Childress*, held that this conduct was of the type that “naturally and justly leads the other party to believe the provisions of the contract are modified or waived,” and was therefore enforceable as modified against the owner.<sup>159</sup>

In *Son-Shine Grading*, the general contractor’s field supervisor orally instructed the grading subcontractor to perform additional excavation work despite a requirement in the written agreement that rock requiring removal would first be measured by the general contractor’s engineers.<sup>160</sup> The court of appeals, paraphrasing the language of *Childress*,<sup>161</sup> held that the trial court’s findings of fact were “clearly sufficient” to support the conclusion that “the contract terms governing the measurement of the amount of rock removed was modified by a mutual oral agreement.”<sup>162</sup>

Two practical considerations emerge from a careful reading of *W.E. Garrison Grading Co.* and *Son-Shine Grading*. First, the court of appeals did not explicitly analyze whether the oral modification that contravened the NOM clause in each case was supported by consideration. This seems to be the result of the court’s attention to facts that in both cases revealed pronounced elements of estoppel. In *W.E. Garrison Grading Co.*, the subcontractor performed the additional borrow and mucking excavation, and the owner paid for a portion of it.<sup>163</sup> After the subcontractor in *Son-Shine Grading* performed additional work, the general contractor received and paid some of the bills—which meant that he had notice of the quantity of work being performed—and then allowed his engineers to continue working on other jobs.<sup>164</sup> It appears that when substantial issues of waiver and estoppel are present, the court of appeals has not carefully analyzed whether consideration was present in deciding whether to invalidate a NOM clause. Under circumstances where estoppel is

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158. *W.E. Garrison Grading Co.*, 27 N.C. App. at 727–29, 221 S.E.2d at 513–15.

159. *Id.* at 729, 221 S.E.2d at 515 (citations omitted) (citing *J.R. Graham & Son, Inc. v. Randolph County Bd. of Educ.*, 25 N.C. App. 163, 167–68, 212 S.E.2d 542, 544–45 (1975)).

160. *Son-Shine Grading*, 68 N.C. App. at 420, 315 S.E.2d at 348–49.

161. See *supra* note 153 and accompanying text.

162. *Son-Shine Grading*, 68 N.C. App. at 422, 315 S.E.2d at 349.

163. *W.E. Garrison Grading Co.*, 27 N.C. App. at 728, 221 S.E.2d at 514.

164. *Son-Shine Grading*, 68 N.C. App. at 423, 315 S.E.2d at 350. “In doing so, ADC ratified the modification made and the appellants are estopped to deny Mabe’s authority to make it. To hold otherwise would be to penalize plaintiff for ADC’s own derelictions, which the law does not permit.” *Id.* at 423, 315 S.E.2d at 350 (citations omitted).

used as a substitute for consideration, the court sees no need to draw attention to what it is doing.

Second, the extent of a corporate agent's authority is often an underlying issue in NOM clause cases. In both *W.E. Garrison Grading Co.* and *Son-Shine Grading*, the apparent or implied authority of an on-site engineer or supervisor to agree to change orders was in question.<sup>165</sup> As the cases show, the court of appeals has not hesitated to uphold trial court findings that a supervisor or professional adviser, on whom a party depended to carry out a particular project or task, had sufficient authority to agree to substantial oral modifications on behalf of his principal.<sup>166</sup>

The North Carolina appellate decisions that have examined the enforceability of NOM clauses aptly illustrate the core issue identified in Part I of this Article. In every case, the parties included a NOM clause in their original written agreement. In the course of performance, a party suggested a change by words or conduct, and the other party relied on those words or that conduct to its own detriment. The party who suggested the change then attempted to enforce the original agreement by invoking the NOM clause, usually in order to avoid having to pay a higher price for additional work or a different quantity of goods. In addition, the party argued that its agent who approved the change did not have authority to do so. Whatever array of facts a particular case may present, there has usually been evidence of reasonable, good-faith reliance on the suggesting party's (or its agent's) word, with the result that the court invokes principles of reliance or estoppel to prevent the injustice that would occur if the NOM clause were enforced.

## V. THE EFFECT OF THE STATUTE OF FRAUDS

Some contracts are governed by the Statute of Frauds. These contracts are unenforceable unless they are in writing and signed by the person to be bound by the contract's terms.<sup>167</sup> A nonexhaustive

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165. See *Son-Shine Grading*, 68 N.C. App. at 420, 315 S.E.2d at 348; *W.E. Garrison Grading Co.*, 27 N.C. App. at 729, 221 S.E.2d at 515.

166. Cf. *Biggers v. Evangelist*, 71 N.C. App. 35, 44-45, 321 S.E.2d 524, 530-31 (1984) (holding that where written contract for sale of real property contained NOM clause, oral agreement between parties' lawyers to modify property description in deed was sufficient to modify description in sale contract); *J.R. Graham & Son, Inc. v. Randolph County Bd. of Educ.*, 25 N.C. App. 163, 167-68, 212 S.E.2d 542, 544-45 (1975) (finding oral modification where architect instructed plaintiff to perform work additional to that in the contract and supervised and approved payment of invoice).

167. For a thorough review of the types of contracts that are within the North Carolina Statute of Frauds, see HUTSON & MISKIMON, *supra* note 32, §§ 4-18 to 4-70, at 328-416.

list of contracts governed by the Statute of Frauds in North Carolina includes the following: (1) contracts involving interests in real property (including contracts to sell land, certain leases, mortgages, deeds of trust, easements, restrictive covenants, profits *a prendre*, mineral leases and mining contracts, and certain contracts regarding timber and growing crops);<sup>168</sup> (2) guaranty and suretyship contracts;<sup>169</sup> (3) contracts for the sale of goods for a price of \$500 or more<sup>170</sup> or for the lease of goods;<sup>171</sup> (4) certain contracts by executors and administrators of decedents' estates;<sup>172</sup> (5) contracts that make unenforceable any oral promise to pay a debt where the effect of the promise is to fix a new date from which the statute of limitations runs;<sup>173</sup> (6) covenants not to compete made as part of an employment contract or an agreement for the sale of a business;<sup>174</sup> (7) certain contracts between a husband and wife releasing rights in real estate and future income;<sup>175</sup> (8) separation agreements;<sup>176</sup> (9) contracts made by or on behalf of a city;<sup>177</sup> and (10) commercial loan commitments in excess of \$50,000.<sup>178</sup>

An article on NOM and NOW clauses is not the place to discuss interpretive problems incident to the Statute of Frauds and whether the statute applies after the original contract is concluded. Such issues are better left to scholarly commentary on the Statute of Frauds itself. Because the applicability of the "public" Statute of Frauds to certain types of contracts inevitably duplicates the effects of a "private" statute of frauds in the form of NOM and NOW clauses, it is important for North Carolina lawyers to understand that contracts within the Statute of Frauds will receive the same practical benefits as if a NOM or NOW clause had been included in the writing memorializing the parties' original agreement.

The traditional rule embraced by a majority of American courts is that in order to be enforceable, modifications of contracts within the Statute of Frauds must comply again with the requirements of the

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168. N.C. GEN. STAT. § 22-2 (2001).

169. *Id.* § 22-1.

170. *Id.* § 25-2-201(1).

171. *Id.* § 25-2A-201(1)(b).

172. *Id.* § 22-1.

173. *Id.* § 1-26.

174. *Id.* § 75-4.

175. *Id.* § 52-10(a).

176. *Id.* § 52-10.1.

177. *Id.* § 160A-16.

178. *Id.* § 22-5.

Statute with a signed writing.<sup>179</sup> This is also the rule in North Carolina: even if a writing memorializing the original agreement is sufficient to satisfy the Statute of Frauds, the party seeking to enforce the contract as modified will have no contract remedy if the writing does not embody the alleged modification.<sup>180</sup>

The Supreme Court of North Carolina occasionally has recognized exceptions to the common law rule based on theories of estoppel or waiver. For example, in *Johnson v. Noles*<sup>181</sup> the plaintiff, Johnson, had a written option to purchase the defendants' land. At the closing, Johnson's lawyer informed the defendants that his title investigation had disclosed certain defects in the title.<sup>182</sup> The lawyer suggested the closing be delayed for several days to give him time to clear the title.<sup>183</sup> The evidence at trial tended to show that the defendants orally agreed to the extension in order to provide a deed with full covenants and warranties of title.<sup>184</sup> When Johnson's lawyer tendered the full purchase price at the rescheduled closing less than one week later, the defendants refused to sign the deed on the ground that the agreement to an extension was a parol modification to the original option contract and did not satisfy the Statute of Frauds.<sup>185</sup> The Supreme Court of North Carolina, speaking through Justice Denny, held that the defendants were estopped from refusing to perform the agreement as modified because they had induced Johnson to delay the closing in order to enable them to deliver clean

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179. See, e.g., *Van den Broeke v. Bellanca Aircraft Corp.*, 576 F.2d 582, 584 (5th Cir. 1978) (holding that a buyer's return of a warranty postcard was insufficient to operate as an enforceable modification of the warranty); *Green Constr. Co. v. First Indem. of Am. Ins. Co.*, 735 F. Supp. 1254, 1261 (D.N.J. 1990) (holding that a purported oral modification was ineffective for failure to comply with the Statute of Frauds); *Cooley v. Big Horn Harvestore Sys., Inc.*, 767 P.2d 740, 744 (Colo. App. 1988) (holding that a warranty modification must comply with the Statute of Frauds), *aff'd in part, rev'd in part*, 813 P.2d 736 (Colo. 1991).

180. See, e.g., *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 243-44, 152 S.E.2d 85, 88 (1967) (holding that modification was unenforceable because the writing upon which plaintiff, a purchaser of land, relied contained only the terms of the original agreement and did not embody the terms of the alleged modification); *Concrete Mach. Co. v. City of Hickory*, 134 N.C. App. 91, 95, 517 S.E.2d 155, 158 (1999) (holding that the purported oral agreement to relocate a sewer easement was unenforceable for failure to comply with the Statute of Frauds). See generally HUTSON & MISKIMON, *supra* note 32, § 4.4, at 283-84 (citing both of these cases and providing a comprehensive discussion of the traditional rule).

181. 224 N.C. 542, 31 S.E.2d 637 (1944).

182. *Id.* at 543, 31 S.E.2d at 638.

183. *Id.*

184. *Id.* at 543-44, 31 S.E.2d at 638.

185. *Id.*

title to the land.<sup>186</sup> In other cases, the state supreme court avoided injustice by construing a subsequent oral undertaking as a waiver of a term in the original agreement, thus bypassing the requirement that a modification of the original written agreement satisfy the Statute of Frauds.<sup>187</sup>

The effect of the Statute of Frauds on contracts that are subsequently orally modified is aptly illustrated by the decision of the North Carolina Court of Appeals in *Varnell v. Henry M. Milgrom, Inc.*,<sup>188</sup> a case decided under Article 2 of the UCC. Varnell, a peanut farmer, executed a written contract with peanut buyer Henry M. Milgrom, Inc. under which Milgrom agreed to purchase all of Varnell's peanut crop grown under a federal crop quota program.<sup>189</sup> The agreed price for the peanuts was \$640 per ton.<sup>190</sup> According to Varnell, Milgrom later agreed to purchase, in addition to Varnell's quota program peanuts, all other peanuts grown by Varnell.<sup>191</sup> As part of the new arrangement, Milgrom would pay a reduced price of \$600 per ton for all of Varnell's peanuts.<sup>192</sup> The new arrangement was

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186. *Id.* at 546, 31 S.E.2d at 640. Justice Denny stated:

The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance is, to say the least, very startling, and, if well founded, will enable the defendants in this case to make use of the Statute of Frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff.

*Id.* (citation omitted); see also *Alston v. Connell*, 140 N.C. 362, 368-69, 53 S.E. 292, 295 (1906) (holding that where plaintiff consented to delay in the closing of a purchase option at defendant's request, defendant could not later avoid the agreement on the basis that parol modification was not placed in writing).

187. See *Fletcher v. Jones*, 314 N.C. 389, 394, 333 S.E.2d 731, 735 (1985). In *Fletcher*, the state supreme court, speaking through Justice Frye, held that the plaintiff, a purchaser of land, was entitled to specific performance where the defendant-seller, after the original deadline for closing stipulated in the written contract had expired, repeatedly assured the plaintiff that closing would occur as soon as his divorce became final. "By characterizing the defendant's oral promise of an extension of time as a waiver, the supreme court avoided ruling on whether such an extension needed to be in writing." HUTSON & MISKIMON, *supra* note 32, § 4.4, at 285 n.17 (citing *Fletcher*, 314 N.C. at 389, 333 S.E.2d at 731); cf. *Fletcher v. Jones*, 69 N.C. App. 431, 438, 317 S.E.2d 411, 416 (1984) (Becton, J., dissenting), *aff'd in part, rev'd in part*, 314 N.C. 389, 333 S.E.2d 731 (1985) (stating that the better analysis was to estop the defendant from raising the Statute of Frauds so as to prevent him from defrauding the plaintiff). The court of appeals and supreme court opinions in the *Fletcher* litigation are good examples of the relative interchangeability of the waiver and estoppel doctrines in North Carolina and the analytical lengths to which the appellate courts will go to avoid unfairness.

188. 78 N.C. App. 451, 337 S.E.2d 616 (1985). *Varnell* is discussed in HUTSON & MISKIMON, *supra* note 32, § 8-4, at 528.

189. *Varnell*, 78 N.C. at 452, 337 S.E.2d at 617.

190. *Id.*

191. *Id.*

192. *Id.*

not reduced to writing.<sup>193</sup> Milgrom later refused to take delivery of any peanuts.<sup>194</sup> Varnell was forced to sell his peanuts elsewhere at prices substantially below \$600 per ton.<sup>195</sup>

Because Varnell's agreement with Milgrom was a contract for the sale of goods for the price of \$500 or more, it was subject to the Statute of Frauds.<sup>196</sup> The main issue before the court of appeals was whether the alleged agreement changing the price term of the original contract from \$640 to \$600 per ton was a novation or a new agreement as required to resatisfy the Statute of Frauds, or instead, an attempt at modification of the original agreement that operated as a waiver.<sup>197</sup> Section 2-209(4) of the UCC provides: "Although an attempt at modification or rescission does not satisfy the requirements of [the Statute of Frauds] . . . it can operate as a waiver."<sup>198</sup>

Varnell argued that the alleged oral agreement was not a novation but a modification, and as such "operate[d] as a waiver" of Milgrom's ability to assert the Statute of Frauds.<sup>199</sup> The court of appeals rejected this reasoning, relying on the language of section 2-209(5)<sup>200</sup> to hold that "waiver" in section 2-209(4) "is employed with reference to the terms of the contract, not the Statute of Frauds."<sup>201</sup> The official comment to section 2-209(4) states that the intent of the section is "to prevent contractual provisions excluding modification except by a signed writing from limiting . . . the legal effect of the parties' actual later conduct."<sup>202</sup> Subsection (4) "is directed primarily toward *conduct* after formation of the contract which will constitute a

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193. *Id.*

194. *Id.*

195. *Id.* After Varnell commenced a legal action to recover for the lost sale, Milgrom tendered payment for the quota peanuts.

196. N.C. GEN. STAT. § 25-2-201 (2001).

197. *Varnell*, 78 N.C. App. at 454, 337 S.E.2d at 618 (stating that "the record does not reveal whether the parties intended at the time of the alleged agreement to substitute a new contract for the original one or simply to modify it").

198. § 25-2-209(4) (2001).

199. *Varnell*, 78 N.C. App. at 454, 337 S.E.2d at 618.

200. § 25-2-209(5). The statute states:

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

*Id.*

201. *Varnell*, 78 N.C. App. at 455, 337 S.E.2d at 619.

202. § 25-2-209 N.C. cmt. (2001).

waiver . . . .”<sup>203</sup> Varnell’s pleadings alleged no conduct of either party consistent with the alleged oral agreement.<sup>204</sup> Judge Eagles was careful to point out that Varnell “did not plant additional peanuts in reliance on the alleged oral agreement, nor did he allege any other conduct tending to show reliance.”<sup>205</sup>

Although the published opinion does not reveal whether Varnell’s contract with Milgrom contained a NOM clause, the presence of a NOM clause would not have altered the court’s decision. Section 2-209(2) is the only provision of the General Statutes of North Carolina that specifically validates NOM clauses: “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.”<sup>206</sup> Had Varnell’s and Milgrom’s oral attempt to change the contract price resulted in post-formation conduct consistent with a waiver of the NOM clause, the waiver might have been effective pursuant to section 2-209(3).<sup>207</sup> Subsections (2) and (3) are at bottom duplicative: one affects private statutes of frauds erected by the parties in the form of NOM clauses, and the other affects the public Statute of Frauds as embodied in the General Statutes of North Carolina.<sup>208</sup> In essence the legislature, by enacting the Statute of Frauds contained in section 2-201 of the UCC, imposed a NOM clause on the Varnell-Milgrom contract. The court of appeals simply enforced it by refusing to apply the statutorily mandated waiver exception to the facts of the case.<sup>209</sup>

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203. *Id.*

204. *See Varnell*, 78 N.C. App. at 456, 337 S.E.2d at 619.

205. *Id.*

206. § 25-2-209(2).

207. *See id.* § 25-2-209(3).

208. It could be argued that Article 2’s private statute of frauds is more powerful than the public Statute of Frauds because it can bar enforcement in situations where an exception to the Statute of Frauds would prevail.

209. *Cf. Mulberry-Fairplains Water Ass’n, Inc. v. Town of N. Wilkesboro*, 105 N.C. App. 258, 267–68, 412 S.E.2d 910, 916–17 (1992) (holding that where defendant failed to plead the Statute of Frauds as a defense to the alleged oral modification of a contract for the sale of water, his or her right to assert the Statute of Frauds had been waived, and alleged modification would be enforced under doctrine of equitable estoppel); *Bone Int’l, Inc. v. Johnson*, 74 N.C. App. 703, 706–07, 329 S.E.2d 714, 716–17 (1985) (holding that where the buyer’s evidence showed that the buyer had relied to his detriment on the seller’s oral waiver of warranty disclaimers in written sales agreement, summary judgment in favor of the seller of used trucks was improper even though there was no writing evidencing oral modification to the sales agreement). *Bone Int’l* and *Mulberry-Fairplains* are discussed in HUTSON & MISKIMON, *supra* note 32, § 8-4, at 528 (*Bone Int’l*) and 531–



## VI. CERTAIN PRACTICAL RAMIFICATIONS

At this point it should not be difficult to deduce that where NOM and NOW clauses are concerned, there are four basic types of contracts: (1) agreements governed by North Carolina law that are within the North Carolina Statute of Frauds, including agreements governed by Article 2 of the UCC; (2) agreements governed by North Carolina law that are outside the North Carolina Statute of Frauds; (3) agreements governed by the law of another state that are within the Statute of Frauds as adopted by that state's legislature;<sup>210</sup> and (4) agreements governed by the law of another state that are outside that state's Statute of Frauds. The purpose of this Part VI is to reflect on the settings in which NOM and NOW clauses are usually drafted, and then to consider some practical ramifications of each contract type.

Most well-drafted contracts contain some sort of NOM clause. Why this should be the case is unclear. The answer may lie in ready access to a law firm's forms file and the indiscriminate use of cutting and pasting within documents that are easily retrieved from a computer database containing thousands of contracts. Agreements that do not need NOM clauses because they are already within the Statute of Frauds include the clauses out of an abundance of caution. But lawyers drafting agreements for which NOM clauses are useless because they are outside the Statute of Frauds nevertheless insist on inserting the clauses, either from ignorance or hope that the court might enforce the clause in derogation of the common law.

There appears to be no reason to insert a NOM clause in contracts that are within the North Carolina Statute of Frauds. Because modifications of contracts within the Statute of Frauds must resatisfy the requirements of the Statute with a signed writing,<sup>211</sup> the Statute inevitably duplicates the effect of the NOM clause.<sup>212</sup> Moreover, there seems to be little reason to insert a NOM clause in a

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32 (*Mulberry-Fairplains*).

210. Practitioners should exercise caution in determining whether an agreement governed by the law of a different jurisdiction is within the Statute of Frauds. Other states, like North Carolina, may codify their Statutes of Frauds in scattered sections of their compiled statutes.

211. See § 25-2-209(3); *Carr v. Good Shepherd Home, Inc.*, 269 N.C. 241, 243-44, 152 S.E.2d 85, 88 (1967); *HUTSON & MISKIMON*, *supra* note 32, § 4.4, at 283-84. There is a narrow category of sales contracts (those in which the price of the goods is less than \$500) for which section 2-209(2) of the UCC validates the enforceability of NOM clauses. See § 25-2-209(2). Written agreements for sales contracts of this size are rarely seen. For other sales contracts, section 2-209(3) controls.

212. There is of course no harm, other than prolixity, in including a NOM clause in contracts that are within the Statute of Frauds.

contract that is outside the North Carolina Statute of Frauds, at least as the law now stands. A party that seeks to enforce a NOM clause in a contract outside the Statute will be disappointed, because the common law will hold the clause to be unenforceable. For these reasons, North Carolina lawyers would be well advised to consider whether there is any point in including NOM clauses in the contracts they draft.

As the law now stands, NOM clauses are unnecessary in contracts that are governed by North Carolina law. If, on the other hand, the North Carolina General Assembly were to adopt a statute enforcing NOM clauses as recommended in Part VII below, and if that statute were to apply retroactively (either by express legislation or judicial interpretation) to contracts existing at the time of its enactment, inclusion of a NOM clause could be helpful to clients. If for that reason only, there is no harm, and perhaps some residual benefit, in continuing to include NOM clauses in contracts governed by North Carolina law.

For contracts governed by the laws of states other than North Carolina, the lawyer should ascertain whether the governing state law contains a statute enforcing NOM clauses. New York law is often selected to govern in complex commercial transactions, and that state has adopted such a statute.<sup>213</sup> If the contract in question is governed by the law of such a state, the lawyer should include a NOM clause if it is in the best interest of the client.

From the brief review in Part V above of the types of contracts that fall within the North Carolina Statute of Frauds, it is clear that the Statute of Frauds is a meaningful enforcement mechanism for NOM clauses in a limited class of cases.<sup>214</sup> North Carolina lawyers carrying on general business practices, however, are likely to handle a great variety of contracts for which the subject matter is not within the Statute of Frauds. For example, the complex contractual edifices in which corporate acquisitions and business combinations take place—mergers, sales of stock, sales of assets or divisional businesses, share exchanges and the like—are typically outside the Statute of Frauds. The documents that memorialize fundamental corporate transactions of these types often entail execution and performance of a host of related documents: stock purchase, asset purchase, or merger agreements containing executory covenants (for example, so-

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213. N.Y. GEN. OBLIG. LAW § 15-301(1) (McKinney 2001).

214. The “public” Statute of Frauds eliminates the need for parties to legislate “private” statutes of frauds. *See supra* Part V.

called "earn-out" provisions); escrow agreements under which portions of the purchase price are retained pending the occurrence of certain events; employment agreements for target company management;<sup>215</sup> promissory notes for portions of the purchase price and agreements pledging collateral to secure performance of those notes; and a miscellany of other agreements reflecting contractual undertakings ancillary but nonetheless essential to the main transaction.

When counsel and clients meet at the closing table to execute and deliver the array of paper over which they have labored so diligently, the last thing on their minds is the possibility that the agreements could be modified by a subsequent oral agreement. Yet lawyers who would recoil at the thought of advising a client to execute a stock purchase agreement without a NOM clause are often unaware of the clause's inefficacy in the face of a subsequent oral modification, supported by consideration, which can be proved by clear and convincing parol evidence.<sup>216</sup> Because the oral modification must be proved by clear and convincing evidence, the party claiming modification may be unable to survive the other party's motion for summary judgment. Once a summary judgment motion is made, the modification claimant will need to present, in opposing affidavits and other papers, clear and convincing evidence of mutual assent and consideration for the modification.<sup>217</sup>

On the less glamorous side of transactional practice, the problem

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215. By contrast, noncompetition agreements for owners of the target company who are "cashing out" are subject to the Statute of Frauds in North Carolina. *See* § 75-4.

216. *See, e.g., Ford Motor Credit Co. v. Jordan*, 5 N.C. App. 249, 253, 168 S.E.2d 229, 232 (1969) (stating that "[e]vidence of an oral agreement which modifies a written contract should be clear and convincing"). The enforceability of NOM clauses is counterbalanced by other principles of contract law that can protect a party from false claims of contract modification. These other principles are: (1) the requirement of mutual assent as to the material terms of the modification; (2) the requirement of consideration for modifications at common law (that is, evidence of a bargained-for exchange); and (3) the requirement that mutual assent and consideration be proved with clear and convincing evidence.

217. The rule in both state and federal courts is that when ruling on a motion for summary judgment in general, the trial court must apply the clear and convincing evidentiary standard. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986); *Proffitt v. Greensboro News & Record, Inc.*, 91 N.C. App. 218, 298, 371 S.E.2d 292, 297 (1998); *Varner v. Bryan*, 113 N.C. App. 697, 704-07, 404 S.E.2d 295, 299-301 (1994). The parties' inability to cut off a modification claim as early as possible, i.e., at the pleading stage with a motion to dismiss under Rule 12(b)(6) rather than at summary judgment, may mean that summary judgment is the first stage at which an oral modification claim can be defeated. This ensures that a disputed oral modification will entail all the expenses of litigation, i.e., expenses associated with depositions, discovery, motions, etc., other than the expenses associated with a trial itself.

may be worse. Entering into stand-alone agreements is the stuff of life for many businesses. Lawyers review, negotiate, and draft contracts of seemingly endless variety for business clients every day. To list only a few examples, such contracts include services agreements, employment or consulting agreements, confidentiality agreements preparatory to cooperative business activity, joint research or product development agreements, and technology licensing agreements. These self-contained agreements may carry financial stakes ranging from a few thousand dollars to millions in potential revenues or expenditures. Clients would no more consider entering into a significant stand-alone contract on a purely oral basis than they would a merger agreement. Parties to a heavily negotiated contract may spend days or months hammering out language that accurately reflects the business terms. At the same time, their lawyers are focused on representations, warranties, affirmative and negative covenants, indemnification provisions, and other “substantive” clauses of the agreement. Many of these complex agreements would be enforceable in the absence of a writing so long as their basic terms could be proved by oral testimony.

Whether the contract is within or outside the Statute of Frauds, a careful drafter should consider whether the client is likely to assert an oral modification and whether the client is likely to abide by the requirement of obtaining a written modification if the contract actually is changed in the future. Is the client a service provider or contractor who is the likely recipient of an oral change order and may have to decide whether the order can be honored?<sup>218</sup> Or is the client a purchaser of services or a property owner who is more likely to be the source of a change order? If the client is the former, a NOM clause may not be in the client’s interests; if the client is the latter, inserting a NOM clause may be advisable if the state law governing the contract includes a statute enforcing NOM clauses.

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218. NOM clauses may not always be in the client’s interest. For example, in services contracts the service provider often has multiple duties, while the customer’s primary obligation is simply to pay the purchase price. In this situation a NOM clause could work against the service provider’s interest if the customer changes the type of services he wishes to receive after performance has begun but fails to execute a confirmatory writing. The NOM clause might prevent the service provider from recovering for the undocumented services. Under the statute recommended in Part VII, however, reasonable, good-faith reliance on the service provider’s part could allow for recovery in the interest of justice.

## VII. A LEGISLATIVE RECOMMENDATION

The common law rule on the unenforceability of NOM clauses for contracts outside the Statute of Frauds has been the subject of important statutory inroads. Both New York and California have adopted statutes that purport to enforce provisions in written agreements that prohibit oral modification or rescission.<sup>219</sup> As has been noted elsewhere in this Article, North Carolina itself has validated NOM clauses that appear in certain limited classes of agreements, largely as the result of the General Assembly's adoption of uniform acts in particular fields of law.<sup>220</sup> These statutes are, at a superficial level, nothing more than legislative extensions of the Statute of Frauds; they carry out the parties' intentions as memorialized in their original agreement.

Changing the common law principle that NOM and NOW clauses are unenforceable is no simple matter. While contract law does not easily accommodate changes, it is difficult to modify the law itself without the aid of appellate judges.<sup>221</sup> In states that have adopted statutes reversing the common law rule that NOM and NOW clauses are unenforceable, the legislature's efforts have met with "surprisingly sharp resistance from the bench,"<sup>222</sup> as judges confronted with complicated facts have sought to achieve equitable results. The judiciary's main objection to a complete statutory reversal of the common law rule is the injustice worked by the reversal where one party has relied on the oral modification. Courts in states where NOM clauses have received legislative blessing have bent over backwards to avoid this harsh result by bringing to bear several creative mechanisms from the judicial toolbox: they have generously found that a writing in fact existed;<sup>223</sup> have held that the

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219. See CAL. CIV. CODE § 1698 (1985) (stating that a contract in writing may be altered by a contract in writing or by an executed oral agreement); N.Y. GEN. OBLIG. LAW § 15-301(1) (McKinney 2001) (stating that a written agreement that contains a provision forbidding oral change cannot be changed by an executory agreement unless such agreement is in writing and signed by the party against whom enforcement is sought or by his agent).

220. See, e.g., N.C. GEN. STAT. § 25-2-209(2) (2001) (contracts for the sale of goods); *id.* § 25-2A-208(2) (leases of goods); *id.* § 52B-6 (premarital agreements).

221. Snyder, *supra* note 3, at 640.

222. *Id.*

223. See, e.g., *DFI Communications v. Greenberg*, 363 N.E.2d 312, 316 (N.Y. 1977) (stating that the minutes of a board of directors' meeting signed by the corporate secretary were enough to constitute a writing under a New York statute enforcing NOM clauses); *Monroc, Inc. v. Jack B. Parson Constr. Co.*, 604 P.2d 901, 906 (Utah 1979) (holding in the alternative that the buyer's letter was a sufficient writing under Article 2 of the UCC even though it was written to a state engineer rather than to the seller).

original written agreement was rescinded and replaced by a new oral one,<sup>224</sup> or have used estoppel to defeat the NOM clause where substantial reliance was at stake.<sup>225</sup> As long as judges remain determined to minimize unjust outcomes, it will be difficult for legislatures to enact validating statutes, however artfully contrived, that will confine the judiciary in a cage.<sup>226</sup> Drafters of legislation would do well to bear in mind that “[j]udges are the ones faced most immediately with real, particularized fact situations, and understandably the courts seek an equitable result.”<sup>227</sup> There are limits on the efficacy of statutory innovation.

Nevertheless, there should be a way for the law to show greater respect for the parties’ role in making their own rules through the use of NOM and NOW clauses. We need, in Professor Snyder’s words, a way to resolve “the conundrum of accommodating change while protecting the legal knot tied in the original deal,” so that contracting parties can “have a hand in making the rules by which they plan to play.”<sup>228</sup> Legislation must fashion a rule that offers both predictability for contracting parties and flexibility for judges who interpret their contracts.

A lawyer’s first reaction to the need for responsive legislation is to look to the most comprehensive and successful commercial statute ever adopted by the states: the Uniform Commercial Code. Article 2 of the UCC provides that “[a] signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded,” but “an attempt at modification or rescission [that] does not satisfy . . . [such a] requirement[ ] . . . can operate as a waiver.”<sup>229</sup> At least superficially, the UCC seems to accomplish everything that is needed. NOM clauses are valid, and the parties’ efforts at subsequent modifications that do not honor the NOM clause are ineffective as a contractual change. Harsh results can be avoided in individual cases by construing the modification as a

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224. See *Green v. Doniger*, 90 N.E.2d 56, 59 (N.Y. 1949) (holding that the intent of the parties was to allow subsequent oral modifications to replace the original written contract).

225. See *Rose v. Spa Realty Assocs.*, 366 N.E.2d 1279, 1284 (N.Y. 1977) (finding induced reliance significant enough to warrant estoppel). Professor Snyder carefully analyzes the treatment of the New York statute by that state’s highest court. See Snyder, *supra* note 3, at 640–45.

226. The metaphor is Professor Snyder’s. See Snyder, *supra* note 3, at 642.

227. *Id.* at 644.

228. *Id.* at 610–11.

229. N.C. GEN. STAT. §§ 25-2-209(2), (4) (2001). The waiver may be retracted, but only if it relates to an executory part of the contract and if the other party has not relied on the waiver. *Id.* § 25-2-209(5).

waiver.

The difficulty with using Article 2 as a model for a statute that would validate NOM and NOW clauses across the board, preempting the common law rules entirely, is the “schizophrenic”<sup>230</sup> nature of the UCC’s approach. As should be obvious from the Supreme Court of North Carolina’s treatment of waivers as modifications and vice versa, the confusion of which has been somewhat alleviated by Justice Exum’s opinion in *Rubish v. Wachovia Bank*,<sup>231</sup> courts have had difficulty reconciling “the left hand, which taketh away the modification, and the right hand, which giveth a waiver.”<sup>232</sup> In some cases, NOM clauses are enforced literally, both within and outside Article 2; in others, they are ignored. In still other cases, the courts have invoked estoppel and waiver theories to prevent parties from asserting the NOM clauses in their own agreements.<sup>233</sup> Unless the North Carolina appellate courts are prepared to adhere to a far narrower definition of waiver than their own precedent suggests, it seems unlikely that the “schizophrenic” effects of NOM clauses will be mitigated by statutory reform in cases featuring hard facts.

The North Carolina appellate courts have not decided any cases dealing specifically with the enforceability of NOW, as opposed to NOM, clauses. As Professor Snyder notes, legal scholarship has given little attention to NOW clauses as a subject apart from their NOM sisters. Courts in other states, however, have had to consider the enforceability of NOW clauses, and as with NOM clauses, have split

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230. Douglas K. Newell, *Cleaning Up U.C.C. Section 2-209*, 27 IDAHO L. REV. 487, 489 (1990), cited in Snyder, *supra* note 3, at 646 n.178.

231. See *supra* notes 41–53 and accompanying text.

232. Snyder, *supra* note 3, at 646 & nn.179–84. Professor Snyder cites several articles that in turn collect cases from other states and federal circuits.

233. The touchstone case remains *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986), a fractured opinion in which Judges Posner and Easterbrook split over the proper application of a NOM clause. The *Wisconsin Knife* majority held that section 2-209 could not mean that the same action—an attempted oral modification of an agreement containing a NOM clause—can be ineffective as modification but be validated under the different label of “waiver.” *Id.* at 1286–87. In *Wisconsin Knife*, the court identified reliance as the key element that would “transform a failed modification into an effective waiver.” Snyder, *supra* note 3, at 646. “[S]cholars have not shown much more unity on the subject of Section 2-209” than the Seventh Circuit itself. *Id.* at 646–47 & nn.186–87 (citing the differing views of Professors White and Summers and Professor Farnsworth). The secondary literature on the subject is extensive and inconclusive; a number of scholars have proposed reforms to section 2-209. See generally Hillman, *Standards*, *supra* note 5 (discussing principles to guide revisions to Article 2); Eisler, *supra* note 26 (proposing “a principled basis for interpreting the modification rules of section 2-209”); Robert A. Hillman, *A Study of Uniform Commercial Code Methodology: Contract Modification under Article Two*, 59 N.C. L. REV. 335 (1981) (suggesting solutions to inconsistencies and ambiguities in Article 2).

into several camps. Some courts, adhering closely to the common law rule, have deemed NOW clauses to be wholly unenforceable. Others enforce NOW clauses literally, as they are written. Still others deploy waiver or estoppel theories to defeat NOW clauses.<sup>234</sup> The legislation proposed below suggests that NOW clauses be treated like NOM clauses.

Section 29(2) of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”)<sup>235</sup> addresses the problem of NOM and NOW clauses in a single sentence that is far easier to understand than section 2-209(2) of the UCC.<sup>236</sup> This sentence reads as follows:

A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.<sup>237</sup>

This provision, with appropriate revisions to embrace NOW clauses and flesh out the nature of the reliance that would defeat enforcement, provides an admirable starting point for North Carolina legislation validating NOM and NOW clauses.<sup>238</sup> The simplicity of the CISG’s approach opens it to criticism, however, on the ground that it “leave[s] open the type of ‘conduct’ and ‘reliance’ that can bar the

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234. See Snyder, *supra* note 3, at 647–48 & nn.188–205 (collecting and analyzing the leading cases from other jurisdictions).

235. See *Final Act of the U.N. Conference on Contracts for the International Sale of Goods*, Official Records, Annex I, at 230, U.N. Doc. A/Conf. 9 7/18 (1980), reprinted in INT’L LEGAL MATERIALS 668 (1990) [hereinafter CISG].

236. See Robert A. Hillman, *Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effects of “No Oral Modification” Clauses*, 21 CORNELL INT’L L.J. 449, 458–63 (1988) (discussing Article 29(2)’s treatment of NOM clauses).

237. CISG, *supra* note 235, art. 29(2).

238. Some scholars have espoused the view that the CISG is not an appropriate model for revision of Article 2 of the UCC. See Henry D. Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 1995, 2014 (1998) (stating that inconsistent policy objectives are one of the many reasons why the CISG is an inappropriate model for Article Two); Franco Ferrari, *The Relationship Between the U.C.C. and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1022–24 (1996) (suggesting that the interpretive functions of the UCC and CISG are too different for useful comparison). As noted by Professor Snyder, Professor Gabriel does acknowledge that “the CISG is appropriate for ‘selective borrowing.’” Gabriel, *supra*, at 2014; Snyder, *supra* note 3, at 671 & n.298.



assertion of a NOM clause.”<sup>239</sup> Fortunately, drafting from whole cloth is not necessary: Professor Snyder has proposed an inclusive statutory scheme that addresses nearly all of the issues associated with NOM and NOW clauses. This statute, which is both more comprehensive and more complex than the CISG provision, addresses the problem of reasonable, good faith reliance on a party’s conduct.

I propose the following enabling rule:

Except as otherwise provided in this section, a term excluding modification, rescission, or waiver except by an authenticated record is binding if the term is expressed in a record authenticated by the party against whom enforcement of the term is sought. However, to the extent necessary to avoid injustice, a party is precluded from asserting the term if the party’s language or conduct induced the other party to change its position reasonably, materially, and in good faith.<sup>240</sup>

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239. Hillman, *Standards*, *supra* note 5, at 1526.

240. Professor Snyder’s proposed statute includes definitions of “course of performance,” “course of dealing,” and “usage of trade,” each of which can be relevant to whether a waiver or modification has taken place. Because this Article has examined only NOM and NOW clauses, it recommends only the portion of Professor Snyder’s proposed statute that validates such clauses. There is considerable merit to Professor Snyder’s entire statutory scheme, however, and as such it is set forth in full below:

§ 1-304. Course of Performance, Course of Dealing, and Usage of Trade.

(a) A ‘course of performance’ is established between parties to a particular agreement if:

- (1) the agreement involves repeated occasions for performance by a party;
- (2) that party performs on one or more occasions; and
- (3) the other party, with knowledge of the nature of the performance and opportunity to object, accepts the performance or acquiesces in it without objection.

(b) A ‘course of dealing’ is established between parties by conduct or expressions that are fairly to be regarded as establishing a common basis of understanding for interpreting their other expressions and other conduct.

(c) A ‘usage of trade’ is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the agreement in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a trade code or similar record the interpretation of the record is a question of law.

(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which the parties are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.

(e) The express terms of an agreement and any applicable course of performance, course of dealing or usage of trade shall be construed

This statute would allow parties to control the manner in which their agreement can be modified, rescinded, or waived. It recognizes that NOM and NOW clauses increase the parties' ability to lock in their deal and are a regular part of modern commercial practice. Parties will be permitted to insist that changes to an agreement be memorialized with the same dignity as the original contract. At the same time, parties will not be allowed to perform the agreement as if the NOM and NOW clauses did not exist. They will be required to police their own conduct under the agreement, refraining from actions that would induce the other party to change its position in reliance. And even if a party is induced to change its position, the degree of change must have been reasonable, material, and undertaken in good faith. This limited reliance exception to a new statutory rule that NOM and NOW clauses are enforceable would allow judges to decide cases in accordance with the community's insistence that courts act "sensibly, wisely, even justly."<sup>241</sup>

It may be useful to evaluate the efficacy of this proposed statute

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wherever reasonable as consistent with each other. If such a construction is unreasonable:

- (1) express terms prevail over course of performance, course of dealing, and usage of trade;
  - (2) course of performance prevails over course of dealing and usage of trade; and
  - (3) course of dealing prevails over usage of trade.
- (g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party such notice as the court finds sufficient to prevent unfair surprise.

§ 1-304A. Modification and Waiver.

- (a) An agreement made in good faith that modifies or rescinds a contract needs no consideration to be binding.
- (b) Except as otherwise provided in this subsection, a term excluding modification, rescission, or waiver except by an authenticated record is binding if the term is expressed in a record authenticated by the party against whom enforcement of the term is sought. However, to the extent necessary to avoid injustice, a party is precluded from asserting the term if the party's language or conduct induced the other party to change its position reasonably, materially, and in good faith.
- (c) In the absence of a term governed by subsection (b), a waiver made through course of performance (section 1-304(f)) or otherwise may be retracted [if the waiver affects an executory portion of the contract] by giving reasonable notice to the other party that strict performance will be required, except to the extent retraction would be unjust in view of a material change in position in reasonable and good faith reliance on the waiver.

Snyder, *supra* note 3, at 656–58 (citations omitted). Professor Snyder recommends that the statute be codified in Article 1 of the UCC.

241. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 17 (1977), *quoted in* Snyder, *supra* note 3, at 655 n.230.

against a fact pattern that readers of this Article will find familiar: a common situation involving property owners and contractors. Assume that A hires B to excavate and grade A's land for a fixed price. A and B enter into a written contract containing a NOM clause. B encounters more rock than expected and tells A he wants to terminate the contract. A, seeking to induce B to stay on the job, orally promises B to pay more than the original price. B accepts A's new proposal, which is never put into writing, and rents better, more expensive equipment to continue the excavation work. B then demands a progress payment reflecting the price increase. A refuses, pointing to the NOM clause. B walks off the job. A then sues B on the original contract and B defends on the basis of the alleged oral modification.

In the lawsuit, A raises the NOM clause in an effort to defeat B's oral modification defense and also claims that the alleged oral modification was not supported by consideration. B asserts his detrimental reliance (renting better, more expensive equipment) on A's gratuitous promise as the basis both for defeating the NOM clause and for enforcing (defensively) a modification that lacks consideration. A contends that no enforceable promise of a higher price was made and argues that B would have had to rent better, more expensive equipment anyway in order to finish the job—in effect, that there was no detrimental reliance because B's performance of the excavation work was already bargained for in the original contract.

Under the statute proposed above, A's assertion of the NOM clause would defeat B's oral modification defense unless B could prove (presumably by clear and convincing evidence—the prevailing standard<sup>242</sup>) that B's rental of equipment was induced by A's promise and that B's reliance was reasonable, material, and undertaken in good faith. B's burden of proof raises questions of fact that would have to be determined by the jury (or the judge, in the case of a bench trial).

The reliance exception in the proposed statute contains three terms that could swallow up the positive goal of giving effect to NOM and NOW clauses. Allowing the NOM or NOW clause to be avoided because a party was induced to change its position “reasonably, materially, and in good faith” should demand that the party seeking to establish reliance—despite its earlier agreement to the NOM or

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242. Snyder, *supra* note 3, at 662.

NOW clause—sustain a heavy burden of proof.<sup>243</sup> Recognizing that courts will find a way to compensate reasonable reliance, the General Assembly should include with the new statute a commentary for the guidance of judges, articulating standards for determining the reasonableness, materiality, and bona fides of the reliance. The key question is whether the party arguing reliance was actually aware, or should have been aware, of the NOM or NOW clause at the time the reliance took place. The commentary could note, for example, as relevant factors for consideration, the size of the transaction, whether the NOM or NOW clause was a separately negotiated term, separately signed, or whether it was simply a part of the contract's "boilerplate" provisions, ignored by the parties and their lawyers.<sup>244</sup> The relative sophistication of the parties—whether they are illiterate individuals, sole proprietors of businesses or Fortune 500 companies—and prior courses of dealing between them under similar contracts, could also be important factors for the court's consideration.<sup>245</sup> Parties who wish to be at a lower risk of undesired changes should provide for separate signature or initialing by their agents next to the NOM and NOW clauses. To this end, the General Assembly should also carefully review Professor Snyder's extensive and helpful suggestions for courts, lawyers, and clients who might seek to take advantage of a statute enforcing NOM and NOW clauses.<sup>246</sup>

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243. Snyder, *supra* note 3, at 662. The burden should be proof by "clear and convincing" evidence, rather than by a preponderance of the evidence.

244. Snyder, *supra* note 3, at 664.

245. Snyder, *supra* note 3, at 665.

246. Snyder, *supra* note 3, at 660–69 nn.250–95 and accompanying text. Professor Snyder goes on to recommend a "coercion standard" for judging contract modifications that he recommends appear in the comments to the revised UCC, or that courts adopt as a part of the common law. Snyder, *supra* note 3, at 677–85 nn.329–52 and accompanying text.

